# Practical FAQs on Supply and Taxability

GST & Indirect Taxes Committee
The Institute of Chartered Accountants of India
*(Set up by an Act of Parliament)*
New Delhi

# Practical FAQs
# on
# Supply and Taxability

**GST & Indirect Taxes Committee**
**The Institute of Chartered Accountants of India**
*(Set up by an Act of Parliament)*
*New Delhi*

DISCLAIMER:

The views expressed in this book are of the author(s). The Institute of Chartered Accountants of India may not necessarily subscribe to the views expressed by the author(s).

The information contained in this book has been drawn primarily from the CBIC website - www.cbic.gov.in and other sources. While every effort has been made to keep the information in this book error free, the Institute or any office of the same does not take the responsibility for any typographical typographical or clerical error which may have crept in while compiling the informa

| | | |
|---|---|---|
| First Edition | : | January, 2022 |
| Committee/Department | : | GST & Indirect Taxes Committee |
| E-mail | : | gst@icai.in |
| Website | : | www.icai.org; https://idtc.icai.org |
| Price | : | ₹ 250/- |
| Published by | : | The Publication & CDS Directorate on behalf of<br>The Institute of Chartered Accountants of India<br>ICAI Bhawan, Post Box No. 7100,<br>Indraprastha Marg, New Delhi – 110 002 (India) |
| Typeset by | : | Elite-Art, New Delhi-110 002 |
| Printed by | : | TAN Prints India Pvt. Ltd.<br>District - Jhajjar – 124 501 (Haryana)<br>February \| 2022 \| P3002 (New) |

# Foreword

The Goods and Services Tax (GST) implemented on July 1, 2017 as one of the most remarkable tax reforms in the fiscal landscape of the country. GST with a conceptual development period of more than a decade, was introduced in India with the objective of eliminating the multiplicity of taxes and rates into one tax, thereby mitigating the ill effects of cascading of taxes and creating a one national market. During its four and a half years of journey, GST has been able to considerably streamline the indirect tax compliances by reducing the number of indirect taxes and number of authorities that a taxpayer needs to interact with.

The reform of such a magnitude cannot be achieved without its share of implementation challenges and initial setbacks. However, the Government has been very receptive and quick in addressing the various concerns raised by the industry and public by amending the law or issuing necessary clarifications as and when required. The innumerable notifications, circulars, orders, instructions, and FAQs were issued in the last four and a half years bears the testimony to this fact.

The Institute of Chartered Accountants of India (ICAI), through its GST & Indirect Taxes Committee, has rendered unflinching support to the Government in ushering the GST regime in India and continues to provide its unabated assistance in ironing out the post-implementation issues as well. Further, ICAI has also been playing crucial role in GST knowledge dissemination amongst all the stakeholders through its various technical publications, GST Newsletter, live webcasts, e-learning, certificate courses, conferences, and programmes.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has come out with another useful publication titled, *"Practical FAQs on Supply and Taxability"*.

I congratulate CA Rajendra Kumar P, Chairman, CA Sushil Kumar Goyal, Vice-Chairman, and other members of GST & Indirect Taxes Committee for this initiative as this publication is a compilation of practical queries of stakeholders on the core concept of GST viz., supply & taxability. The answers to such queries are drafted by erudite subject experts.

I am sure this publication will be of immense use for the members of ICAI and will also prove to be a handy guide for all the stakeholders.

Place : New Delhi

Date : 28th January,2022

**CA Nihar N Jambusaria**

President, ICAI

## MEMBERS OF THE GST & INDIRECT TAXES COMMITTEE

***Members from the Sitting Council***

CA Rajendra Kumar P, Chairman
CA Sushil Kumar Goyal, Vice-Chairman
CA Nihar N Jambusaria, President (Ex-Officio)
CA (Dr.) Debashis Mitra, Vice-President (Ex-Officio)
CA Atul Kumar Gupta, Past President
CA Anil S Bhandari
CA Jay Ajit Chhaira
CA Tarun J Ghia
CA Nandkishore C Hegde
CA Chandrashekhar V Chitale
CA Aniket S Talati
CA Dayaniwas Sharma
CA G Sekar
CA M P Vijay Kumar
CA Ranjeet Kumar Agarwal
CA Pramod Kumar Boob
CA Manu Agrawal
CA Anuj Goyal
CA Prakash Sharma
CA Kemisha Soni
CA Satish Kumar Gupta
CA Hans Raj Chugh
CA Pramod Jain
CA Charanjot Singh Nanda
Shri Manoj Pandey
Adv. Vijay Kumar Jhalani

***Co-opted Members***

CA Upendra Gupta, IRS
CA Rajeesh Gupta
CA Ravichandran V A
CA Mahesh Madkholkar
CA Raman Kumar Gupta
CA Abhay Desai
CA Arvind Bhansali
CA Niraj Harodia
CA Prasun Kumar Bhattacharyya

## EXPERTS WHO HAVE CONTRIBUTED TOWARDS THE DEVELOPMENT OF THIS PUBLICATION

| S.No. | Name | S. No. | Name |
|---|---|---|---|
| 1. | CA Aanchal Kapoor | 17. | CA Purushothaman J |
| 2. | CA A Jatin Christopher | 18. | CA Rajendran R. |
| 3. | CA Ajaykumar Narayan Parnaik | 19. | CA Ram Akshya Rout |
| | | 20. | CA (Dr.) Rashmi Ainapur |
| 4. | CA Ankit Kanodia | 21. | CA R. Sriram |
| 5. | Adv. Gajendra Maheshwari | 22. | CA R.V. Bhuvaneswari |
| 6. | CA G Saravanakumar | 23. | CA Sampath Kumar V V |
| 7. | CA Ganesh Prabhu B | 24. | CA Saradha H |
| 8. | CA (Dr.) Gaurav Gupta | 25. | CA Saurabh Singhal |
| 9. | CA J Balasubramanian | 26. | CA Shaikh Abdul Samad Ahmad |
| 10. | CA Karthick P | | |
| 11. | CA Lukose Joseph | 27. | CA Shankara Narayanan V |
| 12. | CA Mohan Jonnalagadda | 28. | CA S. Pradeep |
| 13. | CA N K Bharath Kumar | 29. | CA Shubham Khaitan |
| 14. | CA Neha Jain D | 30. | CA Swathi Jain A |
| 15. | CA P Sankaran | 31. | CA Viral M Khandhar |
| 16. | CA P. Harini Sridharan | 32. | CA Virender Chauhan |

# Preface

It has been four and a half years since the Goods and Services Tax (GST) was introduced in India. July 1, 2017 has been etched in the annals of the fiscal history of our country as the date of birth of GST, the most pathbreaking and radical tax reform in the Indian economy.

GST has brought with it multifarious advantages for the trade and industry; it amalgamates a large number of Central and State taxes into a single tax, it mitigates cascading of taxes, it breaks the artificial trade barriers to create a common national market. The end consumers of goods have benefitted from GST in terms of a reduction in the overall tax burden on goods, which was estimated to be around 25%-30% under the earlier indirect taxation regime.

'Supply' is the taxable event under GST. The taxable event is the event the occurrence of which triggers the tax liability. The entire legislation of a tax is centered around this focal point. In the erstwhile indirect taxation regime, there were different taxable events for each of the indirect taxes levied. For instance, central excise duty was levied on manufacture of goods, State-level VAT was levied on intra-State sale of goods, central sales tax was levied on inter-State sales of goods and service tax was charged on provision of services. Since under GST all these taxes have been subsumed into one tax, there is one taxable event viz., supply - supply of goods and/or services.

The definition of supply under GST law is an inclusive one, which increases its scope considerably. GST is leviable on any transaction only when the same qualifies as 'supply' and falls within the four corners of the charging section. One must also consider the exemptions, if any, notified by the Government to conclusively determine the taxability of any transaction. GST in India is levied as Central GST and State GST on intra-State supplies and as Integrated tax on inter-State supplies. Therefore, the nature of supply is also crucial for determining the taxability of a transaction. Taxpayers, therefore, are continually on the lookout for answers to myriad of questions being faced by them while taking tax positions or undertaking compliances.

It has been the consistent endeavor of the GST & Indirect Taxes Committee of the ICAI to facilitate the members as also the other stakeholders in every possible way in matters related to indirect taxes. Also, we stand by the Government as a "*Partner in GST Knowledge Dissemination*". We have been supporting the Government with our intellectual resources, expertise and efforts to make GST a real good and simple tax. The publication in your

hands viz., *"Practical FAQs on Supply and Taxability"* is yet another initiative of the Committee in this direction.

The publication is a compilation of practical questions on supply and taxability and their answers. The questions included in the publication were solicited from the various stakeholders. Further, the questions raised by the audience in various programmes organized by the Committee on the topic of supply and taxability were also collated and included in this publication. The answers to such questions have been drafted by the best of minds in the field and then reviewed by eminent subject experts.

We sincerely thank CA Nihar N Jambusaria, President, ICAI and CA (Dr.) Debashis Mitra, Vice-President, ICAI for the encouragement and support extended by them to the various initiatives of the GST & Indirect Taxes Committee. We express our gratitude for the untiring efforts of the thirty-two experts in the development of this publication. We would also like to thank the members of our Committee who have always been part of all our endeavors. Last, but not the least, I commend the efforts made by the Secretary to the Committee, CA Smita Mishra and her team comprising of CA Ajay Kumar Ray, Ms. Impreet Kaur and CA Tanya Pandey for providing the requisite technical and administrative assistance.

We envisage that this publication will facilitate the members in their professional endeavours and provide useful guidance to other stakeholders. Though all efforts have been taken to provide best possible answers to the questions, there can be different views/opinions on the various issues addressed to in this publication. We request the readers to bring to our notice any inadvertent error or mistake that may have crept in during the development of this publication. We will be glad to receive your valuable feedback at gst@icai.in We request you to visit our website https://idtc.icai.org and share your suggestions and inputs, if any, on indirect taxes including GST.

**CA Rajendra Kumar P**
Chairman
GST & Indirect Taxes Committee

**CA Sushil Kumar Goyal**
Vice- Chairman
GST & Indirect Taxes Committee

Place: New Delhi

Date: 28th January, 2022

The answers to the questions in this publication are based on the GST law as amended till 15.01.2022.

Readers may make note of the following while reading the publication:

- For the sake of brevity, the terms “Input Tax Credit”, “Goods and Services Tax”, “Central Goods and Services Tax”, “State Goods and Services Tax”, “Union Territory Goods and Services Tax”, “Integrated Goods and Services Tax”, “Central Goods and Services Act, 2017”, “Integrated Goods and Services Act, 2017”, “Central Goods and Services Tax Rules, 2017”, “Central Board of Indirect Taxes and Customs”, “Reverse Charge Mechanism” and “Union territory” have been referred to as “ITC”, “GST”, “CGST”, “SGST”, “UTGST”, “IGST”, “the CGST Act”, “the IGST Act”, “CGST Rules”, “CBIC”, “RCM” and “UT” respectively in this publication.
- Unless otherwise specified, the section numbers and rules referred to in this publication pertain to CGST Act, 2017 and CGST Rules, 2017 respectively.

**Q1. Whether sale of personal car at ₹ 5 crores by an employee of a private entity will be exigible to GST? If yes, what will be the rate of tax, compensation cess and HSN Code?**

**OR**

**Whether sale of personal car at ₹ 1 crore by a Government employee will be exigible to GST?**

**Ans.** Section 7 provides the scope of supply and reads as under:

*"7. Scope of supply — (1) For the purposes of this Act, the expression 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**;*

*…"*

For an activity to fall within the scope of 'supply', it is essential to satisfy the conditions specified under section 7(1)(a) which provides that an activity would qualify as 'supply' if it is made for a consideration and in the course or furtherance of business.

The term 'business' is defined under section 2(17) as under:

*"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) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed 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;"*

Sale of personal car by an employee is not the business of an employee as the same is not in the nature of trade, commerce, manufacture, profession, vocation, adventure, wager, or any other similar activity.

Therefore, sale of personal car by an employee of a private entity or a Government employee would not be treated as 'supply' as such sale of personal car is not made in the course or furtherance of business and therefore such sale would not be treated as 'supply' under section 7(1)(a) and shall not be subject to GST.

**Q2. Whether GST is payable on prize money received by cricket players if the amount received exceeds the exemption threshold limit?**

**Ans.** The prize money is a reward given to the player for his outstanding performance when compared to the other players. The issue here is whether there is a supply of service by the winner of the prize money to the organisers of the event as per section 7(1)(a). Relevant portion of the said section is reproduced hereunder:

"*7. Scope of Supply – (1) For the purpose of this Act, the expression 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;"*

On a plain reading of the above provision, it is clear that for an activity or transaction to be covered within the scope of supply, such activity or transaction has to done or agreed to be done for a consideration by a person and it should be in the course or furtherance of business. A direct link or immediate nexus between the supply and consideration must be present. Thus, in the given case, the significant point to be noted here is that whether the player has received the prize money as a consideration for participation in the event or not.

From the facts given it could be concluded that the prize money is not a consideration for participation in the event, instead it is for his exemplary performance in the event which is not guaranteed at the time of participation in the event. Thus, payment of prize money which is contingent upon the achievement of the player is known only at the end of an event, and is highly uncertain. Hence, direct and immediate nexus between the activity and consideration is absent, because prize money is the consequence of chance, skill and circumstance and there is no certainty in this regard.

Thus, based on the foregoing discussion, it is understood that the prize money received by the cricket players will not constitute a supply and hence it is not liable to GST. Since the receipt of prize money is not subject to GST the question as to, whether the value of prize money exceeds the threshold limit or not, to determine its taxability, is irrelevant for discussion.

**Q3. Whether a sugar manufacturing company donating oxygen concentrators to hospitals (not as CSR) can be said to be in the course or furtherance of business?**

**Ans.** Supply includes all forms of supply made or agreed to be made for a consideration by a person in the course or furtherance of business. Business has been given a wide meaning in GST, with any type of

activity like trade, commerce, manufacture, profession, vocation, adventure done with or without any pecuniary benefit; any service ancillary to the above activity; whether or not there is volume, frequency, continuity or regularity shall constitute '*business*' under GST. For example, sale of used car, sale of old machines, furniture etc. will be considered as 'business' even though the person is not into the business of selling old things. Hence, the sugar manufacturing company donating oxygen concentrators will be said to be in the course or furtherance of business. However, the same will not be considered as a 'supply' under GST in the absence of consideration (except Schedule I transactions). This donation of oxygen concentrators will demand reversal of ITC taken on its purchase in accordance with section 17(5)(h).

**Q4. Explain the GST leviability on barter system model.**

**Ans.** In a barter transaction, the consideration is other than money i.e., goods and/or services. Under the GST law, barter transaction is also a 'supply'. There are in fact two supplies involved in each barter transaction, first by the supplier and second by the recipient of supply. In the second supply, the recipient and the supplier of the first supply become the supplier and the recipient respectively. The value of the supplies made is the value of the goods/services received (computed as per rule 27).

For example, 'A' supplies refrigerator to 'B'. Against receipt of such supply, 'B' makes a corresponding supply of television to 'A'. Here, 'A' and 'B' act as both suppliers and recipients for their respective transactions. 'A' would charge GST on the supply of refrigerator by determining its HSN code and rate. On the other hand, 'B' would charge GST on the supply of television as per the respective HSN code and the rate of GST on it. The value should be decided as per rule 27.

**Q5. What is the difference between barter and exchange in the context of definition of 'supply'?**

**Ans.** Neither 'barter' nor 'exchange' has been defined under the GST law, although these are supply under section 7. Therefore, one needs to derive their meanings from the other laws. There is very thin line of difference between barter and exchange.

The Supreme Court in the case of *CIT v. Motors & General Stores (P.) Ltd. [(1967) 66 ITR 692 (SC)]* while explaining the term 'exchange' drew a comparison with barter as follows:

*"... It is clear therefore that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immovable property for money consideration. But in exchange there is a reciprocal transfer of interest in the immovable property, the corresponding transfer of interest in the movable property being denoted by the word "barter".*

In the case of *Emperor v. Pascal Shimau [1907 (9) BOMLR 703]*, "*…The word "barter" means interchange, the exchange of one commodity for another and the idea underlying it is that it is in the nature of a transaction between two persons dealing in respect of it with each other at arm's length."*

In terms of section 118 of the Transfer of Property Act 1882, *when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".*

**Q6. Whether supply requires involvement of at least two distinct persons, or it can also be an act of self-supply?**

**Ans.** As per the definition of 'supply' under GST, though not explicitly stated, the presence of two distinct persons is required; the entire GST Law has referred to supplier & recipient in various provisions. Moreover, captive consumption is not taxable under GST as was under Central Excise law thereby implying supply cannot be made to oneself.

Further, the CBIC has clarified this through *Frequently Asked Questions (FAQs) On Goods and Services Tax (GST), 3rd Edition: 15th December, 2018* which stipulates the following:

*"Question. 7 Are self-supplies taxable under GST?*

*Answer. Inter-State self-supplies such as stock transfers, branch transfers or consignment sales shall be taxable under IGST even though such transactions may not involve payment of consideration. Every supplier is liable to register under the GST law in the State or Union territory from where he makes a taxable supply of goods or*

*services or both in terms of section 22 of the CGST Act. However, intra-State self-supplies are not taxable subject to not opting for registration as business vertical.*"

**Q7. Whether supply can be unilateral like singing in a park i.e., without identifying any specific recipient? However, it may be possible that people who enjoy the singing may give some money to the singer as token of appreciation. It would be the discretion of the singer to accept or reject the money.**

**Ans.** To constitute a supply, an activity such as sale, transfer, barter, exchange, license, rental, lease or disposal shall be made or agreed to be made for a consideration. Consideration has been defined in section 2(31) as any payment made in respect of, in response to, or for the inducement of the supply whether by the recipient or any other person acting on behalf of the recipient. Therefore, activities carried out without consideration like donations, gifts etc. are outside the scope of supply (except Schedule I). The '*supply for a consideration*' implies that the supplier does something at the desire of the recipient in exchange for a consideration. Any supply done without this direct reciprocity would not be considered as a supply even if the supplier is gaining a monetary benefit. Donations made with an obligation to provide something in return take the colour of consideration as it '*in response to*' the donation received.

The European Court of Justice in case of *R.J. Tolsma v. Inspector of Turnover Taxes [(2012) 23 taxmann.com 16 (ECJ)]* held that there is no agreement between musician performing on public highways and soliciting donations from passers-by. Donations based on sympathy of passers-by not directly related to musical services. Voluntary, uncertain and unquantifiable sums are not 'consideration'. No case of supply of services for consideration. Hence, not liable to service tax.

Thus, people who listen and enjoy the singing in the park are under no obligation to pay any amount for listening to the singer nor have they engaged him to perform for them and hence will not constitute a supply in the absence of the reciprocity.

**Q8. Explain the GST implication on grants given for specific and non-specific purposes.**

**OR**

**A start-up registered under GST receives a product development grant from the Indian Ministry of Defence in tranches on completion of certain milestones. The product may be developed or may not be developed. Is GST leviable on such a grant for product development?**

**A start-up registered under GST receives a product development grant from a Foreign Government in tranches on completion of certain milestones. The product may be developed or may not be developed. Can this income be treated as a consideration for export of service i.e., zero rated supply?**

**Ans.** Grant is not defined under the GST law. However, its meaning may be borrowed from different sources. The common meaning of the term 'grant' refers to the act of giving something without the intent of receiving it back. It is considered as gratuitous in nature. Further, the objective behind giving a grant is helping out the other person.

GST is levied only when there is a supply. According to section 7, a transaction qualifies as a supply if it is in the form of sale, transfer, barter, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. Therefore, for a transaction to qualify as a supply, the element of consideration is essential except for the activities mentioned in Schedule I which are deemed as supply even without consideration.

Section 2(31) defines the term 'consideration' as under:

(*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;*

It can be seen that, the amount received in the form of "subsidy" is excluded from the coverage of consideration but it does not exclude "grants".

Where donation is given to a person, generally the donor does not expect anything in return. Also, the receiver of donation is not bound to return anything in lieu of the donation. Hence, donation cannot qualify to be a consideration for a supply and is thus, not liable to GST.

However, if the objective of giving the donation is not philanthropic but getting any commercial gain (may be in the form of advertisement or promotion or publicity), it would tantamount to supply of service for a consideration (in the form of donation) as there is an obligation (quid pro quo) on part of the recipient of the donation or gift to do anything (supply a service). Therefore, GST would be leviable on such consideration. This aspect has been clarified vide *Circular no. 116/35/2019-GST dated 11.10.2019*

To illustrate, if a charitable trust is instructed that the donation should be used for paying to a contractor for construction of a building, the same would be considered as a supply.

If the donation is given to a charitable organization with a direction for use in advancement of education, it would not be considered as a supply as the same is for a general purpose without any specific direction

In the given case, the grant given by the Ministry of Defence to the start-up is in relation to a development of a specific product and is given in tranches on achieving certain specified milestones. Therefore, the same is in the nature of consideration for the services provided by the start-up to the Ministry and shall be liable to GST. The transaction would remain supply irrespective of whether the

product gets developed or not. Further, the grant received from foreign government will also be construed as consideration for the supply made by the start-up. The transaction will be treated as 'export of service' only when all the conditions specified in the definition thereof in section 2(6) of the IGST Act are satisfied.

**Q9. Whether services rendered by a club to its members constitute supply and are exigible to GST?**

**Ans.** Section 7 includes all forms of supply of goods or services or both made for a consideration within its purview.

Through the Finance Act 2021, a retrospective amendment (w.e.f. 1st July, 2017) has been made inserting clause (aa) to section 7(1) to widen the scope of the term '*supply*' by including therein activities or transactions of supply of goods or services or both between any person (other than individual) to its members or constituents or *vice versa* for cash, deferred payment or other valuable consideration. An explanation has also been inserted to state that the members or constituents shall be deemed to be two separate persons notwithstanding anything contained in any other law for the time being in force or any judgement, decree or order of any Court, Tribunal or Authority.

Under section 2(17)(e), the term "business" includes 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. The *Circular No. 35/9/2018-GST dated 5.03.2018* provides that supply of services by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration, shall be treated as supply of services.

From the above it can be inferred that services rendered by a club to its members constitute supply and are liable to GST.

The above amendment has been notified on 1st January 2022 *vide Notification No. 39/2021- Central Tax dated 21.12.2021*. This amendment has retrospective application from 1st July 2017. The purpose for the amendment was tabled at the 39th Meeting of the GST Council in the light of the Hon'ble Supreme Court judgement in the case of *State of West Bengal v. Calcutta Club Limited [2019-TIOL-449-SC-ST-LB]* and *CCCE & ST & Ors. v. Ranchi Club Limited*

*[2019-VIL-34-SC-ST]*. Considering the implications in the GST regime, the Government has decided to issue a retrospective amendment. It can thus be construed that the Government always wanted to tax supplies between the members and the association. Hence, this expansion on the scope of supply can be considered as a clarificatory.

**Q10. Whether bonus shares or sweat equity shares given to employees fall under the purview of gift under GST? If yes, what will be the value of such supply?**

**Ans.** In order to tax an activity under GST, it has to qualify as supply of goods or services or both. Section 2(52) and section 2(102) respectively define 'goods' and 'services' as under:

*"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"*

*"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."*

From the above, it can be observed that the definitions of both '*goods*' and '*services*' exclude securities. Further section 2(101) defines the term securities as under:

*"securities shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956)*

Section 2(h) of the Securities Contracts (Regulation) Act, 1956 defines securities as:

*(h) "securities" include*

*(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or a pooled investment vehicle or other body corporate;*

*(ia) derivative;*

*(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;*

*(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

*(id) units or any other such instrument issued to the investors under any mutual fund scheme;*

*Explanation.- For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938);*

*(ida) units or any other instrument issued by any pooled investment vehicle*

*(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;*

*(ii) Government securities;*

*(iia) such other instruments as may be declared by the Central Government to be securities; and rights or interest in securities;"*

Thus, bonus shares and sweat equity shares squarely fall within the ambit of '*securities*' and issue of securities is neither considered as supply of goods nor supply of services. Accordingly, bonus shares or sweat equity shares given to employees is not a supply and thus is not exigible to GST.

**Q11. Whether sale and purchase of gift voucher is a taxable supply or non-taxable supply?**

**OR**

**Whether trading of money loaded gift vouchers constitutes supply? If yes, then what would be the taxability as it is hard to classify them as goods or services?**

**Ans.** A voucher is a means for advance payment of consideration for future supply of goods or services:

*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 recognized 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(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;*

Voucher, being an instrument used as consideration to settle an application, is a type of money, as long as such instrument is recognised by the Reserve Bank of India.

Definition of both goods and services as per the CGST Act excludes money from its purview.

Sub-section (4) of sections 12 and 13 read as follows:

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.

This sub-section must be read and interpreted in the context of section 12 and section 13. These two sections specify the time of supply for goods and services respectively. For instance, section 12(2) deems the supply of goods to have taken place on the date of issue of invoice or date of receipt of payment, whichever is earlier, even if the goods are actually delivered to the recipient later. Likewise, sub-section (4) of sections 12 and 13 deem the supply of the underlying good(s) or service(s) for which the voucher has been issued, to have taken place on the date of issue of voucher, if the supply is identifiable at that point, or the date of redemption of voucher in all other cases.

To conclude, when a voucher is issued, sub-section (4) of sections 12 and 13 *determine the time of supply of the of the underlying good(s) or service(s).* Voucher *per se* is neither a goods nor a service. It is a means for payment of consideration.

**Q12. Whether crowdfunding is exigible to GST?**

**Ans.** Crowdfunding is an activity of raising funds to finance a new business venture or philanthropic activity. The fundraiser exhibits his research, concept, venture ideas, etc. to the vast network of people in social media and solicit voluntary contribution for the said goal. Further, the enthusiast who contributes does not acquire any right or interest in the result of the project which is funded in this manner. Thus, crowdfunding will not be subject to GST since it is a transaction in money; which is neither goods nor services or both.

**Q13. Whether sale of transferable of development rights obtained from Government when land of a person is acquired by any Government Authority, is considered as supply?**

**Ans.** As per section 7(1), the expression "*supply*" includes 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. Transferable of development rights represents interest in an immovable property and it is nothing but service as per the GST Law i.e., "*anything other than goods*" as defined under section 2(102).

**Q14. A book publisher organises an online competition and collects charges for the same. Will it constitute supply under GST?**

**Ans.** Supply includes all forms of supply of goods and /or services such as sale, transfer, barter, exchange, license etc. made or agreed to be made for a consideration by a person in the course or furtherance of business. The term '*supply*' has an inclusive definition implying that all types of activities or transactions undertaken for a consideration in the course or furtherance of business will amount to supply barring some specified transactions.

Hence, an activity or transaction to constitute a 'supply' must satisfy the following elements:

(i) there should be supply of "goods" and / or services" – In the instant case, the book publisher is organising an online competition which tantamount to be a supply of service to all the candidates/ participants of competition by virtue of the terms 'goods' and 'services' defined under the GST Law.

The term 'services' is defined under section 2(102) to mean 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;'

(ii) the supply is made by a person - The definition of the term "person" is exhaustive, and it includes anybody covered within the definition as provided under section 2(84).

(iii) the supply is for a "consideration"- The definition of consideration [section 2(31)] also covers 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. In the present case, the book publisher collects charges, thereby implying consideration.

(iv) the supply is made "in the course or furtherance of business" – Since, the terms "in the course of business" or "furtherance of business" are not defined under the CGST Act, to decide whether a transaction is in the course or furtherance of business, we refer to the term '*business'* defined under section 2(17). The definition of '*business'* under GST is inclusive in nature which *inter alia* covers any trade, commerce,

manufacture, profession, vocation, adventure, wager or any other similar activity.

Inferred from the above, the online competition conducted by the book publisher will constitute a supply of service under the GST law.

**Q15. An Educational Institution registered under section 11 of the Income-tax Act, 1961 is providing transport facility to pick and drop the students and charges the students for such transportation.**

**Whether such activity constitutes supply and is exigible to GST?**

**Ans.** The educational institution provides pickup and drop facility to its students and collects charges towards the same. The pre-requisites for an activity to be covered with the scope of supply as prescribed in section 7 are applied to the case in hand –

| Pre-requisites | Remarks |
|---|---|
| **There should be supply of "goods" and/or services** | Transport facility to pick up and drop is a supply of service |
| **By a person** | The educational institution can be set up as a Trust, AOP or a Society. The educational institution is covered within the definition given under section 2(84). |
| **For a consideration** | The educational institution collects charges from the students and hence it is a payment made in respect of, in response to for the supply of transportation facility. |
| **In the course or furtherance of business** | The activity is covered under the definition of 'business' under section 2(17) as business includes any trade, commerce, manufacture, vocation, profession whether or not for pecuniary benefit, whether or not there is volume, frequency, continuity or regularity of such transaction. |

From above, all the above pre-requisites are present in the instant case. Therefore, the activity of providing the transport facility by educational institution to its students is covered within the scope of 'Supply'.

Further, as per clause (a) of the entry no. 66 of *Notification No. 12/2017-Central Tax (Rate), dated 28.06.2017 ("NN 12/2017-CTR-28.06.2017")*, services provided by an educational institution to its students, faculty and staff is exempted from GST.

Since, the educational institution is providing transport facility to its students, the same will be covered under entry no. 66 of *NN 12/2017-CTR-28.06.2017* and therefore not liable to GST.

**Q16. Whether sale of goods by a Special Economic Zone ('SEZ') unit to Export Oriented Unit ('EOU') constitutes import for EOU under GST in terms of conjoint reading of section 2(za) of the Special Economic Zones Act, 2005 ('the SEZ Act') and section 2(23) of the IGST Act?**

**Ans.** Section 51 of the SEZ Act provides that the provisions of the SEZ Act shall have overriding effect over other laws. Section 30 of the SEZ Act provides that any goods removed from SEZ to Domestic Tariff Area ('DTA') shall be considered as import by the DTA and leviable to all duties of customs as applicable. 'Domestic Tariff Area' has been defined under Section 2 of the SEZ Act to include the whole of India except SEZ. Export Oriented Units (EOU's) are units formed under a scheme of Foreign Trade Policy ('FTP'). However, EOU units are located outside of SEZ but within the territory of India. Section 5 of the IGST Act provides that import of goods would be leviable to IGST under the Customs Tariff Act, 1975. Thus, the sale of goods by SEZ to EOU will constitute as import in the hands of EOU and shall be liable to IGST.

**Q17. An Indian company say A Pvt. Ltd installed its software application at server platform of a Canadian company, say B LLC. A Pvt. Ltd appoints a USA based company say C LLC to render service for updating/ altering / designing of said software application. A Pvt. Ltd. pays directly to company C LLC in US dollars. Whether the transaction between A Pvt. Ltd. and C LLC is exigible to GST? There is no permanent establishment of C LLC in India.**

**Ans.** As per section 2(11) of the IGST Act-

*"Import of services means, the supply of any services , where –*

*(i) The supplier of service is located outside of India,*

*(ii) The recipient of services is located in India, and*

*(iii) The place of supply of service is in India."*

As per section 13(3) of the IGST Act, place of supply is-

*"(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 apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;"*

In this case, the supplier of service i.e., 'C' LLC is located outside India; recipient of service i.e., 'A' Pvt. Ltd is located in India but the place of supply is in Canada. Therefore, it is not an import of service and would not be subject to GST.

**Q18. Explain the difference between the terms "liable to tax" and "leviable to tax".**

**Ans.** Every taxing statute imposes an obligation to pay the tax as provided therein. The terms '*liable to tax'* and '*leviable to tax'* are used to refer to the obligation, sometimes interchangeably. The terms '*liable to tax'* and '*leviable to tax'* are not defined under the GST Law, although frequently used by us, sometimes interchangeably as stated earlier. There is some difference between the two terms which is sought to

be broadly explained hereunder based on common understanding of the respective terms.

In any taxation statute, the commodities, activities, properties etc. on which the tax is imposable and the taxable event for the same are defined / specified as per the objective, scope and basic structure of the statute. There can be some exclusions to the same as well. These commodities, activities, properties etc. are then said to be leviable to the tax. None of the provisions of a statute would normally be applicable to something which is not covered within its levy.

Example - As per section 9, CGST shall be levied on all intra-State supplies of goods or services or both. Thus, what is leviable to CGST is goods or services or both on their supply within the State.

There are few exclusions such as supply of alcoholic liquor for human consumption and petroleum products as long as these are not notified for levy. Further, there are certain activities or transactions which are specified in Schedule III which are outside the scope of supply and naturally outside the scope of levy also viz., entries like services by employee to employer in the course of employment, sale of land, sale of building except those under construction, actionable claims except lottery etc., high seas sales, supply of goods directly between two non-taxable territories etc. Other basic exclusions from definitions of goods and services like money and securities are also outside the scope of levy. Thus, all the above exclusions are practically out of the scope for charging CGST thereon.

Leviable to tax, does not mean that all transactions in the specified commodities, activities etc. would be charged to tax on the taxable event (i.e.) supply of goods or services or both, either intra-State or inter-State. Some transactions are excluded from levy of tax for reasons like threshold limit, nil rated or exempted in public interest like essential commodities, exempted for promoting specific activities etc. Thus, commodities, activities etc. would said to be liable to tax when they are leviable to the tax and also not excused from levy for such reasons. For example, in CGST, we have threshold limits for registration and supplies below the limit by unregistered persons are not liable to tax. We have then certain nil rated goods, exempted goods as well as services, few transaction-based exemptions - some

subject to conditions, zero rating of exports etc. Goods or services which are leviable to tax will be said to be liable to tax if, not excused under such categories and would be subjected to tax on the taxable event.

Thus, it could be concluded that the term '*leviable to tax'* is used in the context of chargeability of tax for a particular activity or a transaction whereas the term *'liable to pay tax*' is used more in the context of discharge of tax viz., time of supply and the person who is liable to discharge the tax viz., forward charge or reverse charge.

**Q19. Whether GST is applicable at the time of awarding a contract or issuing Purchase Order (PO) for supply of goods/provision of service?**

**Ans.** GST is not applicable at the time of awarding a contract or issuing a Purchase Order (PO) for supply of goods or provision of services. The liability to pay tax does is governed by the time of supply provisions given in section 12 and section 13 of the CGST Act for goods and services respectively. Hence, in case of goods as per section 12 of the CGST Act, the liability to pay tax arises earliest of the following two events viz., dispatch of goods or issue of invoice. Similarly in case of services, as per section 13 of the CGST Act, the liability to pay tax arises earliest of the following three events viz., provision / completion of service, issue of invoice or receipt of payment.

**Q20. Whether transfer of furniture by A Ltd from its branch registered in Delhi to its Head Office registered in Uttar Pradesh (UP) falls under the ambit of supply? If yes, whether the registered office should bill to Head Office in UP?**

**Ans.** Section 7 provides the scope of supply under GST which includes transfer:

*"7. Scope of supply — (1) For the purposes of this Act, the expression '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) …*

*(c) the activities specified in Schedule I, made or agreed to be made without a consideration;*

*…"*

Further, section 25(4) provides for the definition of '***distinct persons***' for the purposes of GST law, which reads as under:

*"(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."*

Accordingly, the entities of A Ltd. registered in Delhi and in UP shall be treated as distinct persons in accordance with section 25(4).

As per section 7 all the activities specified under **Schedule I** made or agreed to be made shall be treated as **supply even if made without consideration**. The relevant extract of the Schedule I is reproduced below:

*"SCHEDULE I*
*[See section 7]*
*ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION*

*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."*

Para 2 of the Schedule I covers supply of goods or services between distinct persons when made in the course or furtherance of business. Accordingly, supply of the goods between distinct persons shall be treated as 'supply' under section 7 read with Schedule I.

Therefore, transfer of furniture from the branch office situated in Delhi to Head Office situated in UP shall be treated as '*supply*' under section 7, as the same is the supply of goods between two distinct

persons. Hence, the registered office in Delhi would be required to issue a tax invoice on Head Office in UP for the transaction undertaken.

**Q21. Whether GST is applicable on movement of machines, other goods between branches of the same network hospitals, if all other services provided by them are exempt from GST?**

**Ans.** Section 7 defines the expression "supply", to include -

*(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;*

In addition to this, Schedule I specifically covers the supply between related or distinct persons made or agreed to be made without a consideration as deemed supply.

The term "*distinct person*" covers the branch(es) or unit(s) or establishment(s) or office(s) etc., which has obtained or required to obtain more than one registration in one State or UT or more than one State or UT belonging to the same person, whether registered or not *vide* section 25 (4) and section 25(5).

According to the above provisions, movement of machines and other goods between branches are treated as supply of goods and branches come under the definition *'distinct person'*. Therefore, GST shall be applicable on such movement. However, no GST is applicable in cases where the movement is between the branches situated within the same State or UT and having the same GSTIN.

Health care services provided by a clinical establishment (hospitals) are exempt from the levy of GST. Movement of machines, between the branches having different GST registrations, being supply of goods does not come under the ambit of such exempted services.

**Q22. Whether use of logo of ABC Bank by ABC Securities is a supply? If yes, whether the same is exigible to GST?**

**Ans.** This is a case of internal supply of brands and logos. Use of logo owned by one person, by another for a consideration and in the course of business amounts to supply under section 7(1)(a). Even if

there is no consideration and ABC Bank and ABC Securities are covered within the definition of "distinct entity" as per section 25(4) and section 25(5) or 'related persons' as per explanation to section 15, it shall be a deemed supply in terms of para 2 of Schedule I and in both cases GST liability would arise. Transaction value will be determined as per section 15 and the valuation rules.

**Q23. Whether guarantees provided by holding companies for their subsidiaries/associates are exigible to GST?**

**Ans.** Holding companies and their subsidiaries are related persons as per clause (a) of the explanation to section 15. Para 2 of Schedule I considers supply of goods and /or services between related persons (holding company and subsidiary companies being related person) as a deemed supply even if the same is made without any consideration.

Providing a guarantee is a supply of service and therefore, guaranty by a holding company for its subsidiary companies is exigible to GST. As the transaction is between related persons, the value of supply shall be determined as per rule 28. Further, reliance can also be placed on *Circular No. 34/8/2018-GST dated 01.03.2018* wherein, it is provided that services provided by the Central or State Government to any business entity including PSUs *by way of guaranteeing the loan taken from financial institutions, against consideration shall be taxable*. Hence, the afore-mentioned Circular supports the view that transaction of guaranteeing loan qualifies as supply and therefore, is leviable to GST. However, it must be noted that while the case covered in this Circular is the one where the guarantee is given in lieu of a consideration, there is no consideration involved when a holding company gives guarantee for its subsidiary company.

It is worthwhile to note here that holding companies seldom give the guarantee for its subsidiary company on a stand-alone basis. The act of giving a guarantee is ancillary to the objective of having an investment in subsidiary company i.e., it is the obligation of the shareholder of the holding company to facilitate the subsidiary company in securing investments for its operations. Thus, the terms of contract between the holding and the subsidiary company need to be examined to ascertain the nature of the activity for determining its taxability.

**Q24. A registered person is into the business of supplying steel pipes. It is setting up an industrial township of its own under the same GSTIN.**

**Whether the use of steel pipes in its own industrial township will tantamount to supply?**

**What if the industrial township belongs to another independent registered person?**

**Ans.** The supply of steel pipes by the registered person to its own industrial township, which is registered under the same GSTIN, will not be considered as a supply in terms of section 7(1). This situation is a case of self-consumption and is liable for reversal of ITC availed on the steel pipes based on the provisions of section 17 read with rule 42.

If the industrial township belongs to another independent registered person, the supply of steel pipes will be treated as a supply under section 7(1). Same would be the case if the industrial township to which the goods are supplied is a distinct person i.e., an entity with a separate GSTIN under the same PAN. In such a case, supply of steel pipes shall be deemed as supply of goods in terms of para 2 of Schedule I.

**Q25. Whether goods can be sent to agent say Mr. X without GST, when actual sales made by principal say Mr. Y is chargeable to GST? Mr. X issues the invoice for the goods in his own name.**

**Ans.** As per para 3(a) of Schedule I, supply of goods by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal is a deemed supply. *Circular No. 57/31/2018 GST dated 04.09.2018* has clarified that when the invoice for further supply of goods is being issued by the agent in his own name, any provision of goods by the supplier to the agent will fall under para 3 to Schedule I. Accordingly, such an activity will be a deemed supply and GST will be leviable thereon. Such supply shall be valued in terms of rule 29.

The agent shall be entitled to claim ITC on such goods and shall pay GST on the supplies made by him of goods belonging to the principal. It is to be noted that the principal shall not pay tax on further supply of such goods by the agent.

**Q26. Whether GST is leviable on assignment/transfer of leasehold plot of industrial areas and industrial estates?**

**Ans.** Para 2(a) of the Schedule II provides that:

*"any lease, tenancy, easement, licence to occupy land is a supply of services;"*

Assignment of leasehold plot to another person amounts to transfer of leasehold right, which is one of the bundles of right associated with the land. Further, in broad sense going by para 2 of Schedule II, any benefits arising from the land are to be treated as a supply of service and not to be treated a sale of land. Assignment of leasehold plot amounts to extinguishment of leasehold right in the plot and the compensation received is the consideration for the transfer and liable to GST at 18 per cent.

**Q27. Whether surrender of tenancy right to landlord constitutes supply under GST?**

**Ans.** According to the definition of 'supply', supply of services also includes lease, tenancy, easement, license to occupy the land, etc. The activity of transfer of tenancy right against consideration in the form of tenancy premium is a supply of service liable to GST. It is a form of lease or renting of property and such activity is specifically declared to be a service in terms of para 2 of Schedule II i.e., *any lease, tenancy, easement, licence to occupy land is a supply of services*.

GST will be applicable even in cases where stamp duty and registration fee are paid. The contention that stamp duty and registration charges is levied on such transfers of tenancy rights, and thus, the same should not be subjected to GST, is not relevant. The transfer of tenancy rights cannot be treated as sale of land or building declared as neither a supply of goods nor of services in para 5 of Schedule III.

*Circular No.44/18/2018-CGST, dated 2.05.2018* deals with the issue related to taxability of '*tenancy rights*' under GST. Transfer of tenancy rights to a new tenant against consideration in the form of tenancy premium is taxable. However, renting of residential dwelling for use as a residence is exempt [Entry no. 12 of *NN 12/2017-CTR-28.06.2017]*. Hence, grant of tenancy rights in a residential dwelling

for use as residence against tenancy premium or periodic rent or both is exempt. As regards services provided by outgoing tenant by way of surrendering the tenancy rights against consideration in the form of a portion of tenancy premium is concerned, the same is liable to GST.

**Q28. Whether GST is leviable on leasing cum sale of property by a registered person to another registered person if the property is held within State Industrial Corporation?**

**Ans.** Every State Government as a means to attract investors have introduced special package of incentives for attracting new investments from the existing and prospective entrepreneurs, who intend to set up industries in the existing as well as in the new Industrial Parks to be developed. One such incentive is to provide the land at the subsidized rate under "lease cum sale". This is done to discourage the investor from selling the property at the market price and bank the profit.

Unless both parties execute a sale deed to transfer the ownership, remains only as an optional right contingent upon future sale. Hence, until such time, leasing is the prominent and only activity present and certain over the lease period. As per section 7(1) (a), leasing is also a form of supply and falls within the scope of supply when agreed for a consideration and done in the course or furtherance of business.

Further, it is considered as supply of service as per para 2 of Schedule II. Thus, the activity of leasing will be liable to GST.

**Q29. A partnership firm imports furniture and does not avail any ITC on the same. After a few months, the same is disposed of by way of drawings by one of the partners. Will such an activity be treated as a supply?**

**Are the firm and partners treated as related persons?**

**Ans.** If business assets are removed permanently for personal use, the same is treated as supply of goods as per Schedule II. However, to fall under Schedule II, the activity needs to be a supply first.

Under GST the expression 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;*

In the present case, the activity takes place without any consideration but by way of drawings to the partners account.

Under 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;*

Hence, such activity involves consideration in some form and takes place in the course of business and the disposal of furniture falls within the scope of supply.

As per the Partnership Act, Partnership firm is a collective name given to the partners; it is not a separate legal entity distinct from its members. The explanation to the section 15 provides as under (relevant portion only) –

*"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;*

*……"*

Further, Schedule I provides as under –

*"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:"*

Thus, any supply (including permanent removal for personal use) between partnership firm and partners even without consideration

would amount to supply exigible to GST. Accordingly, withdrawal by a partner without any consideration shall be considered as a supply and exigible to taxes under the CGST Act.

**Q30. Whether a proprietorship firm gifted by a father to his son with a closing stock but having no balance of ITC in the electronic credit ledger, is a taxable or exempt supply under GST?**

**Ans.** When the entire firm is transferred by father to son, this is considered as a **transfer of going concern as a whole.** This is capable of being carried on by purchaser. This will comprise a comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Hence, this is an amount of service and exempted from GST by virtue of entry no. 2 of *NN 12/2017-CTR-28.06.2017*

| ***Sl. No.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent.)*** | ***Condition*** |
|---|---|---|---|---|
| *(1)* | *(2)* | *(3)* | *(4)* | *(5)* |
| *2* | *Chapter 99* | *Services by way of transfer of a going concern, as a whole or an independent part thereof.* | *Nil* | *Nil* |

**Q31. Whether assignment of patent rights temporarily by one entity to another entity is supply exigible to GST? If yes, state the nature of supply if it is between two entities in different States?**

**Ans.** As per section 7(1), the expression "*supply*" includes 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. Therefore, temporary transfer is a supply.

As per para 5(c) of Schedule II. *temporary transfer or permitting the use or enjoyment of any intellectual property right* is a supply of service. Therefore, if assignment of patent rights is only a temporary transfer of Intellectual Property Right ('IPR'), it would be treated as a supply of service and subject to GST.

As this, temporary transfer is a service and is not specifically covered under sub-sections (3) to (14) of section 12 of the IGST Act, the place of supply shall be determined as per section 12(2) and which would be the "*location of the recipient of service*", if made to a registered person.

If the location of the supplier and place of supply are in different States, it shall be treated as an inter-State supply as per section 7 of the IGST Act. However, if the location of the supplier and place of supply are in the same State, it shall be treated as intra-State supply in terms of section 8 of the IGST Act.

**Q32. Whether consideration for not doing an act is leviable to tax under GST?**

**Ans.** 1. For a transaction to qualify as a supply under section 7, there should be a consideration and the transaction should be in the course or furtherance of business.

2. Monetary value of forbearance to an act is treated as consideration in accordance with section 2(31).

3. According to para 5(e) of Schedule II "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" shall be treated as supply of service.

Following may be stated to be examples for consideration for not doing an act:

- Receipt of fee for non-compete agreement
- Amount agreed upon for settlement of any dispute
- Receipt of money for delayed completion of a project
- Notice pay recovery.

**Q33. Supplier buys machinery in his own name and installs it at the client's place and takes monthly usage charges which is**

**fluctuating every month. After a tenure of 3 years, the machinery ownership is transferred to the client free of cost. Whether such monthly charges are liable to GST?**

**Ans.** Monthly usage charges as per the terms and conditions agreed to shall be liable for GST in accordance with the sequential application of the following provisions:

a. Since the supplier is receiving consideration in the form of monthly usage charge for letting out the machinery for use by the recipient, it constitutes supply as per section 7(1)(a).

b. Since the above transaction constitutes supply under section 7(1), as per para 5(f) of the Schedule II such transfer of right to use the machinery for monthly usage charges amounts to supply of service.

c. Applicable rate of GST for the above monthly usage charges shall be the same rate as applicable for supply of such machinery involving transfer of title in such machinery as per entry no. 15(ii) of *Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017* ("*NN 11/2017-CTR-28.06.20"*) under HSN Code 9971. Accordingly, the applicable rate of GST shall be 18 per cent for monthly usage charges, because the applicable rate of GST for supply of machinery is 18 per cent.

Further, after 3 years when the ownership of the (title in) machinery is transferred to the recipient free of cost still it amounts to supply as per section 7(1)(c) read with para 1 of Schedule I as it amounts to permanent transfer or disposal of business assets on which ITC has been availed. Thus, if the ITC was availed on the tax paid on such machinery, then at the time of transfer of ownership in goods after 3 years, GST has to be paid as provided in section 18(6) which shall be an amount equal to the ITC taken on such machinery as reduced by 5 per cent per quarter from the date of receipt as the transaction value determined under section 15 is NIL.

**Q34. An asset purchased in VAT regime on which ITC was not taken is sold in GST regime. Whether such sale is a supply and leviable to GST?**

**Ans.** Sale of an asset purchased during VAT regime on which ITC was not taken when sold in GST regime amounts to supply as per section 7(1)(a), being a sale for consideration made in the course or furtherance of business. Rate of GST applicable for such asset has to be determined as per the corresponding entry in column (3) of the Schedules falling under the tariff item, sub-heading, heading or chapter of the *Notification No. 1/2017-Central Tax (Rate), dated 28.06.2017* ("*NN 1/2017-CTR-28.06.2017*").

In the given question since the ITC on the asset was not availed provisions of section 18(6) shall not apply. The GST at the applicable rate for the specified assets as stated above has to be computed on the transaction value as determined under section 15 i.e., the sale value of the asset specified in the invoice.

However, if that asset happens to be a motor vehicle falling under chapter heading 87 of First Schedule to the Customs Tariff, then GST has to be paid only on the value that represent the margin of the supplier and at the rate specified in *Notification No. 8/2018- Central Tax (Rate), dated 25.01.2018 ("NN 8/2018-CTR-25.01.2018")*. If the registered person has claimed depreciation on such vehicle, then margin of the supplier shall be the difference between the depreciated value of the vehicle on the date of the sale and the sale proceeds. In case depreciation is not claimed on such vehicle, then margin of the supplier shall be the difference between selling price and the purchase price and where such margin is negative, then GST is not required to be paid.

**Q35. State the GST implication in case of sale of an asset, where there is neither profit nor loss.**

**Ans.** The applicability of the GST provisions does not depend on profit or loss on sale and as such there would not be any specific implication because an asset has been sold on - no profit no loss basis. GST liability will have to be discharged on the value arrived at by applying the provisions of section 15 of the CGST Act read with the rules as applicable for determination of value of supply, if required, as in the case of any other transaction of sale.

Thus, if an asset in the nature of capital goods is being sold because such asset would have been capitalised in the books of account, then

GST liability would be determined in the manner as provided in section 18(6), if ITC has been availed on such capital goods. Tax to be paid in such case would be higher of – (i) ITC taken on such asset reduced by 5 per cent per quarter from the date of invoice till the date of sale and (ii) applicable tax on transaction value. In case, ITC on such asset is not availed, then GST shall be charged on the transaction value determined as per section 15.

**Q36. Whether GST is leviable on sale of capital goods as such against consideration when ITC is not availed?**

**Ans.** Sale of capital goods against consideration is a supply in terms of section 7(1)(a), whether or not ITC is availed on the capital goods does not alter the fact that the sale thereof is supply and is leviable to GST. Provision for supply of capital goods on which ITC has been availed are governed under section 18(6). For capital goods which are sold as such (without use) on which ITC has not been availed, the value shall be determined under section 15 and tax shall be paid thereon. Rule 32 prescribes the margin method for determining the value of used goods supplied by the suppliers dealing in buying and selling of **used goods.** Also, *NN 8/2018-CTR-25.01.2018* prescribes special rates and valuation mechanism for supply of used motor vehicles.

**Q37. Whether GST is leviable on sale of goods repossessed from the defaulting borrower who is registered under GST? If, yes determine the value of such supply.**

**Ans.** Sale is covered under the definition of supply under section 7(1)(a). Irrespective of being repossessed from a registered or unregistered borrower, when sold by the person who has repossessed the goods is a supply and is liable to GST. Value of supply shall be the transaction value, if conditions under section 15(1) are fulfilled. Else valuation shall be as per section 15(4) read with rules 27 or 28 as the case may be. As per rule 32(5) [margin scheme in GST], the option is available for valuation of supply of goods repossessed from a defaulting borrower. If the defaulting borrower is not a registered person, the purchase value will be purchase price in the hands of such borrower reduced by 5% for every quarter or part thereof, between the date of invoice and date of disposal by the person

making such repossession. However, if the defaulting borrower is registered, the repossessing lender agency will discharge GST at the supply value without any reduction from actual/notional purchase value.

**Q38. Whether compensation/ incentive received in terms of employment contract, by new employee from the new firm to pay the old firm in lieu of notice period at the time of resignation, constitutes supply and is exigible to GST?**

**Ans.** It can be said that the compensation/ incentive received by employee does not constitute supply in terms of section 7(2) read with para 1 to Schedule III. Para 1 to Schedule III reads as under:

*"SCHEDULE III*
*[See section 7]*

*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"*

Compensation incentive received by employee from the new firm is in respect of the employment agreement entered by the employee and the new firm. Therefore, such compensation amount received by the employee from the new firm is in relation to his employment in terms of para 1 to Schedule III (i.e., in the course of or in relation to his employment).

Accordingly, compensation/ incentive amount received by an employee from the new firm should not be subject to GST.

**Q39. Laptop used by Z in his Office is given to him at the time of his retirement, without any charge. The employer-employee relationship between Z and his Office subsists when the laptop is given to Z. Whether giving of such laptop to Z is a supply liable to GST?**

**Ans.** Para 1 of Schedule III excludes the services provided by an employee to the employer in the course of employment from the scope of the definition of supply. However, goods or services supplied by the

employer to the employee are well within the ambit of the definition of supply. As per explanation to section 15, employer and employee are deemed to be related persons. As per section 7(1)(c) read with para 2 of Schedule I, supply of goods or services or both between related persons when made in the course or furtherance of business is treated as supply even if made without consideration.

In view of the afore-mentioned provisions, the supply of laptop to Z would be treated as supply under GST and the same would be exigible to tax. Since, it is a supply made without consideration to a related person, the same will be valued as per rules 28 or 30 or 31 of the CGST Rules in that order i.e., either on the basis of open market value, or on the basis of value of goods of like kind and quality, or on cost basis or as per reasonable means consistent with principles and general provisions of valuation applied in that order.

However, the aforesaid para 2 of Schedule I has a proviso 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*." Gift means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration. Since the laptop is being given to Z without consideration and without there being an obligation on the employer to do so, it can be treated as a gift given to Z. If the open market value ('OMV') or value of a like laptop is less than ₹ 50,000, benefit of the proviso can be claimed, and tax need not be paid on the laptop, assuming that the value is within the prescribed threshold.

However, where the OMV or value of like kind and quality of laptop is more than ₹ 50,000, benefit of the above proviso to para 2 of Schedule I will not be available and transaction will have to be treated as supply. As the wording therein is "gifts not exceeding ₹ 50,000" and not "*gifts upto ₹ 50,000*", the benefit may not be available upto ₹ 50,000 also. However, there can be contrary views on this.

**Q40. Outstanding amount payable to employees who have resigned 2 to 3 years back is written off by a company. Whether GST is leviable on such amounts payable but written back? Will the answer be different if it is writing off/ reversal of unclaimed outstanding credit balances in the books of accounts?**

**Ans.** The relevant extract of the definition of supply the term 'supply' is under section 7(1) is given as under:

*'For the purposes of this Act, the expression '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;'*

It can be understood that there should be a *supply* of goods or service 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 instant case, there is an amount outstanding in the books which was payable to employees who had resigned 2-3 years back or there are unclaimed outstanding credit balances in the books. The amount that is payable is being 'written back' to profit and loss account as income without making any supply to the ex-employee or the creditor.

It can be seen that; it is mere writing back of a liability in the books of accounts without supplying any goods or service.

Hence, in view of the above,

a) Writing back of outstanding amount due to employees does not make a transaction taxable under GST.

b) With regard to the writing back of unclaimed outstanding credit balances in the books, the above discussed proposition will squarely apply. However, if such credit balance liability is attributable to "failure to pay" to the supplier within 180 days from the date of issue of invoice of the original supply, the related ITC shall be reversed in compliance with rule 37, by way of adding such ITC to the output tax liability.

**Q41. A registered person provides perquisites to its employees like reimbursement of mobile bills, refreshment expenses etc. upto ₹ 500 and recovers the amount of expenditure incurred beyond the said limit from the employees.**

**Whether such re-imbursements are leviable to GST?**

**Ans.** Services provided 'by' an employee to employer is excluded from supply *vide* para 1 of Schedule III to section 7. Where *'perquisites'* are given to employees, it is 'remuneration' for services provided by the employee. Perquisites are included as salary in terms of section 17(2) of Income-tax Act, 1961.

Where certain amounts are recovered from employees, it means that the employer has incurred the underlying expenditure directly to the vendors (on payment of applicable GST). If these expenses are treated as 'perquisites' then there remains nothing further to discuss. However, having treated these expenditure as *'business expenses'* (up to the said limit) , anything exceeding this limit being recovered from employees indicates that - (i) the expenditure is first paid by employer to the respective vendors and that transaction is concluded without reference to the employee concerned (ii) this expenditure (above the limit) that is already incurred is now recovered by the employer from the employee without reference to the vendor.

Transaction (i) above is an inward supply to employer (from vendor) and transaction (ii) is an outward supply by employer (to employee). The HSN of inward supply may or may not be the same for the outward supply. Admissibility of ITC on this inward supply depends on any restrictions applicable to the HSN of the outward supply adopted. Recovery of the amount towards transaction (ii) only has an indirect and not a direct link with employment. That is, there is no instance where the employment depends on making the re-imbursement or the employment will stand terminated in case of non-re-imbursement. It is in the nature of '*pay if you use*' transaction and the exclusion available in Schedule III does not extend to all such indirect transactions with employer.

**Q42. Each partner has received remuneration of ₹ 1 crore from the partnership firm.**

**Whether it will be treated as supply, and will GST be payable on the same by each partner by registering separately?**

**Ans.** Relevant terms under the Indian Partnership Act, 1932 ('IPA') to answer the above question are as under:

- 'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or

any of them acting for all. Persons who have entered partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". (Refer Section 4 of IPA)

- A partner is the agent of the firm for the *purposes of the business of the firm.* The act of a partner done in the ordinary course of business binds the firm. (Refer Sections 18 and 19 of IPA)
- Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. (Refer Section 25 of IPA)

Here it is pertinent to take note of the decision of the Hon'ble Supreme Court in the case of *Malabar Fisheries Co. v. CIT, Kerala [1979 (4) SCC 766]* wherein it has been held that a partnership firm under IPA is not a distinct legal entity apart from the partners constituting it and equally in law. A partnership firm as such has no separate right of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest.

Another relevant decision passed under the erstwhile service tax regime by the CESTAT Ahmedabad in the case of *Cadila Healthcare Limited v. C.S.T. -Service Tax [2021(50) G.S.T.L. 205]* wherein it has been held that *in an arrangement where there is no separate and independent contract for provision of service between the partner and the partnership firm***,** it cannot be said that the partner is a service provider and partnership firm is service recipient, *as the partner was obliged to carry out certain activities in his capacity as 'Partner'.* The Tribunal further held that the remuneration received by the partner is merely a special share of profits in terms of the partnership deed and such remuneration cannot be considered as '*consideration*' towards any services between two persons, hence, not liable to service tax.

Thus, a partnership firm and its partners are not separate from each other. Accordingly, neither of them can be treated as a service provider or service recipient. In other words, renumeration paid to the partners is in the nature of share of profits taken out by the partners

from their partnership firm and cannot be treated as 'supply' under section 7.

Further, CBIC FAQ provides for exemption of GST on salary received by the partner from the partnership firm. However, the said FAQ does not provide any reasoning for arriving such conclusion. Relevant extract of the FAQ is provided as below:

CBIC FAQ's at *https://cbic-gst.gov.in/hindi/faq.html* Point No. 79 provides as under:

| | | |
|---|---|---|
| *79* | *Salary by partnership firm to Partners as per Income Tax Act liable to GST?* | *Salary will not be liable for GST.* |

Thus, renumeration received by the partners from the partnership firm shall not be treated as supply under section 7 and hence no GST is payable by the partner receiving remuneration from the partnership firm.

**Q43. Whether sale of an under-construction flat by a customer to another customer before issue of occupancy certificate is exigible to GST, when the first limb of transaction i.e., original sale is taxable @ 18 per cent? Whether second limb of the aforesaid transaction is a supply exigible to GST? If yes, at what rate?**

**Ans.** The process followed for transferring an under-construction flat is as follows:

a. A tripartite agreement is entered into between the seller (who had originally booked the flat), the purchaser and the builder.

b. Under this agreement, the seller assigns his rights to the under-construction flat to the purchaser with the consent of the builder, the purchaser agrees to pay the balance of the original purchase price payable to the builder and the builder agrees to give possession of the ready flat to the purchaser directly.

c. Thus, the purchaser pays the balance amount agreed with the builder.

CBIC in FAQ No. 6.2.8 in *Taxation of Services: An Education Guide dated 20.06.2012* had clarified that sale of an under-construction flat

does not fall in this declared service entry as the said person is not providing any construction service. In any case transfer of such an interest would be transfer of a benefit to arise out of land which as per the definition of immovable property given in the General Clauses Act, 1897 is part of immovable property. Such transfer would therefore be outside the ambit of '*service*' being a transfer of title in immovable property.

However, this scenario had undergone a change under the GST regime. As per sub-section (102) of the section 2 *'s*ervices' *means anything other than goods,* money and securities but includes activities relating to the use of money or its conversion for which a separate consideration is charged. Further, *para 5 of Schedule III* categorically prescribes that *the transfer of ownership in land and building is neither a supply of goods nor a supply of services*.

On a combined reading of section 2(102) and para 5 of Schedule III, we can infer that the assigning a right for a consideration will tantamount to supply of services and will be subject to GST @ 18 per cent. However, another school of thought suggests that the sale is of building (future) and the buyer is not undertaking a transaction as defined in para 5(b) of Schedule II and thus, there is no GST liability on such transfer of under construction property.

**Q44. Some builders make a deed of declaration in respect of apartment flats in their inventory in their own name and then sell those flats to prospective buyers and do not pay GST as it is resale of flats. Whether such transfer of flats by making deed of declaration in own name is a supply and is liable to GST?**

**Ans.** Transfer of flat by making a deed of declaration after obtaining completion certificate is not a supply and will not be liable to GST.

**Q45. Whether the amount received as insurance claim on account of destroyed stock/capital asset is taxable under GST?**

**Ans.** Under the GST law, every kind of movable property other than money or securities but including actionable claims is covered within the definition of 'goods' under section 2(52).

All forms of supply of goods or services or both are covered within the scope of supply under section 7. However, certain activities or

transactions are treated neither as a supply of goods nor a supply of service as mentioned in Schedule III. As per para 6 of Schedule III, actionable claims, other than lottery, betting and gambling are treated as neither supply of goods nor supply of services. In other words, GST will not be applicable on actionable claims other than lottery, betting and gambling. 'Actionable claim' has been defined to have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882).

As per section 3 of the Transfer of Property Act, '*Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.'*

Besides the above, in *Union of India v. Sarada Mills [(1972) 2 SCC 877, 880]*, the Apex Court has held that, "*an actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability"*.

Hence, actionable claim includes an amount due under a policy of insurance.

An insurance claim received on account of damage of stock/ capital asset will be an actionable claim and therefore it is treated neither as a supply of goods nor a supply of service, thereby not taxable under GST.

**Q46. What is wager? Whether it is a supply under GST?**

**Ans.** Wager is not defined under GST law. According to Black Law's Dictionary, a wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event or upon the ascertainment of a fact which is in dispute between them.

In other words, wager is an act of betting on the outcome of unpredictable event which is also a form of "*actionable claim*".

Schedule III enumerates activities or transactions, which are neither supply of goods nor supply of services. Actionable claim is one among the list prescribed under the Schedule III to the GST Act. However, lottery, betting and gambling (i.e., wagering) are exceptions to this rule. Hence, wager is an activity which qualifies as a supply under GST.

It should be noted that in the case of *Skill Lotto Solutions Pvt. Ltd. Vs. Union of India & Ors [2020 (12) TMI 140 - Supreme Court]*, the Hon'ble Supreme Court held that Article 246A of the Constitution is a special provision empowering the Parliament to make laws regarding goods and services tax and needs to be liberally construed. The Hon'ble Supreme Court relying on its own judgement in *Sunrise Associates vs. Govt. of NCT of Delhi and Ors [2006 (4) TMI 118 - Supreme Court]* held that actionable claims are to be included in the definition of goods and if it was not to be included, then there was no need for excluding them specifically from the definition in Sales Tax laws in earlier regime.

**Q47.**

**A. Determine the nature of supply in case Mr. A of Karnataka supplies goods from his warehouse in Tamil Nadu to Mr. B of Tamil Nadu?**

**B. What if the goods were imported in a port in Tamil Nadu and supplied to Mr. B?**

**Ans.**

A. In the instant case, Mr. A of Karnataka supplies goods from his warehouse in Tamil Nadu to Mr. B of Tamil Nadu.

As per section 10(1)(a) of the IGST Act, if supply involves movement of goods, either by the supplier or the recipient, location of goods at the time at which movement terminates, shall be the place of supply.

From the above, the movement for delivery starts from the warehouse in Tamil Nadu and the recipient of supply is also situated in the State of Tamil Nadu. Warehouse in which the goods are stored is also a place of business or additional place of business to the registered person. In the given case, the registered person is deemed to be at Tamil Nadu (warehouse from where the transaction has originated

and hence this will be the place of business of the supplier). The place of supply shall be the recipient's place which is also in Tamil Nadu and therefore the nature of supply will be intra-State and CGST and SGST will be charged.

B. Mr. A imports goods through a port in Tamil Nadu and supplies to Mr. B in Tamil Nadu.

As per Schedule III of section 7, stipulates the activities or transactions will be treated neither as a supply of goods nor a supply of services. Schedule III was amended with effect from 01.02.2019 and the following were made exempted:

- *Schedule III Entry 8(a). Supply of warehoused goods to any person before clearance for home consumption;*
- *Schedule III Entry 8(b). Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been despatched from the port of origin located outside India but before clearance for home consumption.*

Therefore, if the supply takes place before taking imported goods to domestic tariff area for home consumption etc., by the importer and if supply takes place before clearance from the Customs authorities, the supply will come under Schedule III.

This will be treated as activities or transactions which are neither supply of goods nor supply of services.

**Q48. Are the services provided in the sea between 12 nautical miles and 200 nautical miles from the baseline, chargeable to GST?**

**Ans.** GST Law extends to whole of India. "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, *[distance of twelve nautical miles from the nearest point of the appropriate baseline]*
- continental shelf, *[comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial*

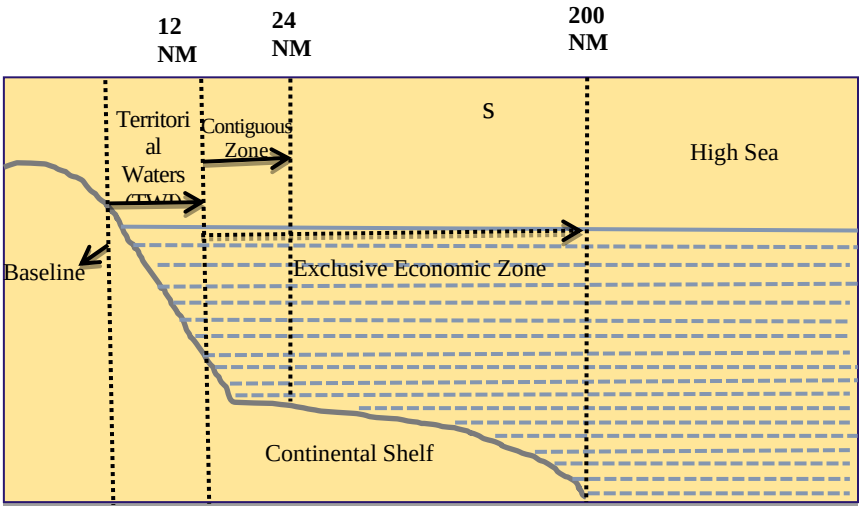
*waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline]*

- 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 (80 of 1976), and *[two hundred nautical miles from the baseline]*
- the air space above its territory and territorial waters;

For the purposes of GST, India extends up to the Exclusive Economic Zone upto 200 nautical miles from baseline. Thus, all supplies made within this zone will be liable to GST.

For supplies made within the State or UT, CGST and SGST/UTGST is payable. Area upto 12 nautical miles inside sea (territorial waters) is part of State or UT which is nearest as per section 9 of the IGST Act.

If supply is beyond 12 nautical miles but upto 200 nautical miles, it is treated as inter-State supply and IGST is payable. Beyond 200 nautical miles, the area is '*high sea*' where all countries have equal rights, and no Indian jurisdiction can be exercised on high seas.



**Q49. Whether discount credited in profit and loss account (P&L A/c) will be considered as supply? What if, a financial credit note is issued by the dealer?**

**Ans.** Any discount given by the supplier of goods to the recipient which is not relatable to the agreement or not mentioned on the face of the invoice issued at the time of supply made by them will not lead to any change in originally stated value of supply for the purpose of GST and thus no tax adjustment would be permissible on account of such post sale discount. A financial credit note is issued in such case. In this context, *CBIC vide Circular No. 92/11/2019-GST, dated 7.03.2019*, (relevant extract of para 4) provides as under:

"*Secondary Discounts*

*i. These are the discounts which are not known at the time of supply or are offered after the supply is already over. For example, M/s. A supplies 10000 packets of biscuits to M/s. B at ₹ 10/- per packet. Afterwards M/s. A re-values it at ₹ 9/- per packet. Subsequently, M /s. A issues credit note to M/s. B for ₹ 1/- per packet.*

*ii. ….*

*iii. ….. It is hereby clarified that financial/commercial credit note(s) can be issued by the supplier even if the conditions mentioned in clause (b) of sub-section (3) of section 15 of the said Act are not satisfied. ….*

*iv. …*

*v. In other words, value of supply shall not include any discount by way of issuance of credit note(s) as explained above in para 2(D)(iii) or by any other means, except in cases where the provisions contained in clause (b) of sub-section (3) of section 15 of the said Act are satisfied.*

*vi. There is no impact on availability or otherwise of ITC in the hands of supplier in this case."*

Inferred from the above, when the original supply had occurred, complete ITC was availed by the recipient. At the time of reduction of the original value, if there is no reduction of output tax liability, ITC

should not be reversed either. Hence, ITC attributable to the value of discount is not to be reversed by the recipient.

However, if the discount is given by the supplier to the recipient on the condition of him performing some additional activities like special sales drive, advertisement campaign, exhibition etc, then such transaction would be a separate supply by the recipient to the supplier. The recipient shall raise a tax invoice charging GST on the same.

**Q50. Whether GST is applicable on volume incentive received by stockist from manufacturer due to high sales volume?**

**Ans.** Volume incentive received by a stockist from manufacturer (i.e., in the nature of high sales volume) is a type of post-sale discount and hence to be examined in the light of the section 15 (3)(b).

Section 15(3) provides for the treatment of discount from the value of supply. Further section 15(3)(b) specifically deals with the discounts which are given after the supply has been effected (i.e., commonly known as post-sale discount). Relevant extract of the provision is as under:

*"(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."*

In the instant case, on a reading of the provision of law following can be inferred:

(i) *Issuance of a tax credit note* - Volume incentive received by the stockist in the form of post-sale discount as per section 15(3)(b)

would be provided by way of issuance of tax credit note by the manufacturer as per section 34 thereof. Also, the stockist would be required to reduce the corresponding ITC as per the tax credit note issued.

Hence, in such case the value of discount shall be excluded from the value of supply by the manufacturer as the conditions by the manufacturer prescribed under section 15(3)(b) are fulfilled.

(ii) *Issuance of a commercial credit note*- Volume incentive received by the stockist in the form of post-sale discount which is not as per section 15(3)(b) then the manufacturer may issue a commercial credit note to the stockist as explained by the CBIC in *Circular No. 92/11/2019 -GST dated 07.03.2019*. Also, from ITC perspective, there shall be no impact in the hands of stockist.

Hence, in such case the value of discount shall not be excluded from the value of supply by the manufacturer as such discount was not known at the time of supply and the conditions prescribed under section 15(3)(b) are not fulfilled.

The same would be a tax neutral situation since neither the manufacturer nor the stockist would be making any adjustment of tax or the corresponding ITC.

**Q51. Whether sale of generic medicines by wholesale distributors is leviable to GST on MRP basis?**

**Ans.** MRP is the maximum retail price a seller can charge from the buyer. MRP is inclusive of all taxes and other charges. Hence, GST is already included in the MRP printed on the product. Thus, supplier of MRP printed products should not charge GST over and above the MRP printed on it. In case he collects GST over and above MRP, it will amount to collecting GST twice. As per provisions of section 76, said excess amount collected should be deposited with the Government.

For instance, if MRP of a product is ₹100 (18% GST rate), GST shall be calculated as ₹ 15 (100/118*18) and the taxable value becomes ₹ 85.

In case. in the above example if the supplier collects ₹ 18 as GST on the MRP of ₹100, he will collect ₹15 +₹ 18 = ₹33 as GST and thus the excess has to be remitted to the Government.

Though the supplier of MRP product cannot sell more than the MRP price, he may offer discount from the MRP printed on the product. In case he gives discount, tax shall be calculated on cum-tax basis and remitted to the Government. For instance, MRP of product is ₹ 100, the rate of tax is 18% and the supplier offers a discount of 10%. Hence, invoice price (taxable value plus GST) becomes Rs. 90 (100-10%) and GST payable shall be ₹ 13.73 and the taxable value shall be ₹76.27.

**Q52. State the difference between composite supply and mixed supply by giving examples.**

**Ans.** COMPOSITE SUPPLY: A composite supply would mean 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.*

The concept of composite supply under GST is identical to the concept of naturally bundled services prevailing in the erstwhile service tax regime. The rule under service tax was - 'if various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character'. '*Bundled service*' means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.

Under both the concepts (be it under GST regime or service tax regime), the following are common characteristics-

(i) There should be two or more supplies. However, under GST regime, the combination should only be of taxable supplies;

(ii) The supplies should be naturally bundled in the ordinary course of business;

(iii) The supplies should be provided in a combined manner or in conjunction with each other.

Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such concept of natural bundling is described in CBIC Flyer as under-

(i) The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package, then such a package could be treated as naturally bundled in the ordinary course of business.

(ii) Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.

(iii) The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service.

(iv) Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are:

- there is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use;
- the elements are normally advertised as a package;
- the different elements are not available separately;
- the different elements are integral to one overall supply. If one or more is removed, the nature of the supply would be affected.

There is no straight jacket formula to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above.

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.

MIXED SUPPLY: A 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.

**Differences**

| Composite Supply | Mixed Supply |
|---|---|
| Combination of two or more taxable supplies | Combination of two or more individual supplies |
| Combination may or may not be supplied for a single price | Combination should be supplied for a single price |
| Combination should be naturally bundled in the ordinary course of business | No such requirement. In fact, as a corollary, the combination should not be naturally bundled in the ordinary course of business. |
| Combination is classified based on the principal supply which give the combination its predominant element.<br>In other words, a composite supply is taxed at the GST rate of the principal supply. | Combination is classified based on the supply in the combination which is liable to highest rate of tax. In other words, a mixed supply is taxed at the GST rate of the item which has the highest rate of tax. |

**Q53. Whether the supply of charger with phone be considered as mixed supply especially when established phone brands have now started removing chargers from the mobile phone boxes?**

**Ans.** The Hon'ble Supreme Court in the case of S*tate of Punjab & Ors. v. Nokia India Pvt. Ltd. [2014-TIOL-100-SC-VAT*] in respect of rule 3(b) of the General Rules of Interpretation of Import Tariff has held that charger is not integral part of mobile/cell phone. Packaging together could not make it composite goods.

This judgement was rendered under VAT law which does not have a provision of composite supply. However, GST Law defines composite supply under section 2(30) thus:

"*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;"*

Composite supply under GST law means supplies which are naturally bundled and supplied in conjunction in the ordinary course of business. Chargers are supplied with mobile phones in the ordinary course of business. Even with the changing trend, if not the adaptor but the charging cable is supplied along with mobile phone. Further, many manufacturers still supply both adaptor and charging cable with the mobile phone.

Thus, it can be said that even in the light of Hon'ble Supreme Court decision holding charger not integral to mobile phone, still charger when supplied in conjunction with mobile phone in the ordinary course is a composite supply.

**Q54. Whether providing CD's/DVD's along with printed books is exempt under GST considering the same as composite supply, the principal supply of which is books?**

**Ans.** Supply of printed books is exempt under GST *vide Notification No. 2/2017-Central Tax (Rate), dated 28-6-2017* ('*NN 2/2017-CTR-28.06.2017'*). Composite supply is defined as any supply consisting of two or more taxable supplies of goods and services or both or any combination of goods and services, which are 'naturally bundled' and supplied in conjunction with each other and where one of the supplies is principal supply. Where supplier is supplying printed books and providing CD's/DVD's containing books readable on electronic devices along with the printed books, the supply of printed books and

CD's/DVD's could be treated as a composite supply as both are supplied in conjunction with each other and supply of books is the principal supply. As principal supply of books is exempt, supply of CD's/DVD's could also be treated as exempt. Where the supplier is supplying CD's/DVD's separately i.e., charging separate consideration for books and separate consideration for CD's/DVD's and buyer has the option to purchase books and CD's/DVD's separately, such case shall not be treated as composite supply and should be taxed separately at the applicable GST rates. In such case, invoice(s) should indicate the consideration charged for both the supplies separately.

**Q55. What is the GST treatment in case of shipping charges (by road) included in the invoice by seller to buyer, hired from a third party (shipping company)?**

**Ans.** Where the shipping charges are recovered by the seller from the buyer while selling the goods, the same would be considered as a composite supply wherein the principal supply would be the supply of goods. Hence, the rate of GST would be the same as applicable to the principal supply i.e., rate applicable to the goods. The HSN would also be the same as that of the goods. This situation has also been provided as an illustration in the definition of "composite supply" as provided under section 2(30). Whether or not the services are hired from a third party or provided on own account, the same would continue to be a composite supply at the time of its recovery.

As regards the payment of shipping charges to the third party by the seller, one needs to check if the services fall within the ambit of Goods Transport Agency ('GTA') / courier / none of these. Please find below the answer depending on the situation:

a. If the transporter shows a GST rate of 5 per cent and the service falls within GTA, the same would be paid under reverse charge by the seller. Further, the seller would be allowed to take ITC against it.

b. If the transporter being a GTA charges 12 per cent GST, the same would be paid under forward / normal charge and the recipient would be allowed to take ITC against it.

c. If the service is that of courier agency, then GST chargeable by the courier company would be 18 per cent. Against this, ITC would be eligible.

d. If the supply is not that of GTA or courier, the transportation services would be exempt from GST.

**Q56. JKL Ltd., an exporter, exports goods with payment of IGST. JKL Ltd. exports goods under cost, insurance, and freight ('CIF') arrangement, mentioning insurance & freight separately on invoice and charges tax rate applicable to goods treating it to be composite supply.**

**(1) Whether treating such supply as composite supply is tenable?**

**(2) Who is the competent authority from whom refund of IGST paid on export of goods can be claimed, Customs (under automatic route) or GST Department (by filing Form GST RFD 01)?**

**Ans.**

(1) Yes. As per section 15 provides that the value of supply shall include any amount charged for anything done by the supplier in respect of the supply of goods before delivery of goods. Since insurance and freight was the responsibility of the supplier in CIF export, such charges are includible in value of supply for the purpose of GST.

(2) Once the taxpayer files Form GSTR-1 and provides export details (Table 6A) along with shipping bill details having IGST levied and also files Form GSTR-3B of the relevant tax period for which refund has to be paid, he is eligible to receive refund on account of the export of goods made on payment of IGST. GST Portal shares the export data declared under Form GSTR-1 along with a validation that Form GSTR-3B has been filed for the relevant tax period with ICEGATE. Customs System validates the Form GSTR-1 data with their shipping bill and EGM data and processes the refund. The taxpayer is not required to file separate refund application in this case and shipping bill itself shall be treated as refund application.

Proper Officer under CGST / SGST shall be the proper officer for seeking such refund. Customs department only facilitates the refund process

**Q57. LNG is being imported by A and stored in a bonded warehouse. Re-gasification service is used from B, a third-party service provider to re-gasify LNG in to RLNG. RLNG (Natural Gas) is supplied by A to various buyers through pipeline.**

**For supplying through pipeline, transportation service is availed from C, a third-party pipeline operator and the same is charged to the customer without any additional margin.**

**Whether the transportation cost will be subjected to VAT along with RLNG (Natural Gas) or be subjected to GST, if transportation cost is clearly identifiable and billed separately to the customer?**

**Ans.** As per section 9(2), the supply of petroleum products is outside the ambit of GST. The question to consider in this scenario is whether a supply which is provided in relation to or is ancillary to supply of petroleum products would be leviable to GST.

Under GST law, if two or more taxable supplies, one of which is a principal supply, are naturally bundled and supplied in conjunction with each other in the ordinary course of business, the combination of said supplies become composite supply and is charged to tax at the rate applicable for the principal supply.

Therefore, when the contract for supply of RLNG is entered into ex- works, the transportation cost billed to the customer cannot be construed to be bundled with the supply of RLNG in the ordinary course of business and thus, will be treated as a separate supply liable to GST. However, if the supply of RLNG is on CIF basis i.e., the supplier undertakes to deliver the RLNG at the premises of the customer, the transportation service would become bundled with the supply of RLNG and thus, would become part of the composite supply of RLNG which is not liable to GST in terms of section 9(2).

Therefore, treatment in GST would be greatly affected by the terms on which the contract for:

(i) supply of RLNG is negotiated and agreed and

(ii) transportation falling within the scope and responsibility of which of the Parties.

**Q58. What will be considered the principal supply when machines are given to research institutes, hospitals free of cost (FOC) under an agreement to purchase a minimum quantity of reagents, spares, etc.?**

**Ans.** These contracts are commercially known as Reagent Rental Contracts. Under these contracts, high value medical equipments are given on FOC basis by the medical equipment suppliers, under a contract with minimum purchase obligations of the reagent consumables required to run the machine. Reagents are sold at value higher than market price to the recipient of equipment to cover the value of equipment. In case minimum purchase obligation of reagents is not satisfied by the recipient, penal damages are recovered by the supplier from the recipient.

As per the definition of composite supply under GST Law, two taxable supplies shall qualify as composite if they are naturally bundled and supplied in conjunction with each other in the ordinary course of business. Medical equipment industry naturally bundles the medical equipment supply with consumables reagents in the ordinary course of business.

The value of medical equipment in the entire contract is higher than the value of consumable reagent supplied under the contract. Further, the duration of the contract is usually in close approximation of the useful life of the medical equipment.

The Hon'ble Kerala High Court in the case of *Abbott Healthcare Private Limited v. The Commissioner of State Tax Kerala & Ors. [W.P(C). No. 17012 OF 2019(B) dated January 7, 2020]* held that supply of diagnostic instrument and subsequent supply of reagents is not a composite supply on two grounds i.e.

a) the supplies were made by two different taxable persons; the supply of instrument by medical equipment manufacture; and the supply of the reagents, calibrators, and disposables by the distributors.

b) the two supplies do not answer the description of being "*naturally bundled and supplied in conjunction with each other in the ordinary course of business*".

**Q59. Whether GST is leviable on sale of developed plot wherein the consideration charged is only for the land alone and not for development of the plot such as roads, electricity lights, etc.?**

**OR**

**In a group of various companies, one company is engaged in development of land and sale of plots after plotting of land. It also carries out development process on the said land including roads, sewerage, parks, hospitals, education and other facilities. Remaining companies are owners of the land. The ultimate right to sell these plots is with the developer company. Out of the sale proceeds, the developer himself keep 70 per cent and gives 30 per cent to the landowner(s) which it books as joint venture expense.**

**Whether GST is leviable where the final product sold is only a piece of land (which is out of GST purview)?**

**Ans.** In an ordinary situation, the landowner firstly obtains the necessary plan approval from the Development Authority besides other permissions required to develop the land. Subsequent to the approvals he undertakes the activity of plot development, either himself or through a developer, which are as follows:

- levelling the land.
- construction of boundary wall.
- construction of roads.
- laying of underground cables and water pipelines.
- laying of underground sewerage lines with sewer treatments plant.
- water harvesting system.
- demarcation of individual plots.
- other infrastructure works.

If the landowner sells the land and charges separately development charges, then obviously GST is payable on development charges @ 18 per cent. However, if he includes the development cost in value of plots and sells individual plots by offering the entire value for the

stamp duty, then the said transaction should be considered as pure supply of land.

Schedule III to GST Laws sets out the activities or transactions which are treated as neither a supply of goods nor as supply of services. Therein para 5 covers sale of land, which is excluded from GST levy. The relevant provision is reproduced herein below:

*"5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."*

From the above definition, it is clear that the transaction shall be out of GST net only if the activity is exclusively dealt with transfer of title or transfer of ownership of land, which is immovable property or earth. The development activities which have been carried out by the landowner was necessary to make the sale of independent plot of land. Further, it is composite supply with principal supply being sale of land.

*Note:* The tax portion in cost incurred for development of land will not be eligible for ITC where the transaction is pure sale of land as the same would be a self-consumption.

**Q60. Homeopathy practitioners purchase medicines from agency and give to patients. Fees charged by them is inclusive of consulting fees and cost of medicine as only receipt for the amount is issued.**

**Will such fee charged by homeopathy practitioner be leviable under GST or exemption can be claimed being in-house medicine?**

**Ans.** According to entry no. 74 of *NN 12/2017-CTR-28.06.2017* (Heading 9993), services provided by way of health care services by a clinical establishment, an authorized medical practitioner or para medics is exempt.

Further the aforesaid notification defines '*Authorized Medical Practitioner*' as:

"2*(k) authorised medical practitioner means a medical practitioner registered with any of the councils of the recognised system of medicines established or recognised by law in India and includes a*

*medical professional having the requisite qualification to practice in any recognised system of medicines in India as per any law for the time being in force;"*

The National Commission for Homeopathy Act, 2020 recognises Homeopathy system of medicine in India and homeopathy practitioners shall be registered with the Central Council of Homeopathy. Such practitioners are covered in the above stated notification.

According to entry no. 63 of *NN 1/2017-CTR-28.06.2017* (Heading 3004) - "*Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale, including Ayurvedic, Unani, homoeopathic siddha or Bio-chemic systems medicaments, put up for retail sale*" is chargeable @ 6 per cent CGST.

As per '*Drugs and Cosmetics Rules'* for regulation of homoeopathic medicines – homoeopathic medicines can either be dispensed by licensed homoeopathic pharmacy shops, homoeopathic practitioner's clinic and even allopathic chemist shops. Practitioners who run the homoeopathic practitioner's clinic are not required to obtain any separate license to sell medicines. Pharmacy License is required only if such practitioner has a separate pharmacy catering to even those not consulting the Practitioner.

According to section 2(30) of the CGST Act, "Composite supply" means:

- Supply is 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.

According to 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.

In order to be a composite supply, the same must be naturally bundled as per the definition. The concept of natural bundling is described in CBIC Flyer [Refer the answer given above in Q No. 52].

In the case of patients undergoing homeopathy treatment, the medical practitioner provides bundled supplies viz., health care service in the form of treatment coupled with supply of medicines. Most of the practitioners in this field provide consultation and supply of medicines as a bundle. The practitioners do not sell them separately. Reading the definition of '*Composite supply*' the supply (in the instant case) qualifies to be a 'composite supply', where provision of health care service is the principal supply. Supply of medicine is ancillary to the principal supply being health care service.

According to section 8 the tax liability of a composite supply shall be the tax rate as applicable to the principal supply, which is health care service in this case.

Hence, whole of the supply is exempt and no GST is chargeable in this respect.

**Q61. A medical practitioner independently practices in a hospital and charges patients for both consultation and medicines dispensed. If total receipts are more than ₹ 40 lakhs inclusive of consultation and cost of medicines, whether his services are exempt being that of a medical practitioner?**

**Ans.** According to Schedule K of the Drugs and Cosmetics Act, '*dispensing medicines*' to one's patient by a doctor is allowed, but not selling medicines. Doctors should ensure that in case they are selling medicines, a license from the Drug Department for retail sale of medicines should be obtained. In such case, where doctors who run clinic also possess a license for sale of medicines, should raise separate invoices for consultation and sale of medicines.

If it is combined and offered for a single price, it amounts to mixed supply because, following elements of composite supply are absent in this case.

- Generally, doctors do not provide treatment as well as supply medicines as a package. Hence, it cannot be concluded that it is naturally bundled.
- No single price is charged for treatment as well as supply of medicines
- Health care service and medicines are available separately.

Further, section 2(74) defines mixed supply and the tax liability relating to mixed supply is covered in section 8. It states that - 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.

Therefore, if only one consolidated bill for consultation and sale of medicines is issued, then the combined supply will be treated as a supply pertaining to sale of medicines. The threshold limit and tax rate as applicable to the sale of medicines will be applicable to the combined supply.

**Q62. There is a hospital with pharmacy. Both belong to the same person (single ownership). Is it possible to have two GST registrations - one for exempt hospital income and another for taxable supply of goods in the pharmacy?**

**Ans.** With effect from 1.02.2019 *vide the Central Goods & Services Tax (Amendment) Act, 2018 read with Notification No. 02/2019 – CT., dated 29.01.2019*, pursuant to section 25(2), multiple registration in the same State has been allowed if the person has multiple places of business. Place of business is defined under section 2(85) to include:

(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;

From the above legal position, if the hospital and the pharmacy can be shown as separate places of business (by defining the area of pharmacy in the hospital), then a view can be taken that separate registration can be taken for pharmacy and hospital.

**Q63. Whether the services of collection of samples for diagnostic testing by a laboratory is exempt from GST? The collection centre does not have any laboratory. It collects the samples from the patients and delivers the same to the laboratory for testing. The collection centre collects the payment for the test from the patient and after retaining its services charges remits the balance amount to the laboratory.**

**Ans.** Services by way of healthcare are exempt under entry no. 74 of *NN 12/2017-CTR-28.06.2017.* Entry 74 reads as under:

"*Services by way of-*

*(a) health care services by a clinical establishment, an authorised medical practitioner or para-medics;*

*(b) services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above."*

Healthcare services is defined under paragraph 2(zg) of the Notification, as under:

*"(zg) "health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions or body affected due to congenital defects, developmental abnormalities, injury or trauma."*

Further, clinical establishment is defined in paragraph 2(s) of the Notification, as under:

*"(s) "clinical establishment" means a hospital, nursing home, clinic, sanatorium or any other institution by whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases."*

Health care services, as defined above, means diagnosis, treatment or care for illness, injury deformity, abnormality or pregnancy in any recognised system of medicines in India. To construe any service as healthcare service, nature of such activities should be of either 'diagnosis' or 'treatment' or 'care'. The definition does not clearly specify as to whether mere collection of human sample for diagnostic testing is health care service. Since the final test report is issued to the patient by the Laboratory, it is the laboratory which is providing the health care service (diagnostic testing in this case) to the patient and the collection agent is providing business support services to the laboratory in conducting the diagnostics tests.

The Constitution Bench (Bench of Five Judges) of the Hon'ble Supreme Court of India in one of the landmark case of *Commissioner of Customs (Import) Mumbai v. M/s Dilip Kumar and Company and Ors [2018-TIOL-302-SC-CUS-CB]* has held that exemption notification should be interpreted strictly. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

In view of the aforementioned judgment and the reasoning set out above, the activity of collection of samples by the collection agent for the laboratory so that the laboratory can conduct the diagnostic tests on the same cannot be construed as a health care service (diagnosis), but a business support service provided to the laboratory and thus, will be liable to GST. However, if the service contract is entered into between the patient and the collection centre and the test report is issued by the collection agent in its name, the service

provided by it would amount to health care service (diagnosis) and thus, will be exempt from GST.

It is interesting to note that in service tax regime, the High Court of Punjab and Haryana has held in the case *of M/s Lal Path Lab (P) Ltd, Collection Centre, Ludhiana, Punjab and Haryana High Court (2007-TIOL-533-HC-P&H-ST), that:*

*"Collection of blood samples on behalf of principal lab, not Business Auxiliary Service - it is technical testing and analysis and is excluded from Service Tax by definition which excludes testing or analysis in relation to human beings or animals - Section 65 (19) (ii) of the Finance Act.*

*The activity of the assessee -respondent is confined to a collection centre with facilities and trained employees for drawal of blood samples and to carry out essential processing (serum separation) of blood and forwarding the samples to the principal lab at Delhi through courier. The case of the assessee -respondent appears to be covered by the exception postulated by sub Section 106 of Section 65, as 'technical testing and analysis' and excluded from service tax as per the explanation given under the definition.*

*The services rendered by the appellants drawing, processing and forwarding of samples is integral to the testing of those samples. There could be no denying that in the absence of drawing of blood samples, there can be no testing. Further, even if the two services are seen as entirely separate and different services, drawing of sample and initial processing of the same are clearly connected or incidental or ancillary to testing and analysis.*"

Though the above decision was rendered under the service tax regime, the ratio of this decision can be extended to GST law as well and a view can be taken that collection of samples is incidental or ancillary to the activity of diagnosis and is therefore a healthcare service. The collection centre would fall within the definition of clinical establishment as it is an institution offering services (by collection of samples) or facilities requiring diagnosis. An individual sample collection agent, known as phlebotomist, can also be construed as authorised medical practitioner if it holds the licence/certificate issued by the Competent Authority. Therefore, the activity of sample

collection by a collection agent can be construed as a health care service provided by a clinical establishment or an authorised medical practitioner and can thus, be argued to be exempt from GST.

**Q64. Whether medical care services and cosmetic care services are exigible to GST?**

**Ans.** Healthcare services are exempt from GST when such services are provided by a clinical establishment. Clinical Establishment has been defined in explanation to *NN 12/2017-CTR-28.06.2017* to mean "*a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases*".

Further, Health care services is also defined in the aforesaid notification as : "*Health care services means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma;"*

Thus, medical care services and cosmetic care services are exigible to GST. Government grants exemption only if the medical care services and cosmetic care services are provided by clinical establishment. However, cosmetic care services are only exempted in cases where it is undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

**Q65. Discuss the GST treatment for a charitable and religious trust registered under section 12AA or 12AB of the Income Tax Act, 1961.**

**Ans.**

(a) As per *NN 12/2017-CTR-28.06.2017 "Services by an entity registered under section 12AA or 12AB of the Income Tax Act, 1961 by way of charitable activities" is exempt.*

The exemption is applicable only for an entity registered under section 12AA or 12AB of the Income Tax Act 1961. For unregistered entity, there is no such exemption.

Further such activities have to be charitable activities as defined in the aforesaid notification as:

*"Charitable activities means activities relating to –*

*(i) public health by way of –*

*(A) care or counseling of*

*(I) terminally ill persons or person with severe physical or mental disability;*

*(II) persons afflicted with HIV or AIDS;*

*(III) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or*

*(B) public awareness of preventive health, family planning or prevention of HIV infection;*

*(ii) advancement of religion, spirituality or yoga;*

*(iii) advancement of educational programmes or skill development relating to: -*

*(A) abandoned, orphaned or homeless children;*

*(B) physically or mentally abused and traumatized persons;*

*(C) prisoners; or*

*(D) persons over the age of 65 years residing in a rural area;*

*(iv) preservation of environment including watershed, forests and wildlife;"*

(b) Also, exemption has been provided in respect of the following in the said notification:

*"Services by a person by way of-*

*(a) conduct of any religious ceremony;*

*(b) renting of precincts of a religious place meant for general public, owned or managed by an entity registered as a charitable or religious trust under section 12AA or 12AB of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act) or a trust or an institution registered under sub clause (v) of clause (23C) of section 10 of the Income-tax Act or a body or an authority covered under clause (23BBA) of section 10 of the said Income-tax Act:*

*…."*

Any supply provided by a charitable or religious trust which falls within the above ambit would be considered as exempt. All other supplies would be considered as taxable.

**Q66. Whether residential care service for the elderly and persons with disabilities is liable to GST?**

**Ans.** Residential care is a term used to *describe the general care and support provided in a standard elderly care home.* It can often be referred to as "*personal care*" or even "*assisted living*" and usually involves help with basic needs such as washing, dressing, mobility assistance and so on. However, it is seen that the statue does not provide any definition for the same. Hence, one may have to refer to the classification list of services as provided by CBIC to examine the nature of such services.

Residential care services for elderly and persons with disabilities falls under SAC code 999322 under the classification list of services.

*This service code includes:*

*1. round-the-clock care services by residential institutions for elderly persons*

2. *round-the-clock care services by residential institutions for young persons and adults with physical or intellectual disabilities, including those having disabilities in seeing, hearing or speaking.*

Where healthcare is the principal service and accommodation is incidental, then residential care services provided to elderly and persons with disabilities, would be exempt under entry no. 74 of *NN 12/2017-CTR-28.06.2017* where such services are provided by clinical establishments.

| ***Sl. No.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent.)*** | ***Condition*** |
|---|---|---|---|---|
| ***(1)*** | ***(2)*** | ***(3)*** | ***(4)*** | ***(5)*** |
| *74* | *Heading 9993* | *Services by way of-*<br>*(a) health care services by a clinical establishment, an authorised medical practitioner or para-medics;*<br>*(b) services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above.* | *Nil* | *Nil* |

[For definitions of '*healthcare services*' and '*clinical establishment*' - Refer the answer given above in Q No.63]

Where accommodation of elderly and persons with disabilities involves customization of beds, bathroom and corridors, and incidentally assistance is provided by caretakers with limited

expertise in offering healthcare support and NOT being a clinical establishment, the same will be exempt under entry no. 9D of *NN 12/2017-CTR-28.06.2017* subject to certain additional conditions stated therein.

| ***Sl. No.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent.)*** | ***Condition*** |
|---|---|---|---|---|
| ***(1)*** | ***(2)*** | ***(3)*** | ***(4)*** | ***(5)*** |
| *[9D* | *Chapter 99* | *Services by an old age home run by Central Government, State Government or by an entity registered under section 12AA or 12AB of the Income-tax Act, 1961 (43 of 1961) to its residents (aged 60 years or more) against consideration upto twenty-five thousand rupees per month per member, provided that the consideration charged is inclusive of charges for boarding, lodging and maintenance.* | *Nil* | *Nil]* |

Where the residential care services being provided by the entity are such which fall under the definition of charitable activity under clause (r) of para 2 of *NN 12/2017-CTR-28.06.2017*, the same would be exempt under entry no. 1 of *NN 12/2017-CTR-28.06.2017* subject to the condition that the entity is registered under section 12AA/ 12AB of the Income-tax Act 1961.

| *Sl. No.* | *Chapter, Section, Heading, Group or Service Code (Tariff)* | *Description of Services* | *Rate (per cent.)* | *Condition* |
|---|---|---|---|---|
| *(1)* | *(2)* | *(3)* | *(4)* | *(5)* |
| *1* | *Chapter 99* | *Services by an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) by way of charitable activities.* | *Nil* | *Nil* |

[For definition of charitable activities - Refer the answer given above in Q No.65]

Thus, in the given case if the commercial activity involves provision of:

a) residential care services by an entity which qualifies to be a clinical establishment and the services comply with health care services as defined *supra*, then the services of residential care shall be exempt under entry no. 74.

b) residential care services by an entity offering services of an old age home and not conforming to healthcare services, would be exempt under entry no. 9D (subject to conditions).

c) residential care services by an entity registered under section 12AA/12AB of the Income-tax Act, 1961 and residential care services which are charitable activities in terms of *NN 12/2017-CTR-28.06.2017*, would be exempt under entry no.1.

d) residential care services not covered under (i) clinical establishment providing healthcare services or (ii) residential accommodation in old age home or (iii) charitable services provided by an entity registered under section 12AA/12AB of the Income-tax Act, 1961 would be liable to tax.

**Q67. A hospital admits patients under Health Insurance Scheme. After the treatment, the insurance company makes payment on behalf of the patients. Whether GST is leviable on such amount received by hospital from the insurance company?**

**OR**

**Can the payment received by doctors or hospitals under third-party administrator (TPA) services be said to be against supply of services?**

**Ans.** Healthcare services are exempt from GST when such services are provided by a clinical establishment. Clinical Establishment has been defined in explanation to *NN 12/2017-CTR-28.06.2017* to mean "*a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases.*"

In the given case since the person supplying the service is hospital, the services are exempt irrespective of who pays the consideration to the hospital as the exemption is given to the service provider and not the service recipient.

**Q68. What shall be the GST implications for a landowner in case of revenue sharing Joint development Agreement('JDA')-**

**(a) at the time of transfer of development right.**

**(b) at the time of receipt of revenue share from land developer.**

**Ans.** Generally, the developer (who is also called as "promoter") does not purchase land for a real estate project. A landowner enjoys various rights with respect to the land, such as cultivation rights, easement rights etc. One of such rights is the right to develop the land into an agricultural, industrial, commercial, residential or for any other purpose. Hence, the promoter enters into an arrangement with the landowners, who transfers development right or permits activities on his land for a consideration. The consideration can be in the form of constructed units on completion of the project or in monetary terms.

When the landowner is given constructed units against the above referred right such agreement is popularly known as "*area sharing agreement*". On the other hand, when the land owner and the promoter agree to share the revenue earned from the sale of the constructed units, the same is called as "*a revenue sharing agreement*". We can observe that in both the methods, discussed above, the landowner transfers a right in favour of the promoter to secure all approvals for development and build an apartment on the landowner's property for sale.

As per the *Notification No. 06/2019 – CTR dated 29.03.2019* the liability to pay the tax, on transfer of development right (**w.e.f. 01.04.2019**), is on the promoter who is in receipt of such right under RCM. Therefore, one can conclude that there is no GST implication for a landowner against the transfer of development right made by him in favour of the promoter. Besides the above, the landowner need not pay GST on receipt of share of revenue from the venture, since such receipt is a consideration for the transfer of development right and the tax liability is on the promoter as discussed above.

**Q69. Whether supply of land development right by landowner to promoter is liable to GST? If yes, whether under reverse charge or forward charge?**

**Ans.** Yes, the transfer of land development right by landowner to the promoter will get classified as "*supply of services*" and will be liable to GST. The taxability of the said activity is explained below:

| Period of Supply | Notification | Who is liable? | Point of Supply |
|---|---|---|---|
| 01.07.2017 to 24.01.2018 | No Notification | Land Owner - FCM | As per section 13 i.e., the date of transfer of development right. |
| 25.01.2018 to 31.03.2019 | *04/2018 CTR, dated 25.01.2018* | Land Owner - FCM | At the time of receipt of possession or the right in the constructed complex, building or civil structure, by way of a conveyance deed or similar instrument (for example allotment letter). |

| | | | |
|---|---|---|---|
| 01.04.2019 onwards | *06/2019 CTR, dated 29.03.2019* as amended | Promoter - RCM | Any tax period not later than the below mentioned events:<br>— date of issuance of the completion certificate for the project, where required, by the competent authority.<br>— date of its first occupation. |

**Q70. A landowner entered into area sharing JDA with promoter X after 01.04.2019 for construction of residential complex. Against the transfer of development right the promoter will be liable to pay taxes under RCM as per Notification No. 13/2017-Central Tax (Rate), dated 28.06.2017 (*"NN 13/2017-CTR-28.06.2017")* (as amended) on the value which is attributable to the residential apartments that remain un-booked on the date of issuance of completion certificate, or first occupation of the project.**

**Whether the apartment handed over by the promoter is for a non-monetary consideration or is it a construction service provided by the promoter to the landowner which attracts GST?**

**Ans.** It is relevant to discuss the *modus-operandi* generally followed with respect to the transfer of development rights by landowners to developers, which is as follows:

— Developer enters into an agreement with a landowner, wherein the right to develop the land is permanently and irrevocably transferred by the landowner to the developer.

— Developer is given permission to enter the land for the purpose of carrying out the development activity. However, ownership in land continues with the landowner.

— As a consideration for sale of development right, a fixed consideration or a share in sales proceeds or ownership of certain developed area is given by the developer to the landowner. In the present case, the landowner is given an ownership of the built-up area.

- Accordingly, the developer acquires exclusive, permanent and irrevocable rights for development and subsequently transfer (by way of sale, lease, license, etc.) to the end customer.
- The developer is allowed to further assign the development rights to any other person, but the landowner is precluded from doing so.

Under the GST, the term 'supply' is defined under section 7 in a very exhaustive manner which also includes barter/ exchange of goods and/or services whereas the term '*services*' is defined to be anything other than goods. Therefore, from the above *modus-operandi*, we can infer that the transfer of development rights will tantamount to supply of services.

Besides the above transaction, the promotor also provides construction service to the land owner, as has been clarified in *Circular No. 151 /2 /2012 – ST dated 10.02.2012* of service tax regime which is as follows:

*"The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers:*

- *from landowner: in the form of land/development rights*
- *from other buyers: normally in cash.*

*The value of development rights in the land may not be ascertainable ordinarily and therefore, value, in the case of flats given to first category of service receiver, that is, the land owner, is determinable in terms of section valuation rules. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax.*"

GST is to be paid by the builder/developer on the '*construction service*' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or

similar instrument (e.g., allotment letter). Hence, to maintain parity in the valuation of service against the value of the TDR, the value of supply shall be taken as the value of the property and the transactions will qualify as supply with consideration.

**Q71. Mr. A, a landowner owns portion of land since 1980. The original purchase cost of the land was ₹ 1 Crore and the present market value is ₹ 100 crores. He intends to develop the residential cum commercial complex in collaboration with a renowned developer. LLP was formed on 15th December 2020 having Mr. A and developer Mr. B as partners with 70:30 profit sharing percentage.**

**Mr. A has transferred development rights at market value to an LLP as his capital contribution and the developer is expected to bring capital to fund the development and construction cost. The approvals for construction of the project are received on 11th May 2021. The project is expected to be completed in April 2023.**

**Whether contribution by way of development rights and capital constitutes supply and is leviable to GST?**

**Ans.** It can be inferred from the question that the landowner had contributed his development right over the land as his capital and the query is relating to such contribution.

- CBIC *vide Circular No. 151/2/2012 - ST dated 10.02.2012* had clarified the *modus operandi* of revenue sharing arrangements undertaken in the construction industry as well as the tax treatment. One of such arrangement is by creating a new entity (in the given case LLP). The Board had clarified that the tax liability for the service of works contract/ construction contract will be on such firm or company.
- *Circular No. 148/17/2011-ST dated 13.12.2011* had clarified that the new entity acquires the character of a "*person*". Therefore, the transactions between it and the other independent entities namely the distributor/sub-distributor/ area distributor and the exhibitor etc. will be a taxable service.
- In term of *Notification No. 06/2019 CTR dated 29.03.2019* a promoter who receives development rights on or after 1st April, 2019 for construction of a project *against*

*consideration payable or paid by him*, wholly or partly, in the form of construction service of commercial or residential apartments in the project or *in any other form* including in cash.

In the given case, the LLP is the promoter and is in receipt of the development right against the consideration in the form of share allocation to the tune of market value of such right. Hence, it will constitute supply and GST will be payable under RCM by the promoter.

**Q72. A residential real estate project undertaken under JDA is stalled with construction being partly completed and is taken over by another promoter for completion.**

**(a) What would be the nature of transaction of transfer of the partly constructed building from existing promoter to new promoter?**

**(b) Can it be treated as a sale of building (though MOA executed might not be registered) not falling within the ambit of GST or is it to be treated as a supply with GST implications?**

**Ans.**

(a) In the instant case, the activity agreed to be provided by the existing promoter, i.e., transfer of the partly constructed building is as a supply of service. The following points are being considered for the purpose of classification:

I. The definition of '*service*' is very wide as it covers anything other than 'goods'. Thus, technically, any transaction in real estate can be subject to GST. However, sale of land and sale of apartments or buildings or civil structure after completion is neither supply of goods nor supply of services.

II. Para 5(b) of Schedule II covers sale 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.

III. In the construction of a complex, the promoter normally does not enter into an agreement for sale before the commencement of the project. However, the sale is during the course of his construction activity.

IV. The partly completed complex can also be supplied as per para 5 (b) of Schedule II and the instant case will be one of "*supply of services*".

V. However, if the entire project is sold/transferred, the same may enjoy the benefit of exemption vide entry no. 2 of *NN 12/2017-CTR-28.06.2017* which reads as under –

| Sl. No. | Chapter, Section, Heading, Group or Service Code (Tariff) | Description of Services | Rate (per cent) | Condition |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| 2 | Chapter 99 | Services by way of transfer of a going concern, as a whole or an independent part thereof. | Nil | Nil |

Thus, whether supply of partly constructed building could enjoy the exemption shall depend upon specific facts of each case.

(b) It cannot be treated as building as it is not complete. It is an incomplete structure.

**Q73. Whether re-imbursement of expenses incurred by the supplier as a pure agent of the recipient falls under the ambit of supply?**

**Whether re-imbursement of expenses to head office by branch(es) or *vice versa* is liable to GST?**

**OR**

**Whether distribution of costs incurred by the head office to branch(es) or *vice versa* or recovery of costs by the head office from branch(es) or *vice versa,* falls under the ambit of supply?**

**Ans.** At the outset, supplier is a registered person making taxable outward supplies. Now, certain costs are incurred by the supplier as a *'pure agent*' of the recipient in terms of rule 33. Such costs incurred, will always make up 'additional component' of some or the other taxable outward supplies being made by this supplier. Rule 33 allows 'exclusion' of such costs in arriving at the taxable value of such outward supplies.

When these costs are distributed to /recovered from other taxable persons without any (express or implied) agreement, they make up an outward supply to such taxable person. Often distribution of costs is not considered to be outward supplies because:

a) there is no margin involved; or

b) costs are retained in balance sheet and set-off with recoveries.

All transactions, in GST, are inward or outward supplies. A transaction would be considered as 'no supply' only when - (i) they are listed in Schedule III or (ii) transactions in money or securities and (iii) pure agency as defined in rule 33.

Just because there is no margin it does not make it non-taxable supply. Supply need not necessarily appear only in an income account. It can be in a recoverable asset or expense account where receipts and payments are netted-off.

Distribution of costs is an accounting expression. Distribution of operating costs incurred which is charged to P&L or distribution of non-operational costs which are in the balance sheet in a recoverable current asset account and amounts recovered are credited to expenditure or current asset account, will still be treated as outward supply for GST purposes.

Now, when costs incurred are distributed, even partly, it is an outward supply and if not exempt, it will be taxable outward supply. Distribution of costs (whole or part) will not be *'no supply'* and tax must be paid at a rate of tax appropriate to the HSN.

Care must be taken not to interchange reimbursement of expenses with allocation of expenses by head office while preparing cost statements or profitability reports of different segments whether

geographical segments or product segments or market segments. Except such allocation where there is a supply by head office and its utilization by the branch in its own operations, mere reflection in accounting or MIS reports will not attract incidence of tax.

**Q74. Whether GST is payable under reverse charge on transportation of alcohol for human consumption (non-GST goods) by road by a GTA?**

**OR**

**A bonded warehouse dealing in Indian made foreign liquor (IMFL) is paying freight for non- GST supply. Whether freight will also be treated as non-GST supply for the purpose of section 9(3)?**

**Ans.** Entry no. 1 of *NN 13/2017-CTR-28.06.2017* states that:

| ***Sl. No.*** | ***Category of Supply of Services*** | ***Supplier of Service*** | ***Recipient of Service*** |
|---|---|---|---|
| ***(1)*** | ***(2)*** | ***(3)*** | ***(4)*** |
| *1* | ***Supply of services*** *by a goods transport agency (GTA) who has not paid central tax @ 6% in respect of transportation of goods by road to-*<br>*(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948); or*<br>*(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or*<br>*(c) any co-operative society established by or under any law; or* | *Goods Transport Agency (GTA)* | *(a) Any factory registered under or governed by the Factories Act, 1948(63 of 1948); or*<br>*(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or*<br>*(c) any co-operative society established by or under any law; or*<br>*(d) any person registered under the Central Goods and Services Tax Act or the* |

| | | | |
|---|---|---|---|
| | *(d) any person registered under the Central Goods and Services Tax Act or the Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act; or*<br>*(e) any body corporate established, by or under any law; or*<br>*(f) any partnership firm whether registered or not under any law including association of persons; or*<br>*(g) any casual taxable person.* | | *Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act; or*<br>*(e) anybody corporate established, by or under any law; or*<br>*(f) any partnership firm whether registered or not under any law including association of persons; or*<br>*(g) any casual taxable person; located in the taxable territory.* |

From the above, it is clear that the RCM provisions are applicable to GTA on supply of services irrespective of the nature of supply and therefore, even while transporting alcohol for human consumption, RCM provisions would be applicable.

Likewise, freight paid for IMFL, a non-GST supply will also not be treated as non-GST supply for the purpose of section 9(3).

**Q75. Whether the service rendered by senior advocate to advocate or firm of advocate is taxable under GST?**

**Ans.**

(i) As per the definitions given under *NN 12/2017-CTR-28.06.2017* –

*"(b) **"advocate"** has the same meaning as assigned to it in clause (a) of sub-section (1) of section 2 of the Advocates Act, 1961 (25 of 1961)"*

*"(zm) **legal service** means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority;"*

*"(zzd) **"senior advocate"** has the same meaning as assigned to it in section 16 of the Advocates Act, 1961 (25 of 1961)"*

(ii) Advocate services are in the ambit of RCM *vide NN 13/2017-CTR-28.06.2017* –

| ***Sl.No.*** | ***Category of Supply of Services*** | ***Supplier of Service*** | ***Recipient of Service*** |
|---|---|---|---|
| ***(1)*** | ***(2)*** | ***(3)*** | ***(4)*** |
| *2* | *Services provided by an individual advocate including a senior advocate or firm of advocates by way of legal services, directly or indirectly.*<br>*Explanation.- "legal service" means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.* | *An individual Advocate including a Senior advocate or Firm of advocates.* | *Any business entity located in the taxable territory.* |

(iii) However, certain exemptions have been made available in legal services *vide* entry no. 45 of *NN 12/2017-CTR-28.06.2017* which are mentioned as follows:

| ***Sl. no.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent.)*** | ***Condition*** |
|---|---|---|---|---|
| *45* | *Heading 9982 or Heading 9991* | *Services provided by-*<br>*(a) an arbitral tribunal to –*<br>*(i) any person other than a business entity; or*<br>*(ii) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from* | *Nil* | *Nil* |

| | | | | |
|---|---|---|---|---|
| | | *registration under the Central Goods and Services Tax Act, 2017 (12 of 2017);*<br>*(iii) the Central Government, State Government, Union territory, local authority, Governmental Authority or Government Entity;*<br>*(b) a partnership firm of advocates or an individual as an advocate other than a senior advocate, by way of legal services to-*<br>*(i) an advocate or partnership firm of advocates providing legal services;*<br>*(ii) any person other than a business entity; or*<br>*(iii) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017);*<br>*(c) a senior advocate by way of legal services to-*<br>*(i) any person other than a business entity; or*<br>*(ii) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017).* | | |

(iv) From above we can infer that:

(a) When a senior advocate is providing his legal services, directly or indirectly, including where contract for provision of such service has been entered through another advocate or a firm of advocates, or by a firm of advocates, to a business entity, such services will be subject to RCM provisions.

(b) When a senior advocate is providing his legal services, to any person other than a business entity, or a business entity having aggregate turnover up to ₹ 20 Lakhs, then such services would be exempt from tax.

(c) When a senior advocate is providing his legal services to an advocate or a firm of advocates, other than the situations at (a) or (b) above, then the recipient would be a business entity; hence such supply of services would again be subject to RCM.

**Q76. Whether renting of tractor by a registered individual to a registered partnership firm or a registered company falls under RCM**?

**Ans.** First we have to check whether the tractor is covered under the definition of motor vehicle. The word 'motor vehicle' or 'renting of a motor vehicle' is not defined under GST law. But as per Motor Vehicles Act, 1988, a motor vehicle means *"any mechanically propelled vehicle used on roads but does not include a vehicle running on fixed rails or a special vehicle used in a factory or an enclosed premises having less than four wheels with engine capacity not exceeding 25 cubic centimetres."*

The Government issued *Notification No. 22/2019-CTR, dated 30.09.2019*, amending *NN 13/2017-CTR-28.06.2017* (Parent notification of reverse charge) and entry no. 15 has been inserted by the said notification w.e.f. 1.10.2019. This Entry was further amended *vide Notification No. 29/2019-CTR, dated 31.12.2019* bringing in the following modification-

| *Serial no.* | *Category of Supply of Services* | *Supplier of service* | *Recipient of Service* |
|---|---|---|---|
| *15* | *Services provided by way of renting of a **motor vehicle designed to carry passengers** where the cost of fuel is included in the consideration charged from the service recipient provided to a body corporate* | *Any person, other than a body corporate who supplies the service to a body corporate and does not issue an invoice charging central tax at the rate of 6 per cent to the service recipient* | *Anybody corporate located in the taxable territory* |

Therefore, on a close perusal of the above entry, it is evident that the provisions of RCM are not applicable in the case of tractor since the same is not designated to carry passengers.

If the renting of tractor is regarding transport of goods, GTA provision may apply.

**Q77. Whether sponsorship received from a proprietorship firm is chargeable to GST under reverse charge?**

**Ans.** The expression "*sponsorship*" has not been defined under GST law. Thus, we may seek guidance from the erstwhile service tax law, wherein the said term was defined under section 65(99a) of the Finance Act, 1994 as under-

***"***sponsorship*" includes naming an event after the sponsor, displaying the sponsor's company logo or trading name, giving the sponsor exclusive or priority booking rights, sponsoring prizes or trophies for competition; but does not include any financial or other support in the form of donations or gifts, given by the donors subject to the condition that the service provider is under no obligation to provide anything in return to such donors.*

The Central Government has issued *NN 13/2017-CTR-28.06.2017* and *Notification No. 10/2017-Integrated Tax (Rate), dated 28.06.2017 ("NN 10/2017-ITR-28.06.2017")* notifying the situations wherein certain supply of services would be covered under ambit of RCM.

Sponsorship services form a part of the said notification in the following manner:

| *Serial no.* | *Category of Supply of Services* | *Supplier of service* | *Recipient of Service* |
|---|---|---|---|
| *5* | *Services provided by way of sponsorship to anybody corporate or partnership firm.* | *Any person* | *Anybody corporate or partnership firm located in the taxable territory.* |

It may be noted that entry no. 53 of the *NN 12/2017-CTR-28.06.2017* lists the sponsorship services that are exempt from GST.

Sponsorship services have been under ambit of RCM since the time of service tax regime. From entry no. 5 of *NN 13/2017-CTR-28.06.2017* and entry no. 6 of *NN 10/2017-ITR-28.06.2017*, it is clear that RCM will be applicable on sponsorship service, only if they are received by a body corporate and partnership firm.

Further while discharging RCM obligations, it should be ensured that in case such sponsorship services are exempt under *NN 12/2017-CTR-28.06.2017*, then the liability to pay tax under RCM will not arise.

*Conclusion:* Sponsorship services received from a proprietorship firm by a body corporate or partnership firm will be liable to RCM.

**Q78. Mr. A, located in India, has developed mobile app for learning music and makes the same available on an online platform (say, Toogle) located outside India for monthly or quarterly subscription. Toogle's terms and conditions applicable to each country where the users are located, state that Toogle is - (i) merchant-on-record or (ii) agent of app-developer ('concessionaire').**

**Is Mr. A an OIDAR service provider? Discuss the GST implications in the above scenario.**

**Ans.** GST treatment for app-developer varies based on the country where users are located. Generally, app-developer will NOT be an OIDAR because Toogle is the one which is providing 'online access' to information or data base to users and NOT the app-developer.

If Toogle is merchant-on-record for user in India, then app-developer is supplying the app to Toogle and Toogle is supplying the app as OIDAR service provider to such user. In case Toogle is agent (or concessionaire) of app-developer, then app-developer will issue B2C invoice to the user with applicable GST and commission will be either paid to (or deducted by) Toogle from the payment made to app-developer. This commission will be the consideration for the services provided by Toogle to app-developer as an intermediary. Since the place of supply of intermediary services is the location of the service provider, the same would be outside India. Thus, RCM would NOT be applicable to the app-developer in India.

**Q79. Hotels are getting bookings through online platforms like Booking.com. These platforms have no place of business in India. Hotels pay commission to these platforms for such bookings. It may be noted that (a) Service receiver is registered under GST in India (b) Service provider has no place of business in India and is providing service from outside India.**

**Whether hotels availing these services are liable to pay GST under RCM on the commissions paid to such booking portals.**

**Ans.** As regards commission paid to intermediaries, the place of supply is dictated by section 13(8)(b) of the IGST Act and when place of supply is outside India, GST on reverse charge basis is not applicable on the hotel in India.

Online portals operate on different business models and not always on commission basis. Online portal collects the entire amount from the customer and pay the hotel tariff after deducting their charges or fee. When commission is paid by hotel to online portal, total cost of accommodation must be known to the customer. When total cost of accommodation is not known to the customer, online portal cannot claim to be a commission agent. RCM will not apply only when the online portal acts as a commission agent (intermediary) and the hotel in India records gross tariff as income and books commission paid as expense.

When the hotel receives 'net tariff', online portal will not be an intermediary. It will provide services of booking accommodation to

customers in India and hotel will provide accommodation services to online portal. Place of supply of services provided by online portal to customers will be in India resulting in importation of services by the customers thereby triggering reverse charge liability in case of customers using the said service in the course or furtherance of business. Place of supply of services provided by hotel will also be in India and the hotel will be liable to pay tax thereon under forward charge.

**Q80. A Government company is availing services from a consulting firm. The said service is exempt from GST under entry no 3 (pure services) of *NN 12/2017-CTR-28.06.2017*. The consulting firm ABC & Co., in order to provide services to the Government company, has formed a consortium of consultants, one of whom is a foreign service provider PQR, and paid GST under reverse charge on services availed from such foreign service provider. Can the consulting firm claim refund of GST paid under reverse charge for services provided under aforesaid notification to Government company?**

**Ans.** In the instant case, PQR the supplier of service is located outside India and the recipient of service i.e., ABC & Co. is located in India. The place of supply as per section 13(2) of the IGST Act is location of the supplier of services i.e., India. Thus, the activity of engaging consultant located in non-taxable territory amounts to "*import of service*" in terms of section 2 (11) of the IGST Act.

According to the provisions of section 5 (3) of the said Act read with the entry no. 1 of the *NN 10/2017-ITR-28.06.2017,* the consulting firm will be liable to pay the tax under reverse charge on the fees charged by the consultant located in non-taxable territory. The extract of the aforesaid entry no.1 is as under:

| *Sl. No.* | *Category of Supply of Services* | *Supplier of service* | *Recipient of Service* |
|---|---|---|---|
| *(1)* | *(2)* | *(3)* | *(4)* |
| *1* | *Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient.* | *Any person Located in a non-taxable territory* | *Any person located in the taxable territory other than non-taxable online recipient.* |

In the present case, the above said inward supply is attributed toward the exempted supply as it is consumed to provide service to Government which is exempted. and hence availing ITC on such input tax will be challenged in line with section 17(2) read with rule 42.

Further, section 54(8) has not specifically provided for refund of taxes paid under reverse charge attributed for providing the exempted activity. Hence, a refund claim cannot be filed.

**Q81. Whether the management fee of € 50,000 charged by a Foreign Company PQR Inc from its subsidiary company in India PQR India Pvt. Ltd. is a taxable supply?**

**Ans.** Yes. Management fee charged by foreign company POR Inc. to its Indian subsidiary PQR India Pvt. Ltd. is a taxable supply as explained below and the Indian subsidiary company PQR India Pvt. Ltd. would be liable to pay IGST on reverse charge basis as per section 5(3) of the IGST Act read with *NN 10/2017-ITR-28.06.2017*.

Considering the wide scope of the term "*Service*" as defined under section 2(102) to mean anything other than goods, money and securities, the transaction in question is that of supply of service by foreign company PQR Inc. to its Indian subsidiary PQR India Pvt. Ltd.

Since the location of the supplier of service is outside India and the location of the recipient is in India, provisions of section 13 of the IGST Act will apply to determine the place of supply. As per section 13(2) of the IGST Act, the place of supply of the service shall be the location of the recipient of service - PQR India Pvt. Ltd. - i.e., in India as the nature of activity / service is not any of the services

specified under sub-sections (3) to (12) of section 13 of IGST Act for which specific provisions shall apply to determine the place of supply.

Since, the supplier of service is located outside India; the recipient of service is located in India and the place of supply for this particular service is in India [as per section 13(2) of IGST Act], in terms of section 2(11) of the IGST Act, supply of service in the instant case would be treated as import of services. As per section 7(1)(b) of the CGST Act, supply includes import of services for consideration, whether or not in the course or furtherance of business. Further as per section 7(4) of the IGST Act supply of services imported into territory of India shall be treated as supply of services in the course of inter-State trade or commerce. Therefore, import of service shall be liable to levy of IGST, as per section 5 of the IGST Act. The fact of holding subsidiary relationship will not make any difference as far as taxability of this transaction is concerned.

Further, in *NN 10/2017-ITR-28.06.2017*, issued in exercise of powers conferred by section 5(3) of the IGST Act, it is specifically mentioned at Sr. No. 1 that in respect of any service supplied by any person who is located in non-taxable territory to any person (other than non - taxable online recipient) located in taxable territory, the whole of integrated tax leviable under section 5 of the IGST Act shall be paid by the recipient located in taxable territory on reverse charge basis. Accordingly, PQR India Pvt. Ltd. would be liable to pay IGST on reverse charge basis.

**Q82. A Pvt. Ltd. is exporting goods which are purchased from out of India and sent to a country in West Africa. Fee for Electronic Cargo Tracking Note (ECTN) Certificate required under such export is paid by A Pvt. Ltd.**

**Whether GST is payable on such fee on reverse charge basis?**

**Ans.** Cargo Tracking Note (CTN) is a loading certificate which is mandatory for many West African Countries. It is a supply in terms of the provisions of section 2(11) of the IGST Act *[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 (as per section 13(2) location of the recipient of service);]* read with section 7(1)(b) of the

CGST Act *[(b) import of services for a consideration whether or not in the course or furtherance of business;]* and, therefore, liable to IGST on RCM basis by virtue of section 5(3) of the IGST Act read with entry no.1 of *NN 10/2017-ITR-28.06.2017*.

In the instant case, it is only the supply of the goods to West African Countries which is neither a supply of goods nor supply of services in terms of para 7 of Schedule-III *[7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.]*, but all other inward supplies of goods and services would be liable to tax, unless specifically exempted, even if made for the purposes of making such supplies of goods.

**Q83. LMN Ltd. has obtained term loan from State Government and has not repaid the principal and interest for years together. Some of the loans were given adhoc and some of them were given by the Government directly to the supplier of capital equipment. LMN Ltd. recognises entire outflow of Government as loan. As per the Government Order (GO) issued at the time of sanctioning the loan, penal interest /charges will be imposed @ 2.5 per cent for every default in repayment of the principal and interest. The company has made suitable provision in the books for principal and penal interest.**

**Whether GST is leviable on the penal interest under reverse charge for *adhoc* loan and specific loan?**

**Ans.** Clarification regarding applicability of GST on additional/ penal interest has been provided by CBIC *vide Circular No. 102/ 21/ 2019-GST, dated 28.06.2019* read with *C.B.I. & C. Corrigendum F. No. CBEC/20/16/4/2018-GST, dated 15-7-2019*. Relevant extracts read as under-

*'4. As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the CGST Act, the value of supply shall include "interest or late fee or penalty for delayed payment of any consideration for any supply". Further in terms of Sl. No. 27 of notification No. 12/2017-Central Tax (Rate) dated the 28.06.2017 "services by way of (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest*

*involved in credit card services)"is exempted. Further, as per clause 2 (zk) of the notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017, "'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;*

*……..*

*6. It is further clarified that the transaction of levy of additional / penal interest does not fall within the ambit of entry 5(e) of Schedule II of the CGST Act i.e. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", as this levy of additional / penal interest satisfies the definition of "interest" as contained in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. It is further clarified that any service fee/charge or any other charges that are levied by M/s ABC Ltd. in respect of the transaction related to extending deposits, loans or advances does not qualify to be interest as defined in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017, and accordingly will not be exempt.'*

*Conclusion:* After going through the Circular, it would be apparent that penal interest would not be subject to GST as such interest is exempt *vide NN 12/2017-CTR-28.06.2017*, and hence RCM provisions would not be applicable.

**Q84. Whether GST is leviable on reimbursement of travelling expenses and lodging charges paid by bank auditor (reimbursement received from client)?**

**Ans.** GST is a contract-based law. In other words, levy of GST is based on the scope of agreement/contract between supplier and the recipient of supply. In a case where the agreement between the auditor and the client provides that the auditor has to incur travelling and lodging charges, which would be payable by the client on actuals, such charges would form part of the value of supply.

Section 15 provides that the value of supply shall include incidental expenses, charged by the supplier to the recipient of supply and any

amount charged for anything done by the supplier in respect of the supply.

Section 15 further fortifies the above position by providing that value of supply shall even include any amount that the supplier was liable to pay in relation to a supply, but which has been incurred by the recipient of supply. This is on the same principle that as per the agreement between the supplier and recipient, such amount was payable by the supplier and hence is includible, irrespective of who has actually made payment such charges.

Such charges would not form part of value of supply only in a case where such charges are incurred by the supplier on behalf of the recipient as a pure agent in terms of rule 33.

**Q85. Whether commitment fees paid to the bank for blocking the funds for a Long-Term Loan facility attracts GST? Whether such commitment fee is in the nature of interest cost being recovered by the bank?**

**Ans.** A commitment fee in banking sector refers to a fee charged by the lender (banker/NBFC) from a borrower in order to compensate the lender for its commitment to lend. Commitment fees is associated with unused credit or undisbursed loans, wherein the fund is blocked by the borrower for usage as necessitated.

Further, entry no. 27 of *NN 12/2017-CTR-28.06.2017* (as amended), exempt the below mentioned services from GST under the SAC Heading 9971:

*Services by way of - (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services); (b) inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers.*

And, as per clause 2(zk) of the said notification, *'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;*

From the above, it can be inferred that service with consideration in the form of interest or discount is only exempted and not otherwise.

Moreover, the CBIC *vide* FAQ on Banking, Insurance and Stock Brokers Sector (Updated as on 27.12.2018) provides as under:

| | | |
|---|---|---|
| *42.* | *If any service charges or administrative charges or entry charges are recovered in addition to interest on a loan, advance or a deposit, would such charges be also a part of the exemption?* | *No. The services of loans, advances or deposits are exempt in so far as the consideration is represented by way of interest or discount.* ***Any charges or amounts collected over and above the interest or discount would represent taxable consideration and hence liable to GST****.* |

To conclude commitment fee is charged on the undistributed or future loan, while interest is calculated on the amount that has already been distributed. Thus, commitment fee is not in the nature of interest, though there is similarity between the two.

Exemption under entry no. 27 is restricted only to those cases where consideration is in the form of interest or discount and not in any other scenario. Also, clause 2(zk) stated above specifically excludes any service fee or other charge in respect of any *credit facility which has not been utilized***.** This has also been clarified in the FAQ above. Accordingly, commitment fees charged by the Bank / NBFC for blocking the funds for a loan facility is taxable under GST.

**Q86. Whether banks are liable to pay GST on legal charges, title search report charges etc. paid to the advocates which are in turn recovered from customers by directly debiting the customers saving/current account?**

**Ans.** *Nature of transaction and query:* All banks have advocates appointed on their panel through Board resolution for providing various services like providing search and title report of immovable property to be mortgaged to the banks by the customers while granting loans to customers. As per the banks' policies, all such search and title report etc. have to be from empanelled people and customers are not free to choose other advocates.

Thus, banks obtain such services from the empanelled advocates who raise invoice in the name of banks. However, these charges are paid by the banks to the advocates directly by debiting such charges to the customers loan account/saving/current account maintained by the customers with the banks. Recovery of such charges from customers is in the bank's loan policy and is also included in the terms of the loan contract entered with the customers/ borrower.

Whether GST is leviable on such legal charges paid by the banker wherein it is recovered from customers- the following is to be considered:

- *Who is the recipient of service:* The key point to decide on the taxability of such legal fees recovered by the bank from its customer is based on who is the *recipient* of such service under GST law.

  As per section 2(93)(a) "*recipient*" of supply of goods or services or both, means *where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;*

  It can be inferred that recipient is not based on who is bearing the cost of consideration, rather who is liable to pay the consideration. Merely because the bank is recovering the legal fees by debiting the customer's account, the customer cannot be considered to be the person liable to pay consideration. The contract/ agreements between the three parties involved is the only determinant factor as to who is liable to pay for the legal services to the advocate, even in the case of default by the other party. Such party who is liable to pay the consideration to the advocate would be the recipient of the service. Additional caution should also be exercised to factor any principal agent relationship between these parties, which could affect the determination of 'recipient' of service as per the definition.

- '*Banker*' being recipient of service: As per the contract terms, if banker is the recipient of service, then banker would be liable to pay tax under RCM, unless such legal services are otherwise exempted as per the exemption notification extracted above.

- '*Customer/ borrower'* being recipient of service: As per the contract terms, if the customer/borrower is the recipient of service, then taxability would be dependent on whether the customer is a business entity or not. If the customer is a person other than business entity, then such legal services would be exempted from tax. If the customer is a business entity who is liable to pay the consideration to the advocate as per the contract, then the customer would be liable to pay tax under RCM, unless such legal services are otherwise exempted as per the exemption notification extracted above.

**Q87. Whether the notice pay recovered from the employee, in terms of the employment contract, comes within the ambit of supply? If yes, whether the same is taxable under GST?**

**If the answer to the above is in the affirmative, whether in case of non-recovery of GST charged on notice pay from the employee, the same can be calculated by reverse calculation i.e., by treating the notice pay amount as inclusive of GST?**

**OR**

**Whether compensation paid in lieu of notice period by an employee at the time of resignation constitutes supply for levy of GST?**

**OR**

**Whether recovery of amount from employee for not serving the notice period as per the employment contract constitute supply for levy of GST?**

**Ans.** From an analysis of the law and judicial precedents, following two views emerge:

*i.* *Notice pay recovery taxable as supply of service under section 7 read with para 5(e) to Schedule II*

Section 7 provides for the scope of supply, which reads as under:

*"7. Scope of supply — (1) For the purposes of this Act, the expression —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; and*

*(c) the activities specified in Schedule I, made or agreed to be made without a consideration;*

*(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."*

From a reading of the above provision, it is apparent that section 7(1A), provides that if a transaction qualifies as 'supply' under section 7(1), then by virtue of Schedule II, whether such transaction is a supply of goods or supply of services.

Further, in terms of para 5(e) to Schedule II agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act shall be treated as supply of service. The said clause reads as under:

*"SCHEDULE II*

*[See section 7]*

*ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES*

*5. Supply of services*

*….*

*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and…."*

Notice pay recovery from an employee by the employer shall be treated as a supply of service for a consideration under section 7. In such cases, the employer agrees to the obligation of tolerating an act (i.e., letting the employee quit by waiving the notice period on payment of notice pay). Hence, it would be covered by para 5(e) to Schedule II.

Hence, such notice pay amount recovered from an employee by the employer shall be taxable under the GST law.

*ii. Notice pay recovery does not constitute 'supply' in as much as the same is the recovery of the salary already given*

Notice pay recovered is towards the resignation or non-service of notice period as per employment contract and such recovery is an inherent part of the employment contract in as much as this is a recovery of salary already given.

Thus, such amount of notice pay recovered from the employee shall not be subject to GST. However, it is pertinent to note that it will be dependent on the language of the employment contract, i.e., if such recovery of notice pay is in relation to the past salary, then GST would not be leviable. On the contrary, if the same cannot be established, then in such cases GST would be leviable.

Further, attention is invited to the following judicial precedents under the erstwhile Service tax regime wherein it has been held that cessation of employment should be treated as employment service not liable to service tax.

- *HCL Learning Systems v. CCE (Service Tax Appeal no. 70580 of 2018) - CESTAT Allahabad*
- *GE T&D India Limited v. Deputy Commissioner of Central Excise, Large Tax Payer Unit, Chennai (W.P.Nos.35728 to 35734 of 2016) - Madras High Court*

In case of non-recovery of GST charged on notice pay from the employee, the same can be determined by reversed calculation i.e., by treating that the notice pay amount as inclusive of GST by virtue of rule 35, which reads as follows:

*"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 = (Value inclusive of taxes X tax rate in % of IGST or, as the case may be, CGST, SGST or UTGST) ÷ (100+ sum of tax rates, as applicable, in %)"*

Thus, the notice pay amount can be treated to be inclusive of GST (assuming that it is specified in the employment contract) and accordingly the amount of tax payable can be determined by reverse calculation.

**Q88. A company recovers 50 per cent of the value of food provided to the employees from their salary. Balance 50 per cent value is borne by the company.**

**Whether collection of money from employees for canteen expenses is taxable under GST?**

**Ans.** Generally, GST is charged on the amount of consideration recovered from the recipient of goods or services. But in this case, the employer and employee are considered as related persons as per explanation to section 15. The relevant extract of explanation to section 15 is as under:

'*Explanation. — For the purposes of this Act, —*

*(a) persons shall be deemed to be "related persons" if —*

*(i) ……*

*……*

*(iii) such persons are employer and employee;*

*…..*

*(viii)*

Cost recovery must be examined in the light of the applicable HSN code. When cost of food provided is charged to employees (related persons) and HSN 9963 is applied, tax will be payable on OMV by uplifting the taxable value to 100% of cost incurred (even though only 50% is incurred). Rate of tax will be 5% under HSN 9963 and without ITC. Where the cost recovered is not only for the cost of food but also for other services provided and HSN code applied is 9985 or something similar, output tax is payable on actual cost recovered at 18%. Input tax credit on inward supplies will continue to be blocked credits.

Gift, if any, would be to the extent that is borne by the Company (and not to the extent recovered). This portion is not relevant for treatment unless the same is admitted as a perquisite and offered for income-tax.

**Q89. Whether cross charge transactions are exigible to GST?**

**Ans.** Yes, cross charge transactions are exigible to GST. The answer is confined to the specific question and the aspect of whether and when to follow ISD mechanism and cross charge is not discussed.

The term "c*ross charge*" is not defined in GST Law. Cross charge refers to supply from one registered entity to another registered entity where the entities involved have the same Income Tax PAN. Being part of the same legal entity, there may be no occasion to pay any consideration by the recipient unit. The process of transfer of common expenses / costs to the units benefitted is referred to as cross charge.

Where the inward supply is received by one GSTIN and the identity of the said inward supply is lost by being consumed by such GSTIN-location and the benefit inherent in such inward supply is enjoyed by other GSTINs of the same legal entity, there would be an outward supply of services, most likely, of a different HSN. Cross-charge applies when the inward supply is to a 'location of supplier of services' which qualifies as a 'fixed establishment' as defined in section 2(50). A location which is a 'fixed establishment' does not operate as ISD-location as defined in section 2(61).

Input Service Distributor (ISD) is where inward supplies are not meant for use or consumption, but such ISD-location merely receives the invoice and passes on the tax paid as credit by issuing the prescribed document to the user-location (having different GSTIN but same PAN).

**Q90. Mr. H is an accountant working in the head office. He handles centralized accounting for all the offices of the company registered under GST in different States, under the same PAN. The said accounting service at head office being attributable to all the units, the Accountant's salary is apportioned to all the units.**

**(a) Whether such apportionment of salary is covered under the ambit of supply?**

**(b) Will your answer change, if no such apportionment is done in books but, services provided by the Accountant are still for the Company as a whole?**

**(c) What if the accountant is an unregistered contractor instead of an employee?**

**Ans.**

(a) GST treatment is based on the indelible facts in a business and not the adoption or omission of accounting treatment. Accounting follows business decisions. Where it is an admitted fact that services of the accountant have been provided to other GSTINs with the same PAN, the apportionment of salary of Accountant under the given arrangement to all units is covered under the ambit of supply. As per section 25(4) when a person is having registration in more than one State, then each such registration will be treated as distinct persons for the purpose of the Act.

(b) Omission to apportion the salary in the books of account does not deny the fact that there has been a supply by HO to branches. In terms of the provisions of section 7(1)(c) read with para 2 of Schedule I, any supply of goods or services or both between separately registered units of an entity having common PAN shall be treated as supply, even if it is made without such apportionment of consideration. Accordingly, if it is a fact that services of the Accountant in head office are provided to various units in different States, then it amounts to supply and thereby liable to tax to be discharged through cross charge mechanism. The answer will not change just because in the books of account the salary is not apportioned to respective units. Apportionment of salary and cross charge are requirements under the law as briefly explained above and need to be complied with irrespective of accounting in books of account.

(c) When HO provides services to its branches, and the branches operate as independent taxable persons and not supplying captive services to HO, the supply of accounting support services by HO is undeniable, whether through employees or through outsources

contract staff, then cross-charge of cost of such supply by HO to branches is inevitable. The position will not change if the Accountant is engaged as an unregistered contractor. The remuneration/ service changes paid to him will be covered in the apportionment required to be done and cross charged. Since, the Accountant will become an unregistered contractor and not charge any tax, his services cannot be covered under the ISD mechanism and as such the same process of cross charge will continue for his remuneration.

**Q91. An organisation sends its employee to another organisation on deputation for few years in terms of an open advertisement for deputation. The payment to the person sent on deputation is made by the borrowing organisation every month after tax deduction under section 192 of the Income Tax Act, 1961 and employees provident fund ('EPF') contribution is also deducted. The lending organisation is charging GST on such cross-charge transaction treating it as supply.**

**Whether the action of the lending organisation is tenable in law?**

**Ans.** The action of the lending organization does not appear to be tenable in law as explained below:

The relevant facts to examine the taxability of the arrangement are-

(a) The employee has opted for deputation for a few years as per open advertisement for deputation. It therefore follows that, the borrowing organization has chosen the employee it found suitable. Therefore, this is not the case of deputation of any key employee with cross reporting to the lending organization.

(b) The salary of the person deputed is being paid by the borrowing organization every month to him directly. The borrowing organization is also deducting Income Tax as employer on the salary under section 192 of the Income Tax Act, 1961. It is also deducting and paying EPF. It means, in these two vital statutory activities the borrowing organization is in the capacity of an employer.

(c) From the above, it seems that the employee is working under the direct superintendence, control and directions of the borrowing organization which is responsible for his actions.

(d) The borrowing organization is therefore, the effective or real employer of the said person during the period of deputation. Thus, it's an arrangement of services by an employee to employer in the course of or in relation to his employment which is clearly outside the purview of supply and thereby no GST will be applicable by virtue of para 1 in Schedule III, falling under the category of activity which is neither supply of goods nor supply of services.

(e) The lending organization is not receiving any consideration; even the salary amount is not being routed through it for reimbursement to the employee. Thus, during the tenure of the person working with the borrowing organization, he is their employee and the lending organization, if at all, may have only the responsibility to take the employee back on its rolls on completion of the deputation but it is not getting any consideration for the same. Hence, it is not a supply as per section 7, and thereby GST is not leviable.

From the above, one can reasonably conclude that the lending organization is not supplying any service to the borrowing organization and need not cross charge the transaction as supply.

**Q92. XYX Ltd., a manufacturing company, having common GST registration for its manufacturing unit and Head Office, transfers goods to its depots and pays GST, where all the cost including salary of employees are included in the value of stock transfer. These depots are located in different States and have different GSTINs.**

**Whether GST is payable on salary of employees of Head Office, being a cross charge to depots? If yes, what should be the value of such salary?**

**Ans.** In the instant case, the requirement to pay GST on salary of employees of head office as cross charge will arise if any specific or exclusive services are provided by the Head Office to the depot, apart from the supply of goods.

The transfer of goods to depots for further sale therefrom and cross charge are two independent issues.

The transfer of goods to depot registered under different GSTIN is a transaction of supply of goods and the same is exigible to GST in view of the provisions of section 7(1)(c) read with para 2 of the Schedule I as supply of goods between distinct persons, although without consideration as the depot will not be actually paying the head office / manufacturing unit for the same.

The valuation of such supply will be governed by rule 28 of the CGST Rules. Since the arrangement is for further supply, that is, to sell manufactured goods through depot, it can safely be assumed that price charged for supply of goods of like kind and quality by the recipient depot to its customers (who are not related persons) will be available. And the manufacturing unit can therefore, as per the first proviso to said rule 28, take an amount equivalent to 90 per cent of the price charged for supply of goods of like kind and quality by the depot to customers not being related persons as the value of goods for discharge of GST liability. Further, as an alternative to this basis, as per the second proviso to rule 28, if the recipient depot is eligible for full ITC on the goods supplied by the manufacturing unit, the value as declared by the manufacturing unit shall be deemed to be the OMV of the goods and the GST liability will be discharged as such.

It would be seen that the above methods to determine the valuation of the goods transferred to depot for GST payment are independent of the costing done by the head office / manufacturing unit and how salary cost of head office is treated in such costing of goods is not relevant.

Therefore, if the head office is also providing any specific services using its resources to the depot to support its activities such as invoicing, accounting, general administration, HR function, IT support etc. there will be a requirement for cross charge of the cost including salary, irrespective of whether the salary cost of head office has been considered in valuing the goods transferred to depot. If no such services are provided by head office to the depot, there is no requirement for cross charge. But practically some services, at least the general administration will be provided by HO to all units of the entity including depots and to that extent the cross charge will be required.

In the instant case, since the manufacturing unit and head office are under common GST registration, there is no question of cross charge by HO to the manufacturing unit. However, if the two are separately registered, the response will be different. In such situation, head office will also need to cross charge for the services it provides to the manufacturing unit, and this will also be irrespective of valuation of goods transferred to the depot.

Broadly speaking, the cross charge for internal services provided by head office, the valuation may have to be done as per rule 28 either at OMV or at the value of supply of services of like kind and quality, if OMV not available. Further as per second proviso to rule 28, if the recipient depot is able to take full ITC on the value of service declared in the invoice, then the value of salary declared by the head office shall deemed to be the open market value. On the other side, the head office can also adopt the valuation as per rule 30 on a sequential basis, and as such the value of such salary shall be at 110% of the cost of provision of such services. However, as per rule 31 if the value of supply of such services cannot be determined as per rules 28 to 30, then the same shall be determined by using reasonable means consistent with the principles and the general provisions of section 15. The instant case being supply of services, opting rule 31 is also possible by ignoring rule 30.

**Q93. Will the activities performed in CEOs Office in a Company, be liable to tax under GST?**

**Ans.** Yes, CEOs Officer is a very large establishment comprising of CEO and her team of staff to assist the CEO in operations, finance, legal, investor relations, etc. CEOs Office may be located under one GSTIN but services of CEOs Office are enjoyed by all GSTINs. As such, the services of 'supervision and management oversight' will be the outward supply from the GSTIN which bears the costs of CEO and her entire team, and the branches that enjoy those services are the Recipients. This would be a supply under section 7(1)(c) read with para 2, schedule I of the CGST Act, even when there is no consideration.

CBIC has clarified in the context of BFSI FAQs #55 that it will be taxable. The relevant extract of FAQ on Banking, Insurance and Stock Brokers Sector is as under:

| Sr. No. | Question | Answer |
|---|---|---|
| 55. | ***Will the management oversight or stewardship activities performed in relation to business operations by the Head Office of a bank to a Branch in India be considered as a supply of services by the Head Office even when there is no consideration charged by the Head Office, nor any expenditure recorded in the books of account of the branches?*** | *As per Schedule-I to the CGST Act, 2017, supply of services between distinct entities will be a taxable supply even in absence of a consideration* |

Care must be taken not to distribute credit of CEOs Office costs under ISD. FAQ 56 states that CA certificate may be obtained to determine the "full cost" to be cross charged.

| Sr. No. | Question | Answer |
|---|---|---|
| 56. | ***If tax is payable on provision of management oversight or stewardship services by a related person, what shall be the value of supply when no invoice is raised, no payment is made by recipient or no entry is made in the books of account of the recipient of service? What will be the time of supply?*** | *As per Rule 28 of the CGST Rules, 2017, the bank may obtain a certificate from the Branch or Office providing the estimated cost of rendering the support. It may be backed by a certificate issued by a chartered accountant or cost accountant.*<br>*In such cases, the time of supply shall be the date when such costs are determined or certificate is received and the GST liability on the said costs shall be discharged accordingly. This can be done before the expiry of the quarter during which such supply was made as provided in 2nd proviso to Rule 47 of the CGST Rules, 2017. For this purpose a document may be issued by the entity supplying such services* |

**Q94. The landowner signed a development agreement of land with developer on 01.06.2016, i.e., pre-GST. As per the said development agreement, the landowner would be eligible for 45 per cent share in sale consideration of units which would be constructed on the land when the unit is sold to the buyer.**

**(1) Whether the same is liable to service tax as per the service tax laws for consideration received prior to introduction of GST?**

**(2) Whether the consideration received as per the said agreement post GST would be liable to GST considering the service as continuous supply?**

**Ans.** The landowner in question had entered into a revenue sharing JDA, prior to introduction of GST. As per the development agreement the landowner agreed to transfer the development right on the land, to the developer, for a consideration. The consideration is in form of share in the sale value of the flats proposed to be constructed by the developer to construct on the land and sell the same. The question is on the taxability of the receipt of the consideration, by the landowner, at different point of time:

*A.* *Receipt in Service Tax Regime*

As per section 66B of the Finance Act, 1994 service tax is levied on the value of all services, provided or agreed to be provided in taxable territory, other than those services specified in the negative list. Hence, it was prerogative to determine whether the activity qualifies as service as per the interpretation prescribed in the Act.

The following analogies are drawn, to settle whether the activity of transferring the development right is "SERVICE":

a. Sub-section (44) of section 65B of the Finance Act, 1994 in its interpretation of the term "service" categorically excluded "*a transfer of title in goods or immovable property, by way of sale, gift or in any other manner*".

b. The term "*immovable property*" is not defined in the Finance Act, 1994.

c. Section 3(26) of the General Clauses Act,1897 and section 2(6) of the Registration Act, 1908 define the term "*immovable property*" to include land as well as benefits that arise out of land. Normally, an agreement for transfer of development rights is permanent (i.e.) on irrevocable basis.

Accordingly, one can conclude that transfer of development right, which are irrevocable in nature, was recognized as a benefit arising out of land and thereby, an immovable property under the pre-GST regime. Hence, it was outside the service tax ambit. This has also been confirmed by the CBIC in FAQ No. 6.2.1 in *Taxation of Services: An Education Guide dated 20.06.2012,* where the transfer of development right is considered as sale of land by the landowner.

*B. Receipt in GST Regime*

The taxability in GST revolves around the concept of "SUPPLY". Section 7 had prescribed the scope for the event to get classified as "Supply". Accordingly, 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 is a supply.

As per sub-section (102) of the section 2 '*services'* means anything other than goods, money and securities but includes activities relating to the use of money or its conversion for which a separate consideration is charged. The exclusion of a transfer of title in immovable property prescribed in the erstwhile indirect tax laws did not continue under GST as only a strict transfer of ownership has been envisaged as sale of land under Schedule III. Accordingly, transfer of development right was brought within the purview of GST and became taxable from 01.07.2017.

However, in this context, it is important to note that the *Notification No. 04/2018 – CTR dated 25.01.2018* as amended, notified the time of supply of –

— transfer of development rights by the landowner and

— construction service provided by the promoter to the landowner

to be the time when the promoter transfers possession or the right in the constructed unit to the landowner. Accordingly, for the period from 1st July 2017 to 24th January 2018, the taxability of transfer of development right will be the time when the TDR is transferred / conveyed by the way of an agreement. Hence, the amount received in the GST period against the transfer of the development rights made prior to 01.07.2017 is not taxable.

**Q95. Facts: A landowner entered into to a JDA with a developer in 2015, and after all the approvals development had started in 2018. The agreement is to develop the land (approximately 8 acres) into residential houses, other than affordable housing category, and provide the landowner his share of developed houses in return. There is no consideration paid apart from the share of the developed houses, which will be handed over to the landowner. The sharing ratio between landowner and developer is 32:68 respectively.**

**The developer started the construction in 2018, and the project is also registered under RERA, as per the requirement. The developer in the year 2018, had found a buyer who was interested in the property and had booked one of the houses in the project. The same was reduced to an agreement and partial payment was also received by the landlord in 2018 itself.**

**But in 2019 there was change in GST and the developer opted for the old tax rates i.e., at 18 per cent for the first phase of the project which was in progress, by that time.**

**The Query**

**Since the developer had opted for the old tax rate of 18 per cent, for the first phase of the project, what rate should be charged by the landowner for his share of houses which he will be selling after receiving it from the developer.**

**Ans.** Since the JDA was entered into prior to 1st July 2017, supply of development rights by landowner will NOT be liable to GST. However, supply of construction services back to landowner by the developer will be liable to GST on earlier of (i) acceptance of

bookings of units falling to share of landowner or (ii) date of completion of project.

Having opted for 'ongoing project', the developer will be liable to pay tax at the old rates of 18 per cent with ITC (i.e., 12 per cent after abatement of 1/3 on contract value including land price) on the said ongoing projects. Therefore, he will be charging GST at 12 per cent (effective rate) on the cost of construction of units handed over to the landowner as consideration against Development Right from the landowner. Note that valuation based on selling price of units will apply only if the project is taxable under the new rate regime. Since 'ongoing project' option has been availed, valuation will not be based on this deemed value under section 15(5).

Where the landlord has identified the potential customer for sale of units falling to his share in the given project and agreed to sell the same, tax is payable on receipt of advances in instalment prior to the date of completion of project. As such, landlord will be obligated to take registration under GST for the supply of construction services as prescribed under para 5(b) to the SCHEDULE II. Accordingly, he should also charge 12 per cent GST on the actual selling price with credit for taxes charged by developer on supply of construction services and maintain the legal and operational harmony.

Note that references to the first phase and subsequent phases will be taxed based on old rate or new rate regime if each phase has a different RERA registration. It is not uncommon to find projects being marketed as different phases although all phases have single RERA registration.

**Q96. State the tax treatment of affordable housing in GST regime after 1.04.2019?**

**Ans.** In GST regime, post April 1, 2019, the Government has introduced special rate for various services as recommended by Goods and Services Tax Council for real estate sector *Notification No.3/2019-Central Tax (Rate) dated 29.03.2019*.

The Council with the intention to boast the performance of the real estate sector, which otherwise was found to far below the potential

than what it could contribute to the economy and revenue, recommended composition scheme for construction of residential units. Accordingly, *NN 11/2017-CTR-28.06.2017* (parallel notification issued by the respective State) was amended to introduce the new tax rates effective from 01.04.2019. As per the amended rate, the new tax rates were made applicable to new projects or ongoing projects which have exercised the option to pay tax in the new regime.

The activity of construction of residential units has been classified into TWO major categories:

→ Construction of affordable residential apartments.

→ Construction of residential apartments other than affordable residential apartments.

Clause (xvi) of Explanation 4 to the above referred Notification (as amended) had explained the term "*affordable residential apartments*" as an apartment which satisfies both the following conditions:

- having carpet area not exceeding 60 sq meter (in metro cities) / 90 sq meter (in non-metros).
- having a price of not more than ₹ 45 lakhs.

The rate prescribed for the above class of apartment is 1.5 per cent GST (i.e., 1 per cent GST after abatement of 1/3 on contract value including land price). In this scheme, the developer is not allowed to take ITC except to the extent as prescribed under the notification. Further, tax shall be paid by the promoter developer by debiting the electronic cash ledger only.

**Q97. Whether deduction of one third value from total taxable value of flat is considered as exempt supply and consequently reversal of ITC is required under rule 42?**

**Ans.** Sub-section (2) of section 17 restricts ITC to the extent attributable to the taxable supplies including zero-rated supplies, where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies and partly for effecting exempt supplies.

Besides the above, sub section (3) of section 17 read with rule 42 categorically provides that the value of exempt supply 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 para 5 of Schedule II, sale of building.

The term "exempted supply" is defined in sub-section (47) of section 2 which is as follows:

*"exempted 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 of CGST Act or under section 6 of IGST Act, and includes non-taxable supply.*

Accordingly, we can infer that the '*exempt supply*' includes '*non-taxable supply*' but does not cover any element of "no supply".

Further, explanation 2 in *NN 11/2017-CTR-28.06.2017* provides that:

*"2. In case of supply of service specified in column (3), in items (i), (ia), (ib), (ic), (id), (ie) and (if) against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply."*

Furthermore, Schedule III provides as under –

*"5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."*

Thus, part of the value attributable to sale/transfer of land shall be neither supply of goods nor supply of services under CGST Act and therefore, such sale of land will not be considered as '*exempted supply*'.

Hence, we can conclude that the valuation attribution towards sale/transfer of land is not an exempted supply and there is no need for any reversal of ITC.

**Q98. Whether the promoter of a real estate project is liable to pay GST under reverse charge on exempt inward supplies when there is shortfall in getting 80 per cent inward supplies from registered persons?**

**Ans.** The promoter who is paying GST at 1 per cent or 5 per cent (effective rate after considering 1/3 abatement on land value) in case of construction of affordable residential apartments or other than construction of affordable residential apartments respectively, w.e.f. 01.04.2019, has to comply with certain conditions given in *NN 11/2017-CTR-28.06.2017* as amended.

The conditions relevant for the query are as follows:

→ *The promotor has to procure EIGHTY PER CENT of value of input and input services, [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas], used in supplying the service shall be received from registered supplier only.*

→ *Where value of input and input services received from registered suppliers during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier) falls short of the said threshold of 80 per cent, GST shall be paid by the promoter on value of input and input services comprising such shortfall at the rate of nine percent on reverse charge basis.*

Besides the above stipulations CBIC vide *Notification No. 07/2019 – Central Tax (Rate) dated 29.03.2019* apprised that the tax on following procurement from an unregistered supplier shall be subject to reverse charge:

→ Cement falling under Chapter Heading 2523 in the first Schedule to the Customs Tariff Act, 1975 (51 of 1975).

→ Capital goods falling under any Chapter in the first Schedule to the Customs Tariff Act, 1975 (51 of 1975).

→ Supply of such goods and services or both [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI)] which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, as prescribed in *NN 11/2017-CTR-28.06.2017*.

On combined reading of BOTH notification, one can only conclude that, if the inward supply from registered person after appending the value of cement purchase from unregistered supplier on which RCM @ 28 per cent has been paid (since specific mention in RCM notification falls short of 80 per cent then the tax @ 18 per cent needs to be paid on such value irrespective of its taxability). The above submission has also been confirmed in FAQ No. 18 of the *Circular No. F. No. 354/32/2019-TRU dated 14.05.2019*

| *Sl. No.* | *Question* | *Answer* |
|---|---|---|
| *18.* | *Whether the inward supplies of exempted goods/services shall be included in the value of supplies from unregistered persons while calculating 80% threshold?* | *Yes. Inward supplies of exempted goods/services shall be included in the value of supplies from unregistered persons while calculating 80% threshold.* |

**Q99. What would be the rate of tax at which the amount retained/ forfeited by the builder towards the flat under-construction will be taxed in case of cancellation of flats, when sale of under-construction flat is taxed at the rate of 18 per cent?**

**Ans.** In such a case, the amount retained / forfeited takes the colour of amount received to tolerate an act, which is cancellation of flats. As per Schedule II para 5 (e) it would be treated as a service and the relevant HSN would be 999794. As per *NN 11/2017-CTR-28.06.2017* it is taxable at 9 per cent CGST plus 9 per cent SGST, which comes to 18 per cent in total. However, a contrary view is taken by CESTAT Chennai in pre-GST regime judgment in the case of *Neyveli Lignite Corporation Ltd. Vs Commissioner of Customs, Central Excise &*

*Service Tax [Service Tax Appeal Nos. 41666, 41747 of 2016 & Ors., dated July 26, 2021]- CESTAT Chennai*. It has been held that, no service tax is to be imposed on liquidated damages recovered for not adhering to the time limits mentioned in the contract as the same would not be covered in 'Declared Services' mentioned under section 66E(e) of the Finance Act, 1994. The levy of GST on recovery of compensation/penalty/damages depends upon the "test of supply" i.e., one has to satisfy that recovery of compensation/penalty/ damages in itself is a supply; then only GST could be levied in terms of the newly inserted sub-clause (1A) in section 7. It would also be pertinent to note that section 7(1)(a) which states that all forms of supply "*made or agreed to be made for a consideration".* Forfeiture of money paid could be construed as a consideration for the agreement to make a supply.

If there is no positive act of supply of services between the parties, there can be no agreement between the parties to cause loss or damage by breaching terms and conditions of an agreement for a consideration. The expression '*to tolerate an act'* relates to situations where a person commissions another person to do or commit a particular act for a consideration. The payment of damages is a condition of contract and not a consideration for any service in the nature of forbearance or tolerating an act. No GST if, there is no separate supply. An act of tolerance necessarily requires willful agreement of certain situation wherein the person would willfully/ consciously agree to suffer or restrain in exchange of consideration.

In the present case the amount retained/ forfeited by the builder towards flat under-construction in case of cancellation of flats seems to be as per contract between them and hence, a separate supply taxable @18 per cent under HSN 9997. The supplier of such service, in this case, the person receiving or retaining the money is the supplier and is liable to pay tax.

**Q100. It is a practice in the hotel industry to take advance (including GST) at the time of confirming booking. If the guests do not turn up on the appointed date, the advance amount is forfeited.**

**Whether such forfeited amount is leviable to tax under GST?**

**Ans.** In the case *Lemon Tree Hotel v. Commissioner, Goods & Service Tax, Central Excise & Custom [2020-TIOL-1114-CESTAT-DEL],* it was held as under:

*"Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it. Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of section 66E (e) of the Finance Act.".*

Though the above decision pertains to erstwhile indirect taxes (service tax) regime, whether the same would be applicable in GST regime needs to be analysed. One has to consider the following points in GST era despite Lemon tree hotel decision:

i. As per section 7(1)(a), the expression 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…"* Hence, when guests pay advance, it is agreed that service would be provided and at the time of booking the room itself the guest has agreed to waive his advance in case of cancellation of rooms. Hence, hotel is tolerating the act of not occupying the room by the guests for which it is compensated by forfeiture of advance.

ii. It may be possible to take a view that advance itself is a consideration for supply in the form of blockage of rooms for the guests.

In view of the above points, it is necessary on the part of the hotels to issue tax invoice with GST for the forfeited advances.

**Q101.**

**(a) Whether GST is leviable on upfront refundable deposit collected by the landlord?**

**(b) Whether forfeiting the refundable deposit is for non-payment of rent taxable?**

**(c) Whether interest earned on such deposits is taxable, since the source is renting of immovable property?**

**Ans.** Questions (a) & (b), are answered by drawing the important difference between the advance and deposit as under.

| ADVANCE | DEPOSIT |
|---|---|
| Money received towards goods or services to be supplied in future.9 | Money received as a security. |
| Money has to be utilized for the specific purpose for which the advance is made. | Utilization of a deposit depends entirely on the person receiving the same. |
| Advance does not earn any return on it. | The receiver of deposit money may invest it in capital market. |
| Receipt of advance is taxable in the hands of the supplier of service (exemption is given to the supplier of goods). | Receipt of deposit is taxable only when it is adjusted against the taxable supply. |

(c) Notional interest/income earned by investment done using the money received from security deposit cannot be added to taxable supply (i.e., renting of immovable property) agreed upon between the parties, since the revenue has been generated through investment contract entered by the landlord.

**Q102. A partnership firm is paying rent to the building owned by the partners and the firm is running the boarding and lodging house. In covid period, the lodge was closed for most of the year.**

**If revised deed is entered to reduce the rent payable to partners, whether it will reduce the firm's tax liability?**

**Ans.** This is a continuous supply of service as covered under section 2(33). Section 31(5) prescribes when the invoice is to be raised in such cases. In line with this section, if invoice had been already raised for such supply, the reduction in rent shall be accounted and reported only by a credit note as envisaged under section 34(1). In case the invoice is yet to be raised, the invoice may be given for such reduced rental agreed and credit note will not be required in this case. The credit note can be treated as post supply discount and only if the requirements of section 15(3)(b) are fulfilled, taxable value can be reduced. Such reduction in value will reduce the tax liability of the firm as the consideration gets reduced as per the revised deed.

**Q103. Explain tax treatment in case of composition levy for services.**

**Ans.** A registered person opting for composition levy for services shall pay tax at an effective rate of 6 per cent (3 per cent CGST + 3 per cent SGST/UTGST) of the turnover in the State or UT.

Turnover in the State or Union Territory is defined in 2(112) as under:

*'"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;'*

Further, as per explanation 2 to section 10, turnover in the State or UT shall exclude the following supplies for the purpose of payment of taxes:

(i) Supplies from the first day of April of a FY up to the date when such person becomes liable for registration under this Act; and

(ii) Exempt supply of services provided by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

Note that although a registered person whose aggregate turnover was upto ₹ 50 lakh in the preceding financial year and he would have met the criteria stipulated in rule 5 and opted for composition levy for services, the option of such registered person to avail composition scheme for services shall lapse with effect from the day on which his aggregate turnover during the current financial year exceeds the threshold limit of ₹ 50 lakh or when he violates any conditions or restriction stipulated in the GST Law and he will have pay tax as normal/regular tax payer.

**Q104. Can a caterer opt for composition scheme if he fulfils all the conditions as laid out in section 10?**

**Ans.** The meaning of the term "Catering" as per the Collins Dictionary is as follow:

"*Catering is the activity of providing food and drink for a large number of people, for example at weddings and parties."*

Although the term caterer is very generic, in commercial parlance and even under business test it often connotes the private event caterers as defined in dictionaries. The above services involve both element of preparing food which are pre-planned and serving them. Catering basically involves composite supply of goods as well as service. Para 6(b) of Schedule II is reproduced hereunder:

*"(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."*

Catering services involve food being used as a tool to render services for a consideration; it squarely falls within the scope of para 6(b) of the Schedule II and declared as supply of services. The phrase "*by way of*" indicates a tool or a conduit or a method of providing the services.

Thus, caterers can opt for composition scheme and pay composition tax at the rate of 5 per cent (2.5 per cent CGST and SGST each) on the turnover in the State or UT.

NOTE: The regular rate of tax for catering activity is also 2.5 per cent CGST & 2.5 per cent SGST.

**Q105. Mr. V is engaged in selling footwear and providing catering services within the State under the same PAN.**

**Can he opt for composition scheme if the total turnover from both businesses does not exceed ₹ 50 lakhs?**

**Ans.** Section 10 (1) provides an option to a registered person to opt for composition scheme. In order to be eligible to opt for composition scheme. He has to satisfy the conditions prescribed under section 10 (2) read with rule 5.

Caterers are eligible to opt for composition scheme as they squarely fall within para 6(b) of the Schedule II. On the other hand, selling footwear amounts to sale of goods. Further all supplies are intra-State supplies. Both are eligible for composition as per section 10(1). Since the combined turnover is within the threshold limit, Mr. V may opt for the composition scheme.

**Q106. Whether broomsticks made from plants leaves are exempt goods?**

**Ans.** HSN 9603 covers muddhas made of sarkanda, brooms or brushes, consisting of twigs or other vegetable materials, bound together, with or without handles. These goods are exempted by under *NN 2/2017-CTR-28.06.2017* read with *Notification No. 28/2017-CTR, dated 22.09.2017*. Hence broomsticks made from leaves of plants, which is a vegetable material, are exempt from GST.

**Q107. Whether tender fees received in relation to allotment of warehouse and appointing agencies for handling and transport of warehousing of agriculture produce is chargeable under GST?**

**Ans.** Under entry no. 24 of the *NN 11/2017-CTR-28.06.2017*, support services to agriculture, hunting, forestry, fishing, mining and utilities are exempt from GST. The relevant extract of entry no. 24 of the said Notification reads as under:

***"****Support services to agriculture**, forestry, fishing, animal husbandry*

*Explanation - "Support services to agriculture, forestry, fishing, animal husbandry" means-*

*(i) Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of -*

*(a) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;*

*(b) supply of farm labour;*

*(c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;*

*(d) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;*

*(e) loading, unloading, packing, storage or warehousing of agricultural produce;*

*(f) agricultural extension services;*

*(g) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.*

*(h) services by way of fumigation in a warehouse of agricultural produce.*

*(ii) Services by way of pre-conditioning, pre-cooling, ripening, waxing, retail packing, labelling of fruits and vegetables which do not change or alter the essential characteristics of the said fruits or vegetables.*

*(iii) Carrying out an intermediate production process as job work in relation to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce."*

As per the above entry no. 24 of the said notification, the support services with respect to agriculture produce are exempt from the levy of GST. Further, the term '*support services to agriculture'* under the said entry needs to be given a restrictive interpretation due to the use of the word '*means*' in the explanation. In other words, this category of service is not wide enough to cover any services which are not even directly in relation to agriculture.

Tender fees for allotment of warehouse and appointing agencies for handling and transport of warehousing of agriculture produce is not specifically covered under the support services to agriculture produce. Further, tender fee is not received in pursuant to any service relating to the agriculture produce rather the same is received for appointing agencies for handling agriculture produce. Therefore, such tender fee shall attract GST at the applicable rate.

**Q108. Whether GST is leviable on de-husking charges received by an industrial unit from the Government when paddy is agriculture produce?**

**Ans.** The process of de-husking is usually not carried out by farmers or at a farm level but are generally carried out by the millers. Hence, the process of de-husking is not an agricultural activity.

Therefore, GST is leviable on de-husking charges. According to entry no 26(i) of *NN 11/2017-CITR-28.06.2017*, Heading 9988 - *Services by way of job work in relation to all food and food products falling under Chapter 1 to 22 in the First Schedule to the Customs Tariff Act, 1975* are taxable @ 5 per cent.

Paddy is covered under Chapter 10 in the First Schedule to the Customs Tariff Act, 1975 and hence covered by above notification.

**Q109. Whether GST is leviable on sale of cow dung cakes? if yes, then what is the rate and HSN Code?**

**Ans.** Entry no. 182 of *NN 1/2017-CTR-28.06.2017* (HSN 3101) provides that "*all goods i.e., animal or vegetable fertilisers or organic fertilisers put up in a unit container and bearing a brand name"* is leviable to GST @ 5 per cent.

Hence, if cow dung cakes contain registered brand or are branded and actionable claim or enforceable right in respect of such brand

name has not been foregone voluntarily, the same is taxable at 5 per cent.

Otherwise, it is fully exempt if it is covered under entry no. 108 of *NN 2/2017-CTR-28.06.2017* as amended reads as:

*"All goods and organic manure [other than those put up in unit container and, -*

*(a) bearing a registered brand name; or*

*(b) bearing a brand name on which an actionable claim or enforceable right in a court of law is available other than those where any actionable claim or enforceable right in respect of such brand name has been foregone voluntarily, subject to the conditions as in the ANNEXURE I.*

The conditions specified in Annexure I to *NN 2/2017-CTR-28.06.2017* for foregoing an actionable claim or enforceable right on a brand name are the following:

*(a) the person undertaking packing of such goods in unit containers which bears a brand name shall file an affidavit to that effect with the jurisdictional commissioner of Central tax or jurisdictional commissioner of State tax, as the case maybe, that he is voluntarily foregoing his actionable claim or enforceable right on such brand name as defined in Explanation (ii)(a); and*

*(b) the person undertaking packing of such goods in unit containers which bear a brand name shall, on each such unit containers, clearly print in indelible ink, both in English and the local language, that in respect of the brand name as defined in Explanation (ii)(a) printed on the unit containers he has foregone his actionable claim or enforceable right voluntarily.*

*Provided that, if the person having an actionable claim or enforceable right on a brand name and the person undertaking packing of such goods in unit containers are two different persons, then the person having an actionable claim or enforceable right on a brand name shall file an affidavit to that effect with the jurisdictional Commissioner of Central tax or jurisdictional Commissioner of State tax, of the person*

*undertaking packing of such goods that he is voluntarily foregoing his actionable claim or enforceable right on such brand name as defined in Explanation (ii)(a); and he has authorised the person [undertaking packing of such goods in unit containers bearing said brand name] to print on such unit containers in indelible ink, both in English and the local language, that in respect of such brand name he [the person owning the brand name] is voluntarily foregoing the actionable claim or enforceable right voluntarily on such brand name."*

**Q110. Whether lease of land taken for poultry breeding and hatching activities is leviable to GST?**

**Ans.** Entry no. 54 of the exemption *NN 12/2017-CTR-28.06.2017* had exempted the activities relating to agriculture. The said entry is reproduced below:

*Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of -*

*(a) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;*

*(b) supply of farm labour;*

*(c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;*

*(d) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;*

*(e) loading, unloading, packing, storage or warehousing of agricultural produce;*

*(f) agricultural extension services;*

*(g) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.*

The exemption entry had made it clear that the service by way of renting or leasing of vacant land for the purpose of rearing all life forms of animals, except the rearing of horses, encompassed agriculture and hence exempted.

**Q111. Whether interest received on belated payment of consideration in respect of exempt supply is taxable under GST?**

**OR**

**Whether interest on late payment will form part of value to be considered for exemption limit of ₹ 7,500/- when debit note for the same has been raised especially since the interest is taxable only when the same is received? e.g., monthly service charges billed by society is ₹ 6,500 and interest on outstanding dues is ₹ 1,500. Since, interest is taxable on receipt basis as per time of supply provision then no GST is leviable on ₹ 6,500 which is below exemption limit of ₹ 7500/- even though tax invoice is of ₹ 8,000/- (₹ 6,500 being maintenance or service charges and ₹ 1,500 interest is due to outstanding maintenance charges.**

**Ans.** Determination of value is one of the most important factors in the judicious levying of indirect taxes. It is apparent from the Goods and Services Tax (GST) law that a sincere endeavour has been made to do away with the contentious valuation issues that emerged particularly under the erstwhile Service Tax and Central Excise laws. One such aspect is interest/penalty/late fee for delayed payment of consideration for any supply which has to be specifically included in the value of supply of good or service, as the case may be.

As per section 15(2)(d), the value of supply shall include interest or late fee or penalty for delayed payment of any consideration for any supply. Thus, in the given case since the principal supply is exempted, the interest for belated payment of consideration should also be exempted as it is to be added to the value of the principal supply and interest cannot be treated as a separate supply.

Since, interest is to be included in the value of supply, in the second scenario the supply value is ₹ 8000 which exceeds the exempt limit of ₹ 7500, and hence the entire sum of ₹ 8000 is taxable.

**Q112. Whether supply of salt is a zero-rated supply or exempt supply?**

**Ans.** Entry no. 103 (HSN 2501) of *NN 2/2017-CTR-28.06.2017* read with *Notification No. 42/2017-C.T. (Rate), dated 14.11.2017* exempts the following items:

*"Salt (including table salt and denatured salt) and pure sodium chloride, whether or not in aqueous solutions or containing added anti-caking or free flowing agents; sea water*

As salt is exempt *vide* exemption notification, it is an exempted supply.

**Q113. Whether the annuity payments received after construction of road under Hybrid Annuity Model, fall under the definition of taxable or exempt supply?**

**Ans.** Supply entails a contractual arrangement for the provision of goods or services against a consideration. Commercial contracts are made for business purposes. GST implications have to be determined by searching for existence of taxing ingredients. In case of hybrid annuity model projects, it is clearly a contract involving a consideration to be paid on certain deferred terms which the concessionaire has accepted. In return, the concessionaire has agreed to invest funds in constructing the public infrastructure and maintain it for the duration of the concession period. It is a contract for supply of construction services simpliciter and the only exception being deferment of part of the payment due for works contract. GST is payable on time of supply regardless of any delay in collecting the taxable value billed.

The concessionaire will issue an invoice for the work carried out applying HSN 9954 and corresponding rate of tax and claiming admissible ITC. Public Authority pays some portion of this invoice value right away and defers the balance as per hybrid annuity model terms. Concessionaires becomes entitled to collect one portion right away and wait for the concession period to collect the balance. When the additional consideration towards delay in payment of deferred portion of taxable value is due, Concessionaire will issue a debit note and discharge GST on receipt basis in terms of section 13(4). *Circular 150/6/2021-GST dated 17.06.2021* confirms this position.

**Q114. Whether electricity bill paid by tenant to the Electricity Department or to the landlord is a taxable or exempt supply?**

**Ans.** The issue is to be analysed as per the terms and conditions of the agreement between the Landlord and the Tenant as explained below:

*Situation 1: There is a separate meter –*

*Scenario (a):* As per the terms and conditions of the agreement, the payment of electricity bill is the responsibility of the tenant and if the tenant is paying such electricity charges directly to the Electricity Department then the tenant is not required to pay GST as such services provided by the Electricity Department to the tenant is exempt as per entry no. 25 of *NN 12/2017-CTR-28.06.2017* as it amounts to services by way of transmission or distribution of electricity by an electricity transmission or distribution utility.

*Scenario (b)* In case the terms and conditions of the rental agreement provides that the tenant has to reimburse the actual electricity expenditure to the landlord based on the consumption shown by the separate meter then in such case the landlord acts in the capacity of a pure agent of the tenant for this particular service as per rule 33 and such electricity charges shall be excluded from the value of supply provided it is separately indicated in the Invoice.

*Situation 2: There is no separate meter and only a sub meter:*

In this situation also, the agreement between the landlord and tenant plays a vital role in determination of the taxability of electricity bill reimbursed to the landlord though it is based on the actual consumption of electricity as per the reading in the sub-meter. If the agreement has a clause saying that rent will be paid on fixed amount and the reimbursement of electricity is based on the actual reading shown in the sub-meter, then it can be argued that the landlord is acting as a pure agent as per rule 33 and such reimbursement of electricity expenditure is on actual basis and will be excluded from the value of supply and is not subject to GST. However, if the agreement is silent on the reimbursement of electricity expenses, the entire supply may be treated as composite supply as per section 2(30). Thus, taxability of reimbursement of electricity charges for payment to the Electricity Department, being an ancillary supply, will depend on the nature of the Principal Supply (i.e.) renting of immovable property as per section 8. Thus, in this scenario, reimbursement of electricity bill may be subject to GST.

**Q115. Whether GST is applicable on manpower supply (cleaning service) provided to:**

**(a) Government schools**

**(b) Religious trust**

**(c) Agriculture market yard.**

**Ans.** Supplying manpower for the purpose of providing cleaning services will get classified under the HSN 9985 and will be subject to tax at 18 per cent in GST ecosystem. The querist wanted to know the taxability when it is provided to certain organisation, which is discussed below:

- Government schools **-** As stated above the activity is taxable, however when it is provided to Schools the same is exempt *vide* entry no.66 (iii) of *NN 12/2017-CTR-28.06.2017* which is as under:

| ***Sl. No.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent)*** | ***Condition*** |
|---|---|---|---|---|
| *66* | *Heading 9992 or Heading 9963* | *Services provided –*<br>*(a) by an educational institution to its students, faculty and staff;*<br>*(aa) by an educational institution by way of conduct of entrance examination against consideration in the form of entrance fee;*<br>*(b) to an educational institution, by way of,-*<br>*(i) transportation of students, faculty and staff;*<br>*(ii) catering, including any mid-day meals scheme* | *Nil* | *Nil* |

| | | | | |
|---|---|---|---|---|
| | | *sponsored by the Central Government, State Government or Union territory;*<br>*(iii) security or cleaning or housekeeping services performed in such educational institution;*<br>*(iv) services relating to admission to, or conduct of examination by, such institution;*<br>*(v) supply of online educational journals or periodicals:*<br>*Provided that nothing contained in [sub-items (i), (ii) and (iii) of item (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent*<br>*Provided further that nothing contained in sub-item (v) of item (b) shall apply to an institution providing services by way of,-*<br>*(i) pre-school education and education up to higher secondary school or equivalent; or*<br>*(ii) education as a part of an approved vocational education course.* | | |

- Religious trust**-** Taxable @ 18 per cent.
- Agriculture market yard**-** Taxable @ 18 per cent.

**Q116. Whether services of manpower outsourced to a labour contractor are exempt from GST?**

**Ans.** No such exemption for manpower supply exists under GST.

**Q117. A charitable institution is running an Arts & Science College and an Engineering College. The fees charged by the Institution is more than the Government fixed fees. What will be the GST implications?**

**OR**

**Discuss the taxability in respect of fees charged for providing (a) Education, (b) Notebooks and Books, (c) Noon Meals, (d) Hostel, (e) extra-curricular activities like coaching for NEET, teaching Hindi, Music etc.**

**Ans.** As per the entry no. 66 of *NN 12/2017-CTR-28.06.2017*, services provided by an educational institution to its students, faculty and staff is exempt.

An educational institution is defined in the aforesaid notification as:

*"Educational institution means an institution providing services by way of-*

*(i) Pre-school education and education up to higher secondary school or equivalent*

*(ii) Education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force*

*(iii) Education as a part of an approved vocational education course"*

From the above, it can be inferred that if the college satisfies the definition of educational institution and provides education as part of the curriculum for obtaining a qualification recognized by any law for the time being in force, the same would be considered as exempt. In all other cases, the supply would be considered as taxable regardless of fees limitation imposed by the Government.

**Q118. A registered person takes residential properties on lease and sub-lets them to individuals and corporates for residential purposes (long term). For such service, he collects rent on**

**monthly basis which includes charges for other ancillary services like laundry, food, cleaning, etc.**

**(i) Whether above services will be covered under entry no. 12 of *NN 12/2017-CTR-28.06.2017* and be exempt from tax (renting of immovable property for residential purposes)**

**(ii) If the above does not hold good, will the same be covered under entry no. 14 of the said notification if the declared tariff per day is equal to or less than ₹ 1000?**

**(iii) What will be the taxability of such transaction when entered into with a corporate?**

**Ans.** If a registered person takes the residential property on rent and sub-lets the same to individuals the implications will be as under:

(i) Relevant extract from *NN 12/2017-CTR-28.06.2017*:

| ***S.No.*** | ***Heading*** | ***Description of Services*** | ***Rate*** | ***Rate*** |
|---|---|---|---|---|
| *12.* | ***9963 or 9972*** | *Services by way of renting of residential dwelling for use as residence.* | *Nil* | *Nil* |

Following points merit attention:

- Character test: Activity of "sub-letting" is also in the character of renting.
- Nature test: Property is in the nature of residential dwelling.
- Usage test: Such sub-letting should be for use as residence.

If all the three tests are fulfilled, it will squarely fall within the exemption entry. In the given case, the activity of sub-letting to individual, the residential property for use as residence squarely falls within entry no.12 of the *NN 12/2017-CTR-28.06.2017*.

(ii) To examine that if it does not fall in the above entry say due to residential dwelling used for commercial purposes whether entry 14 of the *NN 12/2017-CTR-28.06.2017* can come as a rescue, let us look at entry 14:

| *S. No.* | *Heading* | *Description* | *Rate* | *Rate* |
|---|---|---|---|---|
| *14.* | *Heading 9963* | *Services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having value of supply of a unit of accommodation below one thousand rupees per day or equivalent.* | *Nil* | *Nil* |

Even though residential properties are not mentioned explicitly whether there is a scope to fit the property in the above entry due to the usage of term by "*whatever name called*". Going by the rule of *noscitur a sociis* the phrase "*by whatever name called*" should be constructed within the context in which it is written, as the associated words hotel, inn, guest house, club or campsite indicates commercial properties, and residential properties will not fit into the above entry going by the above rule of interpretation. Thus, the above entry shall not apply, in case of entry no. 12 of the *NN 12/2017-CTR-28.06.2017* cannot be fitted to provide the exemption.

(iii) Even if sub-letting is done to a corporate, as long as it satisfies the 3-tier test contemplated in entry no. 12 of the *NN 12/2017-CTR-28.06.2017*, exemption can be enjoyed and to whom renting is done is completely irrelevant and only the usage and nature of property is relevant.

**Q119. Services by way of classical music performance for consideration upto ₹ 1,50,000/- is exempt from GST. Whether the same is exempt in case of classical music performance on digital platform?**

**Ans.** Entry no. 78 of *NN 12/2017-CTR-28.06.2017* provides for the following exemption:

*"Services by an artist by way of a performance in folk or classical art forms of—*

*(a) music, or*

*(b) dance, or*

*(c) theatre,*

*if the consideration charged for such performance is not more than one lakh and fifty thousand rupees:*

*Provided that the exemption shall not apply to service provided by such artist as a brand ambassador."*

As the above exemption does not specifically exclude performance on digital platform, classical music performance is exempt where the consideration charged for such performance is not more than one lakh and fifty thousand subject to the condition that the artist does not provide the service as a brand ambassador.

**Q120. Whether supply of audit service to Government / Department of Government / Income Tax Department is exempt or taxable supply?**

**Ans.** As per section 2(53) '*Government'* means the Central Government. As per clause (23) of section 3 of the General Clauses Act, 1897 'Government' includes both the Central Government and any State Government.

The Income Tax Department ('IT Department') is a Government agency undertaking direct tax collection of the Government of India. It functions under the Department of Revenue of the Ministry of Finance. Government Agency is a permanent or semi -permanent organisation

There are certain services provided to Government which have been exempted under *NN 12/2017-CTR-28.06.2017* which have been enumerated below:

| ***Sl. No.*** | ***Chapter, Section, Heading, Group or Service Code (Tariff)*** | ***Description of Services*** | ***Rate (per cent.)*** | ***Condition*** |
|---|---|---|---|---|
| *(1)* | *(2)* | *(3)* | *(4)* | *(5)* |
| *3* | *Chapter 99* | *Pure services (excluding works contract service or other* | *Nil* | *Nil* |

| | | | | |
|---|---|---|---|---|
| | | *composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.* | | |
| *3A* | *Chapter 99* | *Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent. of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.* | *Nil* | *Nil* |
| *11A* | *Heading 9961or Heading 9962* | *Service provided by Fair Price Shops to Central Government, State Government or Union territory by way of sale of food grains, kerosene, sugar, edible* | *Nil* | *Nil* |

| | | | | |
|---|---|---|---|---|
| | | *oil, etc. under Public Distribution System against consideration in the form of commission or margin.* | | |
| *16* | *Heading 9964* | *Services provided to the Central Government, by way of transport of passengers with or without accompanied belongings, by air, embarking from or terminating at a regional connectivity scheme airport, against consideration in the form of viability gap funding:*<br>*Provided that nothing contained in this entry shall apply on or after the expiry of a period of three year] from the date of commencement of operations of the regional connectivity scheme airport as notified by the Ministry of Civil Aviation.* | *Nil* | *Nil* |
| *21B* | *Heading 9965 or Heading 9967* | *Services provided by a goods transport agency, by way of transport of goods in a goods carriage, to, -*<br>*(a) a Department or Establishment of the Central Government or State Government or Union territory ; or*<br>*(b) local authority; or*<br>*(c) Governmental agencies,*<br>*which has taken registration under the Central Goods and Services Tax Act, 2017 (12 of 2017) only for the purpose of deducting tax under Section 51* | *Nil* | *Nil* |

| | | | | |
|---|---|---|---|---|
| | | *and not for making a taxable supply of goods or services.* | | |
| *40* | *Heading 9971 or Heading 9991* | *Services provided to the Central Government, State Government, Union territory under any insurance scheme for which total premium is paid by the Central Government, State Government, Union territory.* | *Nil* | *Nil* |
| *51* | *Heading 9984* | *Services provided by the Goods and Services Tax Network to the Central Government or State Governments or Union territories for implementation of Goods and Services Tax.* | *Nil* | *Nil* |
| *72* | *Heading 9992* | *Services provided to the Central Government, State Government, Union territory administration under any training programme for which total expenditure is borne by the Central Government, State Government, Union territory administration.* | *Nil* | *Nil* |

Audit services provided to Government/ Department of Government/ Income Tax Department are not covered under the exemption list and hence the same will be taxable and it does not fall under any function entrusted to a Panchayat under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under Article 243W of the Constitution.

*Note: Reference to CGST Act, 2017 includes reference to SGST Act, 2017 and UTGST Act, 2017. 'Government' will also include State Government and Department of Government and Income Tax Department.*

**Q121. Supplier, being a health care service provider, located in one State is supplying pathology testing services (exempt) in other State. Such services are rendered by using machinery installed on moving vehicle and certain material. For this purpose, the vehicle, machinery and the material are transferred to the same establishment of the supplier located in the other State. Determine the taxability of inter-State transfer of vehicle, machinery and the material, though the final pathology testing services is exempt from levy of GST.**

**Ans.** The ultimate pathology services provided by the supplier, being health care services is exempt from levy of GST but the inter-State transfer of vehicle, machinery and the material used in providing pathology testing services may be subject to GST, as explained in detail in the forthcoming paragraphs.

It is understood that the vehicle, machinery and the material used in the pathology services will be classified as goods as per section 2(52). Further, the vehicle and machinery will fall under the classification of capital goods as per section 2(19) as such vehicle and machinery, considering its nature and usage, would have been capitalised in the books of accounts of the supplier. Further, the material used in the pathology services will be inputs as per section 2(59).

In the given case, since the supplier is having establishments in two different States, both such establishments located in respective States shall be distinct persons as per section 25(4) and any transfer of goods between such distinct persons even without consideration shall be deemed to be supply, in terms of para 2 of Schedule I.

Thus, it seems that the supplier is liable to pay GST on such distinct entity transactions. However, as per *Circular No. 1/1/2017-IGST dated 7.07.2017*, any inter-State movement of various modes of conveyance, including trains, buses, trucks, tankers, trailers, vessels, containers and aircrafts, carrying goods or passengers or for repairs and maintenance except in cases where such movement is for further supply of the same conveyance, shall be treated as '*neither a supply of good nor a supply of service'* and consequently IGST will not be payable on such movement.

Applying the same Circular in-spirit in the given case, the movement of vehicle carrying machine and material for pathology service will not amount to inter-State supply of goods and hence IGST is not leviable on movement of such vehicle. But, as far as the machinery is concerned, being a capital goods, the movement thereof to the distinct person will be a supply and leviable to GST. Since the supplier is engaged in provision of health care services which is exempt, the supplier would not have availed ITC on such machinery and material used in pathology services as per section 17(2). Hence, the tax has to be determined on the transaction value as per section 15(4) read with rule 27 by applying the corresponding rate of GST as applicable for such machinery and material. In case such vehicle and machinery is returned after completion of the pathology services, though the movement of vehicle may not be subject to IGST as per the above Circular, the machinery may still be liable to IGST again as explained above.

**Q122. In case of a works contract, suppose certain goods are directly procured by a project owner and supplied to the contractor (without any consideration).**

**Whether the project owner will be liable to GST on such free of cost supplies?**

**OR**

**Whether supply of material free of cost is to be treated as disposal of asset and leviable to tax under GST?**

**Ans.** Supply of services by contractor is limited to the specific activities listed in the contract awarded. Where the activities listed in the contract require the contractor to carry-out those services on goods belonging to the customer like installing an air-conditioner or an equipment, it is necessary that the said goods are given (or made available) to the customer to the contractor.

Where the customer provides the said goods to the contractor to carry-out those services, it is referred as '*free issue material*' (FIM). Providing FIM to contractor is not a supply because supply requires '*transfer of property*' in those goods from customer to contractor. The purpose for which FIM are issued to contractor is not to '*transfer*' them but to avail contractor's services on those goods. FIM issued to

contractor continue to remain business assets in the books of account of the customer. Hence, there is no supply in FIM from the customer to the contractor.

**Q123. Whether GST is leviable on sale of membership forms by an association registered under GST? Also specify the rate of tax and HSN code?**

**Ans.** Membership form of an association is sold for a consideration to those who are wanting to provide their details and join as a member upon subscription.

The supply here is the membership form itself. Since all conditions of supply as per section 7 are satisfied, the same shall be liable to GST.

It is covered under entry no. 154 of Schedule III of Central Tax Rate *NN 1/2017-CTR-28.06.2017*. Applicable HSN Code is 4820 and the rate of tax is 18 per cent.

**Q124. Whether supply of services through own website (not an aggregator) is taxable under GST without any threshold?**

**Ans.** Section 24 requires compulsory registration without any threshold limit for electronic commerce operator required to collect TCS. If a person makes supplies through their own website, there is no liability of TCS. Hence, the provisions of compulsory registration would not be applicable to such a person. The threshold limit of turnover provided under section 22 for registration and consequential payment of tax would continue to apply to such service provider (not being e-commerce operator) making supplies through their own website.

**Q125. ABC is a partnership firm in the business of providing logistics services to customers using the services of transportation companies. ABC neither owns any vehicles nor has any delivery boys. It simply takes the request from customers only on its website ABC.com (no physical presence) and puts a request to transportation companies for fulfilling the transportation. There is no commission or agency involved between transportation companies and ABC. ABC is free to determine the pricing and charge whatever amount it wants from customers. The turnover of ABC is less than ₹ 10 lakh per annum.**

**Whether supply of services by ABC to its customer through its website taxable under GST?**

**Ans.** The assessee is a partnership firm. It is engaged in providing logistics services to customers using the services of transportation companies. The mode of operation is that it takes requests form customers on its website ABC.com and correspondingly puts a request to transportation companies for fulfilling the transportation.

It can be noticed from the query that there is no involvement of any type of commission or agency related services between the transportation companies and the assessee.

Further, it is also mentioned that ABC is free to determine the pricing and charge its customers and its turnover over is less than ₹ 10 lakhs.

The above facts categorically carve out that ABC is a logistics service provider as he charges his own price and in turn takes the entire responsibility of goods in question. Based on the facts, we can also conclude that the consignment note is also being provided by ABC.

With the above facts, we need to analyse the position from two angles.

a) The service provider ABC is under RCM

b) The service provider ABC is under Forward Charge Mechanism

when we analyse the provisions of law, we infer the following:

**UNDER RCM**

Section 23 specifies that certain persons are not liable to obtain registration and it covers *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.*

Section 23(2), provides that, Government may on the recommendation of the Council, by notification specify the category of person who may be exempted from obtaining registration under this Act.

In line with the above provisions, *Notification No. 5/2017-Central Tax dated 19.06.2017* was issued specifying that the 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 said act as the category of persons exempt from obtaining registration under the aforesaid Act.

One can consider the exemptions relating to provision of GTA services including services provided to unregistered persons, transportation of exempted goods etc. which is exempted *vide* entry no. 21 & 21A of *NN 12/2017-CTR-28.06.2017* as amended from time to time

a) *Services provided by a goods transport agency, by way of transport in a goods carriage of –*

   *(a) agricultural produce;*

   *(b) goods, where consideration charged for the transportation of goods on a consignment transported in a single carriage does not exceed one thousand five hundred rupees;*

   *(c) goods, where consideration charged for transportation of all such goods for a single consignee does not exceed rupees seven hundred and fifty;*

   *(d) milk, salt and food grain including flour, pulses and rice;*

   *(e) organic manure;*

   *(f) newspaper or magazines registered with the Registrar of Newspapers;*

   *(g) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; or*

   *(h) defence or military equipments.*

b) *Services provided by a goods transport agency to an unregistered person, including an unregistered casual taxable person,*

Therefore, ABC is not liable to obtain registration where its services are liable to be taxed under RCM and the notified recipients pays tax under section 9(3) or they are totally exempted vide exemption notification referred above.

**UNDER FORWARD CHARGE MECHANISM**

It can be seen from section 24, that there is no compulsion for a mandatory registration of supplier of logistics services. Hence, as per section 22, the person is required to obtain separate registration in each State/UT from where the taxable supplies of goods or services or both are being made if the aggregate turnover in a financial year exceeds 10/20 lakh rupees as the case may be.

Since the turnover of ABC as mentioned in the query does not exceed h₹ 10 lakhs, they are not required to obtain registration.

**Q126. Whether consideration paid for availing the transportation services of the goods which are exempt/nil rated is taxable under GST regime? If yes, whether the same is taxable under reverse charge or forward charge?**

**Ans.** All GTA services irrespective of transportation of goods which are exempt/ nil rated are taxable, unless supply of services of the GTA are specifically exempted *vide* entry no. 21 under *NN 12/2017-CTR-28.06.2017* [For entry 21-Refer the answer given above in Q No. 128]

**Q127. In the rice market, the businesses generally do not pay tax under reverse charge on the transportation service availed by them as they contend that since the goods traded are exempt from GST no tax under reverse charge needs to be paid on the transportation services availed for transportation of such goods.**

**Whether such contention is right?**

**Ans.** Tax is not payable on the GTA services availed for transportation of rice not because rice is exempt from GST but because GTA services for transportation of rice are specifically exempted under *NN 12/2017-CTR-28.06.2017 vide* entry no. 21. [For entry 21-Refer the answer given above in Q No. 128]

**Q128. Explain the GST applicability (including ITC) for a company engaged in inter-State passenger transport services through air-conditioned and non-airconditioned buses?**

A. *Classification of Service:* SAC heading 9964 covers passenger transport services as below:

- Group 99641 - Local transport and sightseeing transportation services of passengers
- Group 99642 - Long-distance transport services of passengers

SAC 99642 Long-distance transport services of passengers is relevant in the given case of inter-State passenger transportation through buses.

| SAC Code | Description |
|---|---|
| 996421 | Long-distance transport services of passengers through Rail network by Railways, Metro and the like |
| 996422 | Long-distance transport services of passengers through Road by Bus, Car, non-scheduled long-distance bus and coach services, stage carriage and the like |
| 996423 | Taxi services, including radio taxi & other similar services. |
| 996424 | Coastal and transoceanic (overseas) water transport services of passengers by Ferries, Cruise Ships and the like |
| 996425 | Domestic/International Scheduled Air transport services of passengers. |
| 996426 | Domestic/international non-scheduled air transport services of Passengers. |
| 996427 | Space transport services of passengers. |
| 996429 | Other long-distance transportation services of passengers. |

B. *Rate of GST:* As per entry no. 8 of *NN 11/2017-CTR-28.06.2017* read with entry no. 15 of *NN 12/2017-CTR-28.06.2017* as amended:

| Road Transport (Buses) | | GST Rate |
|---|---|---|
| **Contract Carriage (without ITC):** | • Air-Conditioned Contract Carriage<br>• Non-air-conditioned Contract Carriage conducting tour, tourism, Charter or hire | 5% |
| | • Non-air-conditioned Contract Carriage other than tourism, conducting tour, charter or hire | Exempted |
| **Stage Carriage (without ITC):** | Air-conditioned stage carriage | 5% |
| | Non-air-conditioned stage carriage | Exempted |
| **Cabs, Taxi, rickshaws:** | Metered cabs, or Auto rickshaws | Exempted |
| | Others including radio taxi and motor cabs<br>• Without ITC<br>• With ITC | 5%<br>12% |

Key definitions relevant in this context are as under:

*a.* '**Stage Carriage**' as per Section 2(40) of the Motor Vehicle Act 2(40) *means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey.*

*b.* '**Contract Carriage'** as per section 2(7) of the Motor Vehicle Act *means a motor vehicle which carries a passenger or passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person*

*authorised by him in this behalf on a fixed or an agreed rate or sum—*

*a. on a time basis, whether or not with reference to any route or distance; or*

*b. from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey, and includes:*

*(i) a maxicab ["maxicab" means any motor vehicle constructed or adapted to carry more than six passengers, but not more than twelve passengers, excluding the driver, for hire or reward] and*

*(ii) a motor cab notwithstanding that separate fares are charged for its passengers ["motorcab" means any motor vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward]*

C. *Tax Invoice requirement:*

- The fourth proviso to rule 46 provides that a registered person, other than the supplier engaged in making supply of services by way of admission to exhibition of cinematograph films in multiplex screens, may not issue a tax invoice in accordance with section 31(3)(b) subject to the following conditions, namely, -

  (a) the recipient is not a registered person; and

  (b) the recipient does not require such invoice, and

  shall issue a consolidated tax invoice for such supplies at the close of each day in respect of all such supplies.

- Rule 54(4) provides that where the supplier of taxable service is supplying passenger transportation service, a tax invoice shall include ticket in any form, by whatever name called, whether or not serially numbered, and whether or not containing the address of the recipient of service but containing other information as mentioned under rule 46.

Further, the signature or digital signature of the supplier or his authorised representative shall not be required in the case of issuance of ticket in accordance with the provisions of the Information Technology Act, 2000.

Hence, in the case of passenger transportation services, the supplier may issue tax invoice in the form of ticket, serially numbered or not, containing address of the recipient of service (Passengers) or not, but containing other information as mentioned above under rule 46.

**D.** *Place of supply* provisions as stipulated in the IGST Act in respect of passenger transport services through air-conditioned and non-airconditioned buses are:

- As per 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

  Further, 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 as per section 12 (2).

  Explanation to section 12 (9) provides that, 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.

- Section 12 (2) stipulates that the place of supply of services, except the services specified in sub-sections 12(3) to 12(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.

- Section 12(10) states that 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.

**Q129. Whether GST is applicable for members monthly contribution in the hands of Resident Welfare Association?**

**Ans.**

1. Residents Associations in the form of Resident Welfare Association ('RWA') or Co-Operative Housing Society ('CHS') are formed by members of a residential complex or housing society to run, operate and manage the facilities, amenities or services for their common use on a no profit no loss basis so that members get the services collectively, which they had to otherwise arrange individually, in an efficient and economical manner. Members contribute to RWA or CHS for such services. The issue which arises is whether GST is applicable in the hands of RWA or CHS on such contributions by residents who are actually the members or constituents thereof. The question is answered below purely on the basis of provisions in GST Law and without getting into the aspects of principle of mutuality and whether the judgment of the Hon'ble Supreme Court in the *State of West Bengal vs. Calcutta Club Ltd.[2019-TIOL-449-SC-ST-LB*] will be applicable under the GST provisions.

2. As per section 9 read with section 7, CGST is levied on all intra- State supplies of goods or services or both made or agreed to be made *for a consideration by a person in the course or furtherance of business*. In section 2(84), the term "*person"* is defined to include i*nter alia* an association of persons or a body of individuals, whether incorporated or not. Thus, a society as defined under the Societies Registration Act as well as a cooperative society registered under any law relating to cooperative societies will be a person and such entity will be distinct from its members thereof. Further, as per section 2(17)(e), the term *business* includes *provision by a club, association, society, or any such body (for a subscription or other consideration) of the facilities or benefits to its members*. The effect

of conjoint reading of these provisions is that the supply of facilities, amenities or services by a RWA or CHS to its members thereof against monthly contributions is treated as supply for a consideration by a person in the course or furtherance of business, hence it is exigible to GST as intra-State supply. *GST is thus, leviable in the hands of RWA or CHS on such contributions by residents subject to the exemptions available to RWA or CHS as elaborated in paras 4 and 6 hereunder.*

3. Further, the legislative intent to cover the activities such as provision of facilities or services by RWA or CHS to its members within the scope of GST is obvious and in fact the same is strengthened with the retrospective amendment in section 7(1) of the CGST Act [effective from 01.07.2017] by section 108 of the Finance Act 2021 to include such activities / transactions specifically within the meaning of scope of supply, by inserting clause (aa) therein including an explanation thereto as follows: -

*"(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.*

*Explanation. — For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;"*

4. However, an important relief is provided to RWA / CHS under entry no. 77 of *NN 12/2017-CTR-28.06.2017*, as amended, which provides an exemption in respect of service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution for-

(i) the provision of carrying out any activity which is exempt from the levy of GST (e.g., recovery from members for electricity charges and statutory dues levied on the RWA or CHS as a whole); or

*(ii)* sourcing of goods or services from a third *person for the common use of its members* in a housing society or a residential complex, *upto ₹ 7,500 per month per member.*

The exemption under Clause (i) is in addition to the exemption referred to in Clause (ii). These exemptions, particularly one upto ₹ 7,500 per month per member is a major relief for RWA or CHS. The point to note is that this exemption is restricted to *sourcing of goods or services from a third person* for the *common use of its members* such as provision of security, conservancy, maintenance of common property and facilities etc. and not to facilities and services provided by the RWA or CHS to its members on chargeable basis such as supply of electricity by DG sets, use of Society Hall on rental basis, paid parking space, penalty for delayed payment of charges etc.

5. An issue related to the above exemption - If the contribution per month per member exceeds ₹ 7,500/-, is the entire amount exigible for tax or it is the excess over ₹ 7,500/- that will be exigible? There are contrary views on this. In *CBIC Circular 109/28/2019-GST dated 22.07.2019*, view has been expressed that "*in case the charges exceed ₹ 7,500 per month per member, the entire amount would be taxable*". In other words, this Circular provides that the limit in entry 77(c) of *NN 12/2017-CTR-28.06.2017* is NOT slab-based but absolute. i.e., if maintenance charges are 9,000/- then GST will apply on ₹ 9,000 and not ₹ 2,500 (9,000-7,500) over and above ₹ 7,500/. However, this part of the Circular has been quashed by the Hon'ble Madras High Court in *Greenwood Owners Association & Ors. v. UoI* decided on 01.07.2021 *[2021-TIOL- 1505-HC-MAD - GST]* as "*contrary to the express language of the entry in question*" and the Court held that the term 'upto' connotes an upper limit and means that any amount till the ceiling of ₹ 7,500 would be exempt for the purposes of GST, that is, it is only the excess over ₹ 7,500 that will be liable to tax.

[Moreover, this Circular was also quashed by the Hon'ble Madras High Court (Single Bench) in the matter of *TVH Lumbini Square v. Union of India (WP No. 27100 of 2019 and WMP No. 26479 of 2019)* wherein Hon'ble Madras High Court held that the GST shall be levied only on the amount in excess of ₹ 7,500 per month per member and not on the entire amount.]

This decision was appealed before the Division Bench of Hon'ble Madras High Court by the Department. The Division Bench has stayed the decision of the Single Bench with respect to the quashing of the Circular and posted the matter for further hearing i.e., still pending. Hence, the matter may be prone to litigation if a RWA / CHS decides to pay tax only on the excess above ₹ 7,500/- per month per member, until it reaches the finality.

NOTE: Considering that entry no. 77(c) provides a limit of ₹ 7,500 per month as exemption under *NN 12/2017-CTR-28.06.2017*. The term "*up to*" this limit was interpreted by the Madras HC in *Greenwood Apartment Owners' Association* case to state that this exemption is a 'slab-based' exemption available to all apartments and tax is applicable on maintenance charges 'above' this limit. However, against this decision, appeal before the Division Bench has been admitted and final outcome is awaited.

It must be noted that the claim of exemption attracts reversal of proportionate ITC. If the decision of the Madras HC is followed and exemption claimed by all apartment-owners as a slab-based limit and proportionate ITC is reversed, and in case this decision gets reversed, output tax will be exempt only for apartments whose share of maintenance charges is below ₹ 90,000 per year and demand in respect of all others would be raised. But then, ITC already reversed proportionately cannot be restored if the time limit to claim credit under section16(4) has expired.

6. RWA or CHS is treated as "*person*" and as such it is eligible for threshold exemption of ₹ 20 Lakhs as per section 22(1), even where the contribution exceeds ₹ 7,500/- per month per member and therefore as long as its aggregate turnover is within the threshold limit, it is not liable to GST. Further, where the aggregate turnover is beyond the threshold limit of ₹ 20 Lakhs, but contribution from the individual members towards sourcing of goods or services for common use is less than ₹ 7,500 per month per member, such contribution being exempt service as discussed earlier in para 4, the contribution shall not be exigible for levy of GST. However, where the *aggregate turnover of the RWA or CHS exceeds the threshold of ₹ 20 lakhs and the contribution from members exceeds ₹ 7,500/- per month per member, GST will be applicable in the hands of RWA or*

*CHS on the contributions from members exceeding ₹ 7,500 per month per member.*

7. RWA or CHS is also entitled to avail ITC on the inputs, input services and capital goods to the extent such goods or services are used in the course of furtherance business subject to such conditions and restrictions laid down in the GST Law.

**Q130. Discuss GST implication when tenants of immovable property (residential complex) use the space for commercial purposes.**

**Ans.** Residential complexes often have some units which are used for commercial activities as per zoning and town planning rules of local authorities, e.g., we typically have provisional stores, medical shops, bakeries etc. in residential complexes. Their owners are members of RWA or CHS and contribute towards common expenses. There appears to be no judicial pronouncement or guidance from the Government as to whether the aforesaid exemption under entry no.77 of *NN 12/2017-CTR-28.06.2017* makes any distinction between contribution by members residing in the RWA or CHS with that of those who carry out any commercial activity there. There may be a view that this exemption is only for contribution towards residential use as it refers to a housing society or a residential complex. However, going by the plain reading of the specific entry in the exemption notification *(i.e., NN 12/2017-CTR-28.06.2017)*, it can be strongly argued that the exemption is qua the supplier / provider of service (RWA or CHS) for the specified service without any condition as to its use by the recipient member. Therefore, as long as the entity providing the service meets the specified conditions, the exemption will be available to it in respect of contribution by any commercial units in the residential complex. In the instant case, the taxability of services provided by the RWA / CHS will not be altered by usage of the space by the recipient, either residential or commercial.

**Q131. State the GST implication on commercial premises of co-operative society with respect to collection of contribution from members towards-**

**(a) Property tax (this comprises tax charged by local authority for entire building premises of the society which**

**consists of members individual units as well as parking space, common area used by members)**

**(b) Water charges (water being used by members individually as well for common utility purpose)**

**(c) Electricity charges (for use of lift and fittings installed in common area, passages, compound etc.)**

**Ans.** Co-operative society does not itself hold any immovable property in its name. Super built-up area ('SBA') of each apartment comprises of undivided share of common areas, parking spaces and passages and undivided share ('UDS') of each apartment comprises the total land area within the compound divided to each apartment.

Sum total of SBA of all apartments in the complex will be exactly equal to the total constructed area. And sum total of UDS allocated to all apartments in the complex will be exactly equal to the total land area.

(a) Property tax is assessed by the local administrative body ('LAB') for each apartment taking into consideration total constructed area and total land area. Property tax liability of co-operative society is always 'nil' because co-operative society by itself does not own any SBA or UDS and merely represents the collective ownership of all apartment-owners. Since demand from the LAB will be against each apartment-owner, co-operative society involved in facilitating collection and remittance of property tax assessment of all apartment-owners. It is covered under 'pure agency' provided, no mark-up is added for administrative services provided.

(b) Water charges is charged by LAB to the co-operative society against a single water meter in respect of total water consumed by all apartment-owners. There may be internal sub-meters to more accurately allocate the charges towards water consumption by individual apartment-owners. Since the tests of pure agency cannot be satisfied, inward supply of water charges is a cost incurred by the Society and should be included in the outward supply charged to each apartment-owner as 'maintenance charges' with applicable GST.

(c) Electricity charges is different because each apartment is fitted with an electricity meter by the concerned Distribution Company (DISCOM) under the Electricity Act, 2003. As per section 12 of the said Act, makes it clear that only a license-holder is permitted to 'sell' electrical energy, namely DISCOM or Independent Power Producers (IPP). As such, inward supply of electricity to co-operative society will only be in respect of metered electricity charges for common area lighting and not in respect of individual apartment consumption. If charges of society's meter are allocated to apartment-owners, it would be part of '*maintenance charges*' with applicable GST. But, if the Society provides a service to the apartment-owners of collecting and paying their individual apartments' meter charges, then it would be a case of pure agency, subject to conditions in rule 33.

**Q132. A hotel located in Chennai makes a supply to an employee of a company situated in SEZ.**

**Whether charging IGST on tax invoice by the hotel is correct? Also state the procedure, if any, to be followed.**

**Ans.** A clarification to this specific query has already been provided by CBIC *vide Circular No.48/22/2018-GST dated 14.06.-2018*. The relevant excerpts from the circular are reproduced below.

| ***Sl. No.*** | ***Issue*** | ***Clarification*** |
|---|---|---|
| *1.* | *Whether services of short-term accommodation, conferencing, banqueting etc. provided to a Special Economic Zone (SEZ) developer or a SEZ unit should be treated as an inter-State supply (under section 7(5)(b) of the IGST Act, 2017) or an intra-State supply (under section 12(3)(c) of the IGST* | *1.1 As per section 7(5)(b) of the Integrated Goods and Services Tax Act, 2017 (IGST Act in short), the supply of goods or services or both to a SEZ developer or a SEZ unit shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce. Whereas, as per section 12(3)(c) of the IGST Act, the place of supply of services by way of accommodation in any* |

| | | |
|---|---|---|
| | *Act, 2017)?* | *immovable property for organising any functions shall be the location at which the immovable property is located. Thus, in such cases, if the location of the supplier and the place of supply is in the same State/Union territory, it would be treated as an intra-State supply.*<br>*1.2 It is an established principle of interpretation of statutes that in case of an apparent conflict between two provisions, the specific provision shall prevail over the general provision.*<br>*1.3 In the instant case, section 7(5)(b) of the IGST Act is a specific provision relating to supplies of goods or services or both made to a SEZ developer or a SEZ unit, which states that such supplies shall be treated as inter-State supplies.*<br>*1.4 It is therefore, clarified that services of short-term accommodation, conferencing, banqueting etc., provided to a SEZ developer or a SEZ unit shall be treated as an inter-State supply.* |

Therefore, being an inter-State supply, by virtue of section 5 of the IGST Act, IGST is payable in the instant case.

**Q133. The delivery is terminating at the factory of the vendor and the buyer is undertaking transportation of goods in a different State, but the buyer has asked the vendor to generate e-way bill. Whether this will be an inter-State or intra-State supply?**

**Ans.** Section 10(1)(a) provides the place of supply when "*Supply involves movement of goods*" of the IGST Act. It states that 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.

In the given case although the delivery of the goods is received at the factory of the vendor, it is for the purpose of further movement as e-way bill is being raised by the vendor and the delivery will terminate to the recipient only in the other State(s) thereby making it to be an inter-State supply.

**Q134. Mr. H (a registered person) from Delhi went to Mumbai and purchased some goods in Mumbai. Whether CGST and SGST or IGST will be charged on such transaction?**

**Ans.** Section 10(1)(a) of the IGST Act states that *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*.

From the above section it is clear that when Mr. H travels to Mumbai and purchases some goods in Mumbai, the nature of transaction will depend on the point of termination of movement of goods for delivery to the recipient. In other words, it will depend on whether the goods are moving from Mumbai to Delhi or not. In order to classify the nature of transaction in a correct manner, the supplier has to ensure whether the goods are moving or not as he is the person making taxable supply.

Therefore, if the delivery is terminated at the counter, the supplier may treat the transaction as intra-State Supply and charge CGST & SGST. However, if Mr. H specifically mentions that the goods are to be billed at Delhi address with his GST number, then the supplier can treat the transaction as inter-State supply and charge IGST subject to condition that the supplier collects enough evidence to prove that the goods are really travelling to Delhi *viz.,* e-way bill, copy of lorry receipt, insurance, railway receipt, courier note etc. This position will not change whether Mr. H is registered or unregistered except that the GST number will not be quoted in the invoice.

If the goods are carried on by hand by Mr. H, supply of such goods shall be at Mumbai, as the movement of goods terminates for delivery to Mr. H and the supplier will not be in a position to treat as inter-State transaction to bill IGST as he will not be sure whether the goods are really reaching Delhi or not.

**Q135. The goods are sold by a supplier in Mumbai to a Delhi Customer (unregistered) at Mumbai. The PAN of Delhi Customer and his address were mentioned in tax invoice. Goods were delivered on the sales counter itself at Mumbai.**

**Will it be an inter-State supply (based on destination-based principle) or intra-State supply?**

**Ans.** The goods are delivered on the sales counter at Mumbai, the movement of goods is terminated for delivery to the recipient. Hence, this will be treated as intra-State supply only. This will not be treated as inter-State supply based on the concept of "*consumption based*" as according to the transaction and the law, it shall be deemed that the said goods have been consumed in the same State, though the address and PAN of the recipient is of Delhi address in the tax invoice (only for identity of recipient, address is mentioned).

**Q136. X Ltd. billed Y Ltd. and sent goods directly to Z Ltd. which is located in SEZ (Bill to Ship to). All the three entities are located in the same State.**

**Whether CGST and SGST or IGST should be charged on supply of goods by X Ltd to Y Ltd.?**

**OR**

**Explain the impact of Bill-to and Ship-to transactions on place of supply?**

**Ans.** Section 10(1)(b) of the IGST Act stipulates that: "*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*;"

In the instant case, X Ltd has billed to Y Ltd and sent the goods to Z Ltd who is located in SEZ in the same State.

| Supplier (X Ltd) | Bill to (Third Party) – (Y Ltd) | Ship to (Recipient) – (Z Ltd) |
|---|---|---|
| STATE "A" | STATE "A" | STATE "A" – SEZ |

From the above, the place of supply will be the principal place of business of the third person (Y Ltd) on whose direction the supplier (X Ltd) has sent the goods to the recipient (Z Ltd).

Since, location of the supplier and place of supply are in the same State, CGST and SGST should be charged on the supply of goods by X Ltd to Y Ltd in terms of section 8 of the IGST Act.

Further, pursuant to section 7(5)(b) of the IGST Act, the transaction between Y Ltd and Z Ltd will attract IGST since Z Ltd (though located is in the same State but) is located in a SEZ.

**Q137. Whether CGST and SGST/UTGST or IGST will be charged on supply of goods made by M to –**

**1) registered person where the responsibility for delivery of goods is on the supplier**

**2) unregistered person where the responsibility for delivery of goods is on the supplier**

**3) Registered person where the responsibility for delivery of goods is on the buyer, and the supplier does not have the address of the clients in his records**

**4) unregistered person where the responsibility for delivery of goods is on the buyer, and the supplier does not have the address of the clients in his records**

**Ans.** Registered / unregistered status of the person will not alter the nature of supply.

Section 10(1)(a) of the IGST Act provides that where 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.

1) & 2) Where responsibility for delivery of goods is on the supplier:

Nature of supply will be based on where the movement of goods gets terminated for delivery to the recipient and not based on the responsibility for the delivery of goods by supplier or by buyer. If the goods are going to be shipped to other State and supplier takes the responsibility for the movement of goods, then he will treat it as inter-State supply and charge IGST, and otherwise, if goods are moved to any other place in the same State, then he will treat it as intra-State and charge CGST/SGST. However, in case of bill to ship to model, the supplier may raise invoice on the supplier and treat the transaction as inter/intra-State depending on the location of the recipient and will ship to the address provided by the recipient.

3) & 4) Where responsibility for delivery of goods is on the buyer, and the supplier does not have the address of the clients in his records

When the supplier does not have any details of address of the client, he cannot be sure as to whether the goods are moved out of the State or not. This is a typical over the counter sale and hence, it should be regarded as intra-State transaction and CGST & SGST should be charged.

**Q138. An advertising agency has taken some space on rent in a mall for digital display of advertisement. Whether CGST and SGST or IGST should be charged for sale of space for advertisement?**

**Ans.** The advertisement agency has taken a space for rent in a mall for the advertisement purposes. This activity will be treated as renting of an immovable property and the place of supply of services will be the location of the mall.

In the absence of details in respect of the recipient place of business, the type of tax(es) leviable under GST Act(s) shall be –

- CGST & SGST, if the recipient of service (advertisement agency) and the supplier of service (space owner) both are in the same State.
- IGST, if they are situated in different States.

The second limb of the transaction is when the advertisement agency sells the rented space for advertisement. The place of recipient of

service will be taken as the place of supply, as the services stated in this query is not falling under any of the services listed in sub-sections (3) to (14) of section 12 of IGST Act.

Similarly, in the absence of details in respect of the recipient place of business, the type of tax(es) leviable under GST Act(s) shall be -

- CGST & SGST, if the recipient of service and the supplier of service are both in the same State.
- IGST, if they are situated in different States.

**Q139. Mr. B, a registered taxpayer, is a transporter registered in Gujarat. While transporting goods from Gujarat to Tamil Nadu his truck breaks down in Maharashtra. In Maharashtra the repair maintenance service provider who is also a registered taxpayer, does the repairing of truck, and raises the bill showing labour and material separately.**

**Whether CGST and SGST or IGST should be charged by such repair maintenance service provider?**

**Ans.** In the instant case, the supplier of service is in Maharashtra (registered person – repair maintenance service provider)

The recipient of service is in Gujarat (registered person – transport service provider)

The service stated in this query is not falling under any of the services listed in sub-sections (3) to (14) of section 12 of IGST Act and therefore as per section 12(1) thereof, the place of recipient of service will be the place of supply.

Hence, location of the recipient of service will be the place of supply.

Even though the service has taken place in Maharashtra, the recipient of service is a registered person in Gujarat and, hence his place of business will be taken as the location of service provider and *IGST* should be charged by such repair maintenance service provider.

**Q140. If a TV artist is registered in Gujarat (Ahmedabad) and is acting in Maharashtra or any other State other than Gujarat, where she doesn't have any place of business. TV serial is in Gujarati but is**

**made (Produced and Directed) by PQR Ltd, registered in Mumbai. Will it be inter-State or intra-State supply i.e., whether to charge IGST or CGST and SGST/UTGST for such supply?**

**Ans.** The TV artist is rendering her services in Maharashtra or any other State other than Gujarat.

She is registered in Gujarat (Ahmedabad) and doesn't have a place of business in Maharashtra.

PQR Ltd is registered in Mumbai. i.e., The location of the recipient of the service is in Mumbai.

As per the general or default principle stipulated in section 12(2), where location of supplier and recipient is in India, place of supply of service is the location of the recipient of service (B2B transactions) if the service is not falling under any of the enumerated services listed in sub-sections (3) to (14) of section 12 of IGST Act.

Hence, the place of supply in the instant case shall be the place of the recipient of service i.e., Mumbai.

From the above, the location of the supplier and place of supply are in different States i.e., Gujarat and Maharashtra (Mumbai), and hence it will be an inter-State supply and IGST shall be charged.

**Q141. A company based in Bengaluru is registered under GST. It has a laboratory-cum-workshop (situated in Bengaluru) where manufacturers/designers of electric vehicles can come and use the equipment to test the components that they have developed. Users (service recipients; registered persons) of such equipment come from all over India. Users are responsible for transporting the goods from their place of business to Bengaluru and back. The ownership of the goods always remains with the user (service recipient). The machines available to the user are not fixed to the earth or to any immovable property; they are capable of being moved from place to place.**

**If a service provider based in Tamil Nadu avails such services, whether IGST or CGST and SGST should be charged for use of the equipment?**

**Ans.** Section 12(1) of the IGST Act provides for determination of the domestic place of supply of services where the location of the

supplier of services and the location of the recipient of services are in India.

Section 2(15) of the IGST Act explains the location of the supplier of services. This is determined by applying the following 4 (four) rules in seriatim

| S.2(15) | Supply made from | Location of the supplier of services |
|---|---|---|
| (i) | Registered place of business | Registered place of business |
| (ii) | Fixed establishment other than registered place of business | Fixed establishment |
| (iii) | More than 1 establishment, whether place of business or fixed establishment | Location of establishment most directly concerned with the provisions of supply |
| (iv) | In absence of place of business or Fixed establishment | Usual place of residence |

Section 2(14) of the IGST Act explains the location of the recipient of services. This is determined by applying the following 4 (four) rules in seriatim

| S.2(14) | Supply is received at | Location of the recipient of services |
|---|---|---|
| (i) | Registered Place of Business | Registered place of business |
| (ii) | Fixed establishment other than registered place of business | Fixed Establishment |
| (iii) | More than 1 establishment, whether place of business or fixed establishment | Location of establishment most directly concerned with the receipt of supply |
| (iv) | In absence of place of business or fixed establishment | Usual place of residence |

Place of supply: General Principle-

The general or default principle is that the place of supply of service is the location of the recipient of service (B2B transactions), if the service is not falling under any of the enumerated services listed in sub-sections (3) to (14) of section 12 of IGST Act

In the instant case:

Location of supply of service is at Bengaluru

Location of supplier of service is at Bengaluru

Location of recipient of service is at Tamil Nadu

As the services stated in this query is not falling under any of the services listed in sub-sections (3) to (14) of section 12 of IGST Act, the location of such person (recipient of service) will be the place of supply namely Tamil Nadu.

Both the supplier and the recipient are in India. The place of supply of services (place of the recipient of service) will be Tamil Nadu. Hence, the supplier of services in Bengaluru will raise an invoice with IGST to the recipient of service who is in Tamil Nadu since it is an inter-State supply as per section 7 of the IGST Act.

**Q142. ABC Ltd., a Gurgaon (Haryana) based company have been awarded a work of simulation study services from Delhi based PSU. Later, ABC Ltd. awarded the same work to XYZ Ltd., another Delhi based company on sub-contracting basis. XYZ Ltd. provided simulation study services directly to the PSU.**

**Whether the supply made by:**

**(a) ABC Ltd. to Delhi based PSU and**

**(b) XYZ Ltd. to ABC Ltd**

**is an inter-State or intra-State supply?**

**Ans.** The nature of services of '*simulation study services'* will get covered under section 12(2) of the IGST Act, as it does not get covered under any of the sections from section 12(3) to (14) of the IGST Act.

Though, it is mentioned that, XYZ Ltd provided simulation services directly to the PSU, XYZ Ltd will be raising an invoice on ABC Ltd. and in turn, ABC Ltd. will raise invoice on the PSU.

The first transaction is between PSU, Delhi and ABC Ltd., Haryana, where the former is the service recipient and latter is service provider. The services are being provided from Haryana to Delhi. Since the location of the supplier and the place of supply are in two different States, it will be regarded as inter-State supply.

The second transaction is between ABC Ltd., Haryana and XYZ Ltd. Delhi where the former is the service recipient and latter is service provider. The services are being provided from Delhi to Haryana. Since the location of the supplier and the place of supply are in two different States, it will be regarded as inter-State supply.

**Q143. Mr. V, an employee of VWX Ltd. in Delhi came to see plant/factory of A Ltd. for business purpose. As per the policy of A Ltd, such employees need to follow the quarantine period. Therefore, A Ltd. provided quarantine facility to them in a hotel with whom A Ltd. has regular transactions. It is also decided that VWX Ltd will reimburse hotel charges to A Ltd. at actual cost without any additional fees/charges/margin. Thus, the hotel has raised invoice by charging CGST+SGST under SAC 996311.**

**(1) What will be the SAC at which A Ltd. needs to charge actual hotel cost from VWX Ltd.?**

**(2) Whether the reimbursement claimed will fall under the head "accommodation services" or "other services"?**

**(3) Whether CGST and SGST or IGST should be charged considering the registered place of VWX Ltd. is outside State of A Ltd. and services rendered may fall under the ambit of accommodation services?**

**Ans.** When hotel costs incurred are to be charged to VWX Ltd., company A Ltd. is not permitted to apply HSN 9963 because explanatory notes under HSN 9963 to scheme of classification of services states that only where 'short stay' accommodation (where possession is not transferred) is provided by hotels, inn, guest houses, clubs & other

similar establishments, it will be classifiable as hotel accommodation services under HSN 9963.

In this transaction, inward supply of hotel services is received by A Ltd. (to provide quarantine services to VWX Ltd.) and will be classified under HSN 9963 by the hotel. And when these costs are charged to VWX Ltd. then, being in the nature of business support services (even if, without adding a mark-up), it will be classified under HSN 9985 or something more appropriate but not HSN 9963.

When HSN is not 9963, the place of supply will be determined based on HSN applicable. It would be based on section 12(2) of the IGST Act and nature of supply (inter-State or intra-State) will be decided based on the location of the registered recipient.

**Q144. A works contractor registered in Kolkata undertakes construction service (works contract) for a factory located in Kerala.**

**a) Whether the works contractor should treat the supply as inter-State and raise IGST invoice without taking registration in the State in which the service is executed?**

**b) Should the works contractor procure materials locally from the State in which the service is executed against an IGST invoice and get the same delivered at the work site (local only) where he is not having registration, on a bill-to-ship-to model?**

**Ans.** As per section 12(3)(a), the place of supply of 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 shall be the *location at which the immovable property is located or intended to be located.*

Therefore, in the case on hand, since the immovable property is located in Kerala and the supplier of service is from Kolkata, it should become an inter-State supply. But, before we conclude, let us also practically examine other aspects.

Section 2(50) defines the term "fixed establishment" to *mean 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*;

Going by the above definition, we can appreciate that the Kolkata firm will have sufficient degree of permanence and suitable structure in terms of human and technical resources to supply service or to receive and use services for its own needs as it will be purchasing goods and availing the services at Kerala, as well as have a storage location for material purchased and space for labour. Therefore, it should regard itself as fixed establishment. Further, the querist should also consider the definition of the term "*location of the supplier of services*" as defined under section 2(71) as follows:

*"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;*

Upon applying sub-clause (b) & (c) of the above definition, it can be concluded that, the location of the supplier of service will be the fixed establishment i.e., the location of the establishment most directly concerned with the provision of supply.

Hence, the location of the supplier has to be considered as Kerala only and the supplier will be required to obtain either regular registration or casual taxpayer registration depending on the nature

of work and comply with the GST provisions by charging CGST & SGST.

**Q145. Mr. P registered in Gujarat, has property in Maharashtra which was rented to a registered person of Gujarat.**

**Whether IGST or CGST and SGST should be charged on renting of immovable property?**

**OR**

**Whether CGST and SGST or IGST should be charged on renting of immovable property in a State different from that of registration?**

**OR**

**A property is located in Kolkata and the owner of such property is located in Jaipur. He has no place of business in Kolkata.**

**Whether renting of such immovable property liable to GST? If yes, whether CGST and SGST or IGST is to be charged?**

**Ans.** The place of supply of the service in present case, being renting of immovable property, as per section 12(3) of the IGST Act shall be Maharashtra/ Kolkata. Location of the supplier of services is defined under section 2(15) of the IGST Act and as per clause (a) of this definition the location of supplier of service is Gujarat/ Jaipur.

As per section 7 of the IGST Act, when the location of the supplier and place of supply are in two different States, the transaction would be termed as inter-State supply and IGST shall be charged on this transaction.

**Q146. A photographer registered in Karnataka is providing services to a hotel registered in Kerala hosting a wedding.**

**Whether IGST or CGST and SGST/UTGST should be charged on such supply?**

**Ans.** In the given case, the place of supply of photography services may be determined on the basis of one of the following provisions:

Section 12(2) of the IGST Act *inter alia* provides that the place of supply of a service is the location of the recipient of service (B2B

transactions), if the service is not falling under any of the services listed in sub-sections (3) to (14) of section 12 of the IGST Act.

Section 12(7)(i) of the IGST Act lays down that the place of supply of services provided in relation to a celebration or services ancillary to such services, provided to a registered person, shall be the location of such person.

Section 12(3)(c) of the IGST Act lays down that the place of supply of services by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto *including services provided in relation to such function at such property* shall be the location at which the immovable property is located. Clause (d) of section 12(3) further lays down that any services ancillary to the services referred to in clauses (a), (b) and (c) shall be the location at which the immovable property is located.

**Q147. Mr. X, an unregistered participant attended paid webinar (in online mode) from the State other than the State where the webinar organizer is located. Whether the organizer should charge CGST / SGST or IGST?**

**Ans.** View – 1: Section 12(5) of the IGST Act specifies the place of supply specifically for training and performance appraisal. The provision states that the place of supply of services in relation to training and performance appraisal to, a registered person, shall be the location of such person; and if it is provided to a person other than a registered person, the place of supply shall be the location where the services are actually performed.

Therefore, the organizer should charge CGST and SGST as the place of supply is the location where the training service is provided to an unregistered person.

View – 2: The supplier of service is providing services online. Therefore, the relevant sub-section applicable for the case on hand is section 12(2)(b) of the IGST Act which states that when the services are supplied to an unregistered person, the place of supply shall be either the location of recipient where the address on record exists and in all other cases, it shall be the location of the supplier of services.

**Q148. PQRC Ltd., an Indian metro rail company, awarded detail design consultancy service works to AISA Inc., a Foreign Company for Indian Metro Rail Projects. AISA Inc. provides services to PQRC Ltd. through its permanent establishment ('PE') in Delhi, India.**

**Whether such supply is exigible to GST and what is the place of supply of such services? Explain the taxability of the transactions from both the receiver's and supplier's perspective.**

**Ans.** The nature of service being detailed design consultancy with respect to Indian Rail Metro Projects (an immovable property), the place of supply of services will be the place where the immovable property is located or intended to be located (i.e., in India), in terms of sub-section (3) of section 12 of the IGST Act if it is a domestic transaction or the default sub-section (4) of section 13 thereof.

In order to explain the taxability of the transaction from both the receiver's and supplier's perspective, we need to first decide whether the supply of service between AISA Inc. and PQRC Ltd. is a transaction within India or it's a case of import of services by PQRC Ltd. from AISA Inc. abroad. Therefore, while the location of PQRC Ltd. being an Indian company, is within India, we need to determine only the location of the supplier AISA Inc. for the purpose of this transaction.

The term "*location of supplier of services*" is defined in section 2(71) of the CGST Act as well as in section 2(15) of the IGST Act as –

"*location of the supplier of services means, -*

*(a) where the 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) …*

*(d) ……..*"

The term "fixed establishment" is defined in section 2(50) of the CGST Act as well as in section 2(7) of the IGST Act to mean "*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*."

AISA Inc. has PE in Delhi and services are provided to PQRC Ltd. through this PE. The PE status (for Income Tax purposes) indicates some degree of permanence and structure in operations of AISA Inc. in India. However, the PE status under Income Tax Act itself is not a criterion to decide the location of a supplier of services for GST purposes. PE as per Income Tax Act includes a fixed place of business through which business of the enterprise is wholly or partly carried on, whereas for GST such fixed place should be characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply or to receive and use services for its own needs. Hence, we need to ascertain whether the establishment of AISA Inc. in Delhi is registered under GST or whether it can be called "*fixed establishment*" based on the factual position on the aspects in its definition referred to above.

If the PE of AISA Inc. at Delhi has an adequate number of reasonably permanent qualified manpower with the necessary plant, machinery, equipment etc. to handle the consultancy assignment itself though may be with some support from parent organization, one can say the AISA Inc. PE qualifies to be "*fixed establishment*" and hence can be treated as "location of supplier of services" for the purpose of this transaction. If not, the establishment will not qualify as "*fixed establishment*" and consequently may not be treated as "*location of supplier of services*."

If the PE establishment of AISA Inc. at Delhi can be treated as "fixed establishment", then it would be a transaction of supply within India as the location of supplier and recipient both being in India. However, if the location of AISA Inc. has to be treated as outside India, the recipient PQRC Ltd. being located in India and as the place of supply of service is also in India as per section 13(4), it would be a transaction of import of services. [section 2(11) of the IGST Act]. The

taxability of the transaction from the perspective of both recipient and supplier would be as follows in the respective situations:

**Transaction of supply of service happens to be within India:**

*Taxability for Recipient - PQRC Ltd.:*

1. Not liable to pay IGST under RCM in respect of consultancy services received by it as it is not an import of services.

*Taxability for Supplier - AISA Inc. India PE*

1. Need to take GST registration at Delhi, if not already registered.
2. In respect of any services received from the Parent Company, pay IGST under reverse charge. Take ITC for the same.
3. Collect IGST or CGST / SGST under forward charge on provision of consultancy service to PQRC Ltd. depending on whether it is inter-State or intra-State supply, depending on where PQRC Ltd. is located.

**Transaction of supply of service is in the nature of import of services in India:**

*Taxability for Recipient - PQRC Ltd:*

- Pay IGST in respect of consultancy services received from AISA Inc. under reverse charge as it is import of services from their point of view. Take ITC for the same.

*Taxability for Supplier - AISA Inc. Parent Company abroad as well as PE in India*

- Since, it is not located in India for GST (despite PE which is not taken as location of supplier in India for GST purposes) - No GST registration and compliance required.

The taxability and GST compliance required by PQRC Ltd. in respect of its supplies to Indian Railway Projects would remain unchanged, irrespective of how the consultancy contract with AISA Inc. is dealt with for GST purposes.

**Q149. Whether CGST/SGST or IGST needs to be paid when Mr. X, registered in Maharashtra purchased goods from Maharashtra.**

**Mr. X pays to transporter registered in Madhya Pradesh for delivering the goods from Mumbai to Pune?**

**What if Mr. X is unregistered?**

**Ans.** In terms of section 12(8)(a) of the IGST Act, the place of supply of services by way of transportation of goods, including by mail or courier to, a registered person, shall be the location of such person.

In the instant case:

Supplier of transport service, by way of transportation of goods is located in Madhya Pradesh.

Recipient of transportation services is in Maharashtra.

Therefore, the place of supply is the location of the recipient of service i.e., Maharashtra.

Since, the location of the supplier and place of supply are in different States, it will be an inter-State supply and thereby the transporter will charge IGST for the transportation service provided.

Further, section 12(8)(b) stipulates that *the place of supply of services by way of transportation of goods, including by mail or courier to, a person other than a registered person, shall be the location at which such goods are handed over for their transportation*. Therefore, if Mr. X is unregistered, then the place of supply will be the place at which the goods are handed over for their transportation i.e., Pune. In the instant case, the location of the supplier of transportation service is in Madhya Pradesh and the place of supply will be Pune. Hence, even if Mr. X is unregistered, IGST needs to be charged by the transporter to Mr. X for the transportation services provided.

**Q150. A from Punjab purchased goods from B of Gujarat. A also undertaken GTA services for supply of goods which are liable to tax under reverse charge. Whether A is liable to pay IGST or CGST/ SGST?**

**Ans.**

(i) As per entry no. 1 of *NN 13/2017-CTR-28.06.2017*, the person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as

the receiver of service. If A (assuming he is a GST registered person) has paid or is liable to pay GTA for transportation services, he will be treated as the receiver of service and the location of the *recipient is in Punjab*.

(ii) As per section 12(8) of the IGST Act 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.

As such, in this case the location of the *recipient is in Punjab*.

(iii) The location of the supplier has been defined under section 2(15). In case his location is in a State other than Punjab, then IGST would be payable under RCM, else CGST/ SGST. Apparently, in the instant case location of the supplier seems to be Gujarat and thus IGST would be payable under RCM.

**Q151. If an unregistered freight vendor K having place of business in Maharashtra, provides transport services from Tamil Nadu, whether IGST or CGST and SGST is to be charged on such GTA services? Also state whether GST is to be paid under RCM?**

**Ans.** In this case the location of the supplier of service, i.e., GTA is in Maharashtra and the location of the recipient of services, let us assume is in any State other than Maharashtra, then IGST would be chargeable, else, CGST/ SGST and RCM would be applicable.

**Q152. Determine the nature of supply in case of post-paid services provided by telecommunication company in the same State and in different States?**

**Ans.** Section 12 of the IGST Act, contains provisions relating to place of supply when the service provider and recipient both are in India. In this regard, section 12(11) of the said Act, provides for place of supply of telecommunication services which is as follows:

(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;

It also provides for a situation *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*.

The telecommunication company is providing services in the same State or different States will not have any impact on the conclusion as drawn above.

**Q153. Whether IGST or CGST+SGST/UTGST will be charged on online inter-state orders of goods placed on an aggregator by a –**

**(a) registered person when the delivery responsibility is taken by the supplier**

**(b) registered person when the delivery responsibility is taken by the aggregator**

**(c) unregistered person when the delivery responsibility is taken by the supplier**

**(d) unregistered person when the delivery responsibility is taken by the aggregator.**

**Ans.** Section 10(1)(a) of the IGST Act provides that where 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.

In all the above cases, supply involves movement, and the movement terminates at the location of the recipient outside the suppliers State. Hence, IGST would be payable in all the situations above.

**Q154. Consideration for export of services is due for more than 12 months and there is no possibility of receiving the money. The taxpayer wants to write off the amount. Whether GST is payable even if the taxpayer writes off the whole invoice amount?**

**Ans.** *Zero rated supply:* As per section 16 of the IGST Act - (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.

Thus, export of goods & services is Zero rated supply with the certain conditions and a registered person can make Zero rated supply of goods or services or both under Letter of Undertaking ('LUT'), without payment of integrated tax) and claim refund of unutilised ITC.

*Export of services:* As per section 2(6) of the IGST Act "*export of services*" means the supply of any service when, –

(i) ……..

*(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and*

(v) …"

Receipt of convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India is one of the conditions to qualify export of service.

*Condition for exporting under LUT:* Rule 96A provide provision to be an export of goods or services under bond or LUT as –

*"(1) Any registered person availing the option to supply goods or services for export without payment of integrated tax shall furnish, prior to export, a bond or a Letter of Undertaking in FORM GST RFD-11 to the jurisdictional Commissioner, binding himself to pay the tax due along with the interest specified under sub-section (1) of section 50 within a period of —*

*(a) fifteen days after the expiry of three months, or such further period as may be allowed by the Commissioner, from the date of issue of the invoice for export, if the goods are not exported out of India; or*

*(b) fifteen days after the expiry of one year, or such further period as may be allowed by the Commissioner, from the date of issue of the invoice for export, if the payment of such services is not received by the exporter in convertible foreign exchange or in Indian rupees, wherever permitted by the Reserve Bank of India."*

From the above rules, it can be inferred that, even though the realization of export proceeds is a post export condition to be complied, it is also a basic requirement for the supply itself to be qualified as export of service, as it is one of the five limbs to the definition of export of service. Thus, a failure to comply with such condition results in the transaction not being qualified as export of service to begin with. Consequently, the zero-rated benefit under section 16 stated above is also not available. Thus, the transaction becomes squarely taxable under GST. Also, it is pertinent to note that in the absence of any specific provision or mechanism under GST to reduce the tax liability in the case of non-recovery from the customer/ recipient / overseas recipient, it is impossible to claim the non-existence of liability merely because the balance has been written off in the books of accounts.

Thus, in the case of non-receipt of forex proceeds against export of service, tax liability arises along with interest under section 50 and it cannot be any less due to mere writing off of such receivable in the books of accounts.

**Q155. Mr. A is providing personal services online *via* freelance portals where the end customer may be anywhere across the globe. Whether this shall be treated as export of service when both the work and payment are delivered through the online platform (converted to INR and withholding tax deducted)?**

**OR**

**VVV Ltd. is providing online tuitions only to foreigners using zoom and other online platforms like Google meet and Facebook messenger. What shall be the place of supply, and will such supply be intra or inter-State supply? Can such supply be considered as export of services?**

**OR**

**Whether online classes of music to a person located outside is treated as export of service?**

**OR**

**Whether training provided to the employees of foreign entity by a registered person through zoom call, is an export of services?**

**Ans.** In the instant case(s), the location of the supplier is India i.e., Taxable Territory and the location of the recipient is out of India i.e., non-taxable territory. Therefore, the place of supply needs to be determined as per section 13 of the IGST Act. Section 13(2) thereof states that for the supply of services outside India the place of supply shall be the location of the recipients of services.

In order qualify a transaction as "*export of services*", the definition as per section 2(6) of the IGST Act needs to be satisfied.

*(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; or in Indian rupees wherever permitted by the Reserve Bank of India 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;*

On reading and applying the above provisions to the situations provided, we can infer that, the supplier is located in India, recipient is located outside India, place of supply as per section 13(2) is outside India and payment is also received in foreign currency.

*Therefore, all the above case(s) can be treated as export of service as all conditions as enumerated above are satisfied including the receipt of money in convertible foreign currency. If the consideration is not received in convertible foreign currency, (or in INR if permitted by RBI), the same will not be regarded as export of service and will be liable for payment of IGST.*

The querist may also note that, with reference to the receipt of money through online platform (converted to INR and withholding tax deducted), *CBIC has issued Circular No. 88/07/2019-GST dated 01.02.2019*.

According to para 3.2 of the said Circular "*there is no restriction on invoicing of export contracts in Indian Rupees in terms of the Rules, Regulations, Notifications and Directions framed under the Foreign Exchange Management Act, 1999. Further, in terms of Para 2.52 of the Foreign Trade Policy (2015-2020), all export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency. However, export proceeds against specific exports may also be realized in rupees, provided it is through a freely convertible Vostro account of a non-resident bank situated in any country other than a member country of Asian Clearing Union (ACU) or Nepal or Bhutan".*

**Q156. An unregistered person located in India has purchased warranty extension for laptop from the manufacturer. The invoice has been issued in foreign currency from Singapore by the authorised reseller of the manufacturer. The extended warranty services will be provided by service centres located in India.**

**Which country should charge GST/ indirect tax on this service - Singapore or India?**

**Ans.** The supplier located in Singapore shall not charge GST as he is not a registered person in India. Further, the person providing warranty services to the customers in India for the Singapore company shall raise invoice on Singapore and by application of section 13 (3) (a) of the IGST Act the place of supply of services of Indian company shall be the location where such services are actually performed. In such scenario, since services are performed in India; thus, service of Indian company shall not qualify as exports.

**Q157. RKM Ltd. an Indian company provided services of works contract for construction and fabrication to a Spanish company. The services have been utilized for an India Railway Project in India.**

**Whether such supply is chargeable to GST and what is the place of supply?**

**Ans.** The place of supply for the above service is in India and such supply is also chargeable to GST as discussed below.

In the instant case, the supplier of services is located in India whereas the recipient of service, the Spanish company (as the person liable to pay the consideration) is located outside India. As such, section 13 of the IGST Act contains the provisions for determination of the place of supply of services where location of supplier or location of recipient is outside India. The place of supply of services in this case has be determined as per the provisions contained in the said section.

The service in question relates to works contract for construction and fabrication for a railway project which is in the nature of immovable property, as any service in the nature of works contract will lead to creation of an immovable property as per section 2(119). Since in the instant case, the works contract service as specified above is directly in relation to an immovable property for carrying out construction work and as per sub-section (4) of section 13 of the IGST Act, the place of supply of such service shall be the place where the immovable property (i.e., the railway project), is located or intended to be located. Since the railway project is located in India, the place of supply of such service will also be in India.

Even assuming that, the consideration for the services is being paid by the Spanish company in convertible foreign exchange, the transaction cannot be treated as "*export of services*" as it fails to meet one of the conditions specified in section 2(6) of the IGST Act namely the place of supply of such service has to be outside India. The services therefore cannot be treated as a zero-rated supply and hence the supply is chargeable to GST.

**Q158. XYZ Ltd., an Indian company, agrees to and provide its employees capabilities in the area of IT services like development of website, maintenance etc. to the foreign company BCD Inc. for providing services as instructed. And BCD Inc. pays to XYZ Ltd. and XYZ Ltd. pays to these IT professionals.**

**Whether supply of such professionals to BCD Inc. is export of services and hence not liable to GST?**

**Ans.** The classification of services involved is '*manpower supply service'*. Definition of '*export of service'* requires following conditions to be satisfied-

(i) Location of supplier of service is in India;

(ii) Location of recipient of service is outside India;

(iii) Place of supply is outside India;

(iv) Receipt of convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India;

(v) Supplier and Recipient are not merely establishments of a distinct person in accordance with Explanation 1 in section 8 of the IGST Act.

In the instant case, all the above conditions are satisfied; the place of supply of service is outside India whether by virtue of section 13(2) or even section 13(3) of the IGST Act. Hence, the said service qualifies as export of service under GST law.

**Q159. A researcher who is working as an advisor for various research projects got a contract from ABC International Institute based in New Jersey to make a Research Report. The fee for the said assignment shall be ₹ 25 lakhs.**

**a) Whether the above services provided to ABC International Institute are taxable under GST?**

**b) Whether the researcher needs to have GST registration if he works only as advisor?**

**Ans.** If the location of the recipient (ABC International Institute) is outside India and it satisfies all the conditions of export of services, then it would be a zero-rated supply under GST. However, if the location of the recipient is within India, then the said supply would be taxable under GST as there is no specific exemption provided for the same under the law.

In both the situations, the registration is compulsory under section 22 as the turnover of the researcher exceeds ₹ 20 lakhs. There is no exemption from registration even if he works only as an advisor.

Further, as per section16(3) of the IGST Act, a person having zero rated supply can opt either of the following options:

1) To supply goods or services under a bond or, a LUT without paying IGST and then claim a refund of unutilised ITC; or

2) To supply goods or services on payment of IGST and then claim the refund of tax paid.

**Q160. Whether charges debited to or recovered from foreign supplier by Indian customer due to defective goods supplied by him can be treated as a supply? If yes, will it be treated as zero-rated supply?**

**Ans.** The Indian customer has not made any new supply. He has deduced charges against defective goods supplied by the foreign supplier. In this case the value of the earlier supply received by the recipient is getting reduced. There is no new supply by the recipient. At the time of import of these goods the recipient would have paid import duty and IGST at the value invoiced by the foreign supplier. Now that the value for the purpose of paying customs duty in terms of section 14 of the Customs Act,1962 and section 15 of the CGST Act is reduced, excess tax paid may have to be reversed. The Indian customer in the present case, may approach for refund of excess tax paid under IGST in terms of section 54(8).

**Q161. The taxpayer is an exporter. The taxpayer has carried out some testing of material on instruction of the overseas importer. He has incurred expense of ₹ 50,000 and received the same from overseas importer towards payment for samples. Technically it is not reimbursement because testing bills are in the name of the taxpayer and also the reimbursement amount is not the exact amount that was spent by the taxpayer. The taxpayer has to issue bill for the same.**

**a) Whether the supply made by taxpayer is inter or intra-State supply as testing service is performed in Delhi for making an export?**

**b) Will the answer differ if the taxpayer has not procured order from the overseas importer?**

**Ans.** It can be understood from the above query that the taxpayer has carried out some testing of material. He incurred the expenditure towards payment for samples on his own and received the amount from overseas importer with margin.

a) The supply will be regarded as inter-State supply as the location of supplier is Delhi and place of supply if overseas as per section 13(2) of the IGST Act. This situation will not attract section 13(3)(a) as the services are *not provided* in respect of *goods which are required to be made physically available by the recipient of service*.

There is a requirement of a testing report by the overseas importer and the same is being arranged by the taxpayer from India. The transaction has to be regarded on principal-to-principal basis.

b) The answer will not differ if the taxpayer is unable to procure an order. The transactions are to be seen independently without any connection with the future transaction as the service is supplied and payment is received already.

**Q162. Please elaborate the meaning of intermediary in GST law by giving practical examples and explain the tax implications of the transactions entered into by an intermediary.**

**Ans.** According to section 2(13) of the IGST Act, "*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;*

*Circular No. 159/15/2021-GST dated 20.09.2021* has clarified the scope of 'intermediary' services along with some practical illustrations. It has clarified, *inter alia,* that:

*"It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging*

*or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply"*

The primary requirements of 'intermediary services' are as below –

a) Minimum of Three Parties

b) Two distinct supplies – Main supply and ancillary supply

c) Intermediary service provider to have the character of an agent, broker or any other similar person:

d) Does not include a person who supplies such goods or services or both or securities on his own account

The place of supply of service in case of intermediary is location of the supplier as per section 13(8)(b) of the IGST Act. The same is invoked *only when* either the location of the supplier of intermediary services or location of the recipient of intermediary services is outside India

Illustrations:

1. 'A' is a manufacturer and supplier of a machine. 'C' helps 'A' in selling the machine by identifying client 'B' who wants to purchase this machine and helps in finalizing the contract of supply of machine by 'A' to 'B'. 'C' charges 'A' for his services of locating 'B' and helping in finalizing the sale of machine between 'A' and 'B', for which 'C' invoices 'A' and is paid by 'A' for the same. While 'A' and 'B' are involved in the main supply of the machinery, 'C', is facilitating the supply of machine between 'A' and 'B'. In this arrangement, 'C' is providing the ancillary supply of arranging or facilitating the 'main supply' of machinery between 'A' and 'B' and therefore, 'C' is an intermediary and is providing intermediary service to 'A'

2. 'A' is a software company which develops software for the clients as per their requirement. 'A' has a contract with 'B' for providing some customized software for its business

operations. 'A' outsources the task of design and development of a particular module of the software to 'C', for which "C' may have to interact with 'B', to know their specific requirements. In this case, 'C' is providing main supply of service of design and development of software to 'A', and thus, 'C' is not an intermediary in this case.

Note that sub-contracting for a service is not an intermediary service for e.g. 'A' entered into a contract to provide the service of Annual Maintenance of tools and machinery to 'B' and 'A' sub-contracts a part or whole of it to 'C'. Though 'C' is dealing with the customer of 'A', 'C' is providing main supply of Annual Maintenance Service to 'A' on his own account, *i.e.,* on principal-to-principal basis. In this case, 'A' is providing supply of Annual Maintenance Service to 'B', whereas 'C' is supplying the same service to 'A'. Thus, supply of service by 'C' in this case will not be considered as an intermediary.

The taxability of the transactions entered into by an intermediary has been explained in the *FAQs on GST on IT/ITES* industry. The relevant FAQs are given hereunder:

*"Question 11: I am an Indian Company who makes software and sells it outside the country. I have hired a firm (not a related party) 'C' located abroad to facilitate the supply of software in Europe and the USA. Would I be liable to pay GST on the payments that I make to this entity abroad?*

*Answer: No. In this case, 'C' is covered by the definition of 'intermediary' [section 2(13) of the IGST Act, 2017]. The place of supply of such intermediary service is location of the supplier in terms of section 13(8) of the IGST Act, 2017. As 'C' is located outside India, GST is not payable in this case.*

*Question 12: What factors determine the location of 'C' (in question 11) as being outside India?*

*Answer: In terms of section 2(15) of the IGST Act, 2017, the location of a service provider is to be determined by applying the following steps sequentially:*

*(1) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;*

*(2) 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;*

*(3) 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*

*(4) in absence of such places, the location of the usual place of residence of the supplier.*

*The location of 'C' is to be determined by applying the criterion from (2), or (3), or as the case may be, (4).*

*Question 13: I am an agent in India of a foreign IT/ITES provider (principal located outside India). For agency services, I bill the principal in convertible foreign exchange. Whether GST liability arises in this case?*

*Answer: You are an intermediary and the place of supply of the service provided by you to the principal is in India irrespective of the mode of payment. Hence, GST is payable on the services provided by you as an intermediary to the principal."*

**Q163. An Indian company provides services of referring supplier of material in India to foreign client and then the foreign client negotiates with the Indians suppliers so referred. In case foreign company transacts with the referred supplier, Indian company gets commission in foreign exchange. Goods are supplied outside India by Indian supplier. Whether such transaction (supply of service) tantamount to export of service?**

**Ans.** Export of service is defined under section 2(6) of the IGST Act which is reproduced as under: –

*"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 or in Indian rupees wherever permitted by the Reserve Bank of India; 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*

To verify whether the place of supply is outside India or within India we shall have to read the provisions stated under section 13 of the IGST Act. Section 13(8) talks about 'Intermediary services' where place of supply shall be the location of supplier.

Intermediary is defined under section 2(13) of the IGST Act [For definition - Refer the answer given above in Q No.165].

If the services provided by Indian company falls under the ambit of 'intermediary services', then such services will not qualify as an export and would be liable to tax in India.

In this respect the clarification given by the Board *vide Circular No. 159/15/2021-GST, dated 20.09.2021*, would be important-

*"The concept of intermediary services, as defined above, requires some basic pre-requisites, which are discussed below:*

***3.1 Minimum of Three Parties:*** *By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.*

***3.2 Two distinct supplies:*** *As discussed above, there are two distinct supplies in case of provision of intermediary services; (1)*

*Main supply, between the two principals, which can be a supply of goods or services or securities; (2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply. A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.*

***3.3 Intermediary service provider to have the character of an agent, broker or any other similar person:*** *The definition of "intermediary" itself provides that intermediary service provider means a broker, an agent or any other person, by whatever name called….". This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive."*

From the above discussion an inference can, be drawn that the Indian company is providing services of the nature of an intermediary and thus the services provided by it will not qualify as export of services.

**Q164. "A" in Karnataka is engaged in the sale of rail pass for tourists to Britain. "A" will get commission from foreign principal for every pass sold.**

**"A" engages services of "B" in Tamil Nadu to co-ordinate with prospective tourists (unregistered persons), generate invoice for passes sold and "B" is authorised to collect some amount from tourist as service fee. "A" does not pay "B" any service charges. In other words, "B" in Tamil Nadu render services to "A" in Karnataka but collects fee from person located in Tamil Nadu.**

**(a) Whether "B" should pay CGST & SGST/UTGST or IGST on processing fee received from tourist?**

**(b) Whether the commission received by "A" from foreign company can be treated as consideration for "*export of***

***services*". If not, whether "A" should pay CGST and SGST/UTGST or IGST?**

**Ans.**

(a) In a case where consideration is payable for the supply, '*recipient of supply'* as per the CGST Act is the person who is liable to pay the consideration. In the instant case, B is providing facilitation service to customers against payment of service fee, meaning thereby that the recipient of facilitation service would be the customers. Since location of supplier and place of supply for the service as per section 12(2)(b) of the IGST Act (Extract given below) is State of Tamil Nadu, CGST and TNGST would be payable on the service fee.

*"Section 12. Place of supply of services where location of supplier and recipient is in India. —*

*(1) ….*

*(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."*

(b) Since A is facilitating provision of railway service by Britain Railways to customers in India, A would qualify the definition of intermediary. Intermediary service provided to foreign clients by supplier located in India is liable to GST as intra-State supply in the State of the supplier of service. Hence, A would be liable to pay CGST+KGST (Karnataka GST) on the commission received from Britain.

**Q165. A company is engaged in providing education consultancy services. It sends students to Foreign Universities and facilitates them to study abroad. The company gets commission from such Universities. Whether such supply is export of service or domestic supply attracting IGST?**

**OR**

**Determine tax treatment of service provided by education consultants if, they receive commission in foreign exchange from foreign education institutions on successful admission of students.**

**Ans.** *'Intermediary service'* when provided by a supplier located in India to recipient outside India is exigible to GST as intra-State supply. Section 2(13) of the IGST Act, defines intermediary [For definition - Refer the answer given above in Q No.165].

Since, provision of education by foreign institutes qualifies as supply of service and education consultants are facilitating such supplies, the services provided by education consultants qualify as intermediary service.

Further, as per section 13(8) of the IGST Act, the place of supply in case of intermediary services shall be the location of the supplier of services. In the instant case the location of supplier and place of supply are in the same State, and hence it is an intra-State supply. Such services would be liable to CGST and SGST of the relevant State in which the consultants are located.

**Q166. A company is engaged in providing consultancy / agency services to foreign company in Japan. Explain the taxability position [taxable or exempt or zero rated] of the following services considering that remittance in all such cases is received in foreign currency:**

**(a) Agency service for procurement of material from Indian supplier for export to foreign company**

**(b) Agency service for import of material from foreign company to customer in India**

**(c) Providing research report on Indian market to foreign company**

**Ans.** (a) In the present case, the company say XYZ Ltd. is providing agency services for procurement of material from Indian supplier say ABC Ltd for export to foreign company say PQR Inc. Hence, three parties are involved namely XYZ Ltd,

ABC Ltd & which PQR Inc. Two distinct supplies are involved being procurement of material as main supply and agency services as ancillary supply. Further, XYZ Ltd. is an agent of PQR Inc and is not providing the goods on his own account. Thus, XYZ Ltd. is an intermediary being a facilitator of purchase transaction between two parties. Furthermore, pursuant to section 13(8) of the IGST Act, place of supply for intermediary services is the location of the supplier of service. Hence, the supply in question will be exigible to GST.

(b) Similarly, the company is providing agency service for import of material from foreign company to customer in India, thus qualifying as an 'intermediary' being a facilitator of purchase transaction between two parties. As per section 13 of the IGST Act, place of supply for intermediary services is the location of the supplier of service. Hence, the supply in question will be exigible to GST.

(c) The company is providing research report on Indian market to foreign company, on its own account which does not qualify as *'intermediary services'* under section 2(13) of the IGST Act. The said R&D services do not fall under any of the specific services described under section 13 of the IGST Act. Hence, place of supply for R&D services would fall under the general clause of section 13 of the IGST Act being the location of the recipient of service.

Thus, the supplier of service is located in India, recipient of service is located outside India; place of supply of service is outside India; payment is received in foreign currency and supplier and recipient of service are not merely establishments of a distinct person in accordance with explanation 1 in section 8. Hence, the said services provided by the company satisfy all the condition of the '*export of service*' as per section 2(6) of the IGST Act, and thus would be '*zero rated'*.

**Q167. A Ltd. is engaged in manufacture and supply of packaging machinery used in the pharmaceutical industries in India and abroad with condition of warranty of spare parts of the machine.**

**If any spare is damaged during warranty period, then such part has to be supplied.**

**Whether there exists any provision in the GST law which allows supply of goods as part of warranty without charging GST considering the fact that the cost of such goods has already been collected with GST during the sales of the machines?**

**Ans.** Goods sold under a warranty cover are expected to be functional and defects during warranty period are not separately charged or payable by the customer. As such, when goods (with defects) were supplied, and GST charged on the assumption that the goods are defect-free, appropriate GST was already paid. Now, when warranty claim is made (after due verification of the nature of defect) and replacement parts are delivered, no further GST is chargeable on the replacement parts.

No separate provision in GST law is required for this purpose as the principle of law is found in the Sale of Goods Act,1930 (' SoGA') where section 15 talks about 'condition and warranty'. Goods that have defect fails to satisfy the '*test of merchantability*' and merchantability is '*condition*' to the contract and not mere '*warranty*'. Condition is one which brings the remedy of repudiation of contract, if it is not fulfilled whereas warranty is one which only provides the remedy of damages. In view of the principles and judicial decisions under SoGA, no new principle is required to be laid down under the GST law. Irrespective of whether the warranty claim comes from a customer within India or outside India, the tax treatment in GST or Customs is the same.

**Q168. A Non-Profit Organisation is receiving funds to execute an IT (Information Technology) supported rural health monitoring scheme in primary health care (PHC) at Gram Panchayat level. The NPO gets foreign contribution (FC) funds, but the donors cannot give grants/donation to this NPO.**

**Can the NPO bill for the services rendered /expenses incurred and avail funds. Is it necessary for the NPO to get register under the GST?**

**Is it necessary to raise tax invoice and collect GST?**

**Ans.** Where the funds received by NPO are not categorised as 'donation' whether due to restrictions relating to FC-funds or any other reason, such funds received tantamount to 'consideration'. The question that then arises is whether this consideration is towards supply of 'goods or services. From the limited facts provided, it appears that the title to the IT-infra equipment DOES NOT pass to the payer (of this consideration). As such, there is no supply of goods against this consideration. When it is not supply of goods, it will be supply of services for consideration.

The NPO will have to be registered (after threshold benefit under section 22 is exceeded) to accept this consideration and carry out the project. Entry no.1 to *NN 12/2017-CTR-28.06.2017* is applicable only when outward supplies are in the nature of charitable activities. In the present instance, since the funds received are found to be consideration for supply of services, after due verification of applicability of this exemption entry, a final conclusion can be reached regarding its taxability.

Where the funds received are towards reimbursement of cost of inward supplies of IT-infra (goods and services), the NPO will receive inward supplies from various suppliers with applicable GST. On the outward supply of services for consideration, GST will be applicable as the NPO is acting as a fulfilment-entity of the project for consideration (even though without any margin for its efforts). Registration will be required and applicable output tax payable with benefit of eligible ITC.

Once it is determined that funds received are not in the nature of 'donation' but consideration towards taxable outward supplies which are location-based supplies, then tax invoice must be issued and GST, as applicable, may be computed as per rule 34 and disclosed in the tax invoice and Form GSTR-1/3B filed by the NPO.

**Q169. An amount of ₹ 10,000 has been received in advance from a customer. After 12 months, the said advance is returned due to cancellation of order. What is the treatment in GST when advance received is refunded to the buyer?**

**Ans**-. When advance amount is refunded due to cancellation of order, the tax payer has to issue refund voucher in terms of section 31(3)(e). In

this regard, clarifications were given by the Board *vide Circular no 137/07/2020-GST dated 13.04.2020*. Excerpts of the said Circular are given below:

| *S. No.* | *Issue* | *Clarification* |
|---|---|---|
| *1.* | ***An advance is received by a supplier for a Service contract which subsequently got cancelled. The supplier has issued the invoice before supply of service and paid the GST thereon. Whether he can claim refund of tax paid or is he required to adjust his tax liability in his returns?*** | *In case GST is paid by the supplier on advances received for a future event which got cancelled subsequently and for which invoice is issued before supply of service, the supplier is required to issue a "credit note" in terms of section 34 of the CGST Act. He shall declare the details of such credit notes in the return for the month during which such credit note has been issued. The tax liability shall be adjusted in the return subject to conditions of section 34 of the CGST Act. There is no need to file a separate refund claim.*<br>*However, in cases where there is no output liability against which a credit note can be adjusted, registered persons may proceed to file a claim under "Excess payment of tax, if any" through* ***FORM GST RFD-01.*** |
| *2.* | ***An advance is received by a supplier for a Service contract which got cancelled subsequently. The supplier has issued receipt voucher and paid the GST on such*** | *In case GST is paid by the supplier on advances received for an event which got cancelled subsequently and for which no invoice has been issued in terms of section 31(2) of the CGST Act, he is required to issue a "refund voucher" in terms of section* |

| | | |
|---|---|---|
| | ***advance received. Whether he can claim refund of tax paid on advance or he is required to adjust his tax liability in his returns?*** | *31(3)(e) of the CGST Act read with rule 51 of the CGST Rules.*<br>*The taxpayer can apply for refund of GST paid on such advances by filing* ***FORM GST RFD-01*** *under the category "Refund of excess payment of tax".* |

- Hence, in case the supplier has issued the invoice before supply and paid the tax, he may issue a credit note in terms of section 34. The tax liability shall be adjusted in the return subject to conditions of section 34. There is no need to file a separate refund claim. In case, there is no output tax liability in the said month, he may proceed to claim refund under "*Excess payment of tax, if any*" through *Form GST RFD – 01*.
- Where an advance is received by the supplier for a service contract which gets cancelled subsequently and he has paid tax by issuing receipt voucher, he may issue refund voucher in terms of section 31(3)(e) read with rule 51. He may proceed to apply for refund of GST paid on such advance by filing *Form GST RFD – 01* under the category "*Refund of excess payment of tax*".

**Q170. Mr. D, a landlord has given his commercial property on rent has forgone rent for 3 months due to covid.**

**Whether GST is to be paid on the amount of rent forgone? Whether the foregoing of rent will be treated as an activity of agreeing to tolerate an act or do an act?**

**Ans.** Deciding not to receive consideration is tolerating an act but there is no consideration for the same. Hence, it cannot be treated as a separate supply.

Renting, generally, is a continuous supply of service as per section 2(33). The tax invoice as per section 31 would have been issued. As the supply is for the period of rental agreement, waiver in rent for few months may be treated as reduction in value of supply.

If invoice had been raised for the months for which rent is waived, credit note under section 34(1) shall be given to account for the reduction in value of supply and consequently tax value as well. Alternatively, the landlord can also give discount on the invoice itself (if the invoice is yet to be issued), if the rent is waived partially.

However, if the rent/lease agreement provides for stoppage of rent or suspension of all obligations during a *force majeure* period without any qualifications or riders, the tenant/lessee should immediately exercise its right by issuing a letter to the landlord/ lessor invoking *force majeure* event and intimating cessation of its obligation to pay lease rental during the period the *force majeure* event continues.

**Q171. An individual is receiving rent from commercial property.**

**Dispute arose at the time of renewal of rent (01-04-2017).**

**Settlement reached out of Court in the F.Y.2019-20. Rent was enhanced.**

**If the original rent is considered, his aggregate turnover is less than the threshold limit under the GST Act.**

**If the enhanced rent is taken into account, he would be crossing the turnover limit and to be covered under the GST Act.**

**From which date he is liable to be registered and pay GST?**

**How to deal with the arrears of rent and the impact of interest liability?**

**Ans.** It is important to bear in mind that 'out of Court' only refers to the forum on negotiations and the delay in reaching this settlement goes back in time to cover the consideration payable for the period 01-04-2017. Doubt about the valuation does not defer the time of supply. Supply of renting of commercial property has time of supply in 2017-18 itself. As such, registration is required to discharge self-assessed tax right from 2017-18 itself. Taxpayer's difficulty does not authorize omission to register, however genuine this difficulty may have been. Surely, taxpayer was aware of the amount demanded (at the start of settlement proceedings) and should have assessed the liability to tax and considered risk of interest and penalty in case of delay in conclusion of settlement proceedings.

Now, output tax is payable by every 'taxable person', but ITC is allowed to every 'registered person'. Registration cannot be 'back-dated'. Registration by taxable person is a question of fact and one cannot advise 'when' registration should have been taken if the question is asked in 2021. If this question were asked on 01-04-2017, then the answer would have been based on (i) amount of revised rent demanded by supplier (ii) probability of settlement of this demand (iii) risk of interest and penalty in case of favourable settlement terms but after 2 years of delay.

Arrears of tax, interest and mandatory penalty under section 73(11) must be paid by the supplier. Commercially, in case the delay in settlement is attributable to factors in recipient's control, additional claim towards interest and mandatory penalty could be included in the settlement terms. But GST law does not sympathize with the complexities and delays involved in this process of settlement negotiations that supplier has chosen to pursue.

**Q172. Tour & Travel business operators earn only commission and are supposed to pay tax on entire amount of package tour at a rate of 5 per cent without ITC while their outward supply i.e., commission is taxable at a rate of 18 per cent. Please explain.**

**Ans.** A tour operator pays tax on the commission/convenience fee by whatever name called charged from the customer. However, there are certain situations where the tour operator combines the services of two or more persons and provide organised tours on its own account to customers. In such scenario, he sells tour as a package without giving details of individual components e.g., travel, hotel etc. It is for such scenario only that entry no. 23 of *NN 11/2017-CTR-28.06.2017* provides a rate of 5 per cent without the benefit of ITC.

**Q173. Air travel agents earn commission from airlines and charge processing fees from the passenger. The valuation rule specifies that the value of the services provided by the air travel agent is 5 per cent / 10 per cent of basic fare.**

**Whether the value of the amount earned by the air travel agent from both the airlines and the passenger is 5/10 per cent of the basic fare and GST is paid accordingly on both such receipts?**

**Ans.** Rule 32(3) provides that 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 5 per cent of the basic fare in the case of domestic bookings, and at the rate of 10 per cent of the basic fare in the case of international bookings of passage for travel by air.

It is important to examine if the commission from passengers is sanctioned by the contract with Airline or independent of it. Where it is sanctioned by the contract with Airline, the expression 'in relation to' in rule 32(3) will subsume the entire consideration flowing from the contract with Airline, regardless of who actually pays such consideration. See section 2(31) which provides *"….whether by the recipient or otherwise…."*

If, however, the commission from passenger is independent of the contract with Airline, such commission will be independently taxed under HSN 9985 at 18 per cent being support services in relation to travel not in the nature of commission for booking of airline passage. It would be similar to commission received from Computer Reservation System (CRS) companies which hold and publish airline ticket inventory on an independent basis. Case law on this subject is well developed under the earlier tax regime.

**Q174. Whether a hospital is exempt from registration if its aggregate turnover is less than ₹ 1 crore?**

**Ans.** As per section 22, *"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"*

On the other hand, section 23 *interalia* states that *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* shall not be liable for registration.

Further, section 24 states the categories of persons who shall be required to be compulsorily registered. The relevant extract of section 24 is as under:

*"Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act, —*

*(i)…*

*..*

*(iii) persons who are required to pay tax under reverse charge basis;*

*…."*

Furthermore, there is no specific slab for persons with aggregate turnover of ₹ 1 crore for registration.

Thus, the situation can be categorised as under:

(i) **Hospital is engaged exclusively in providing exempt services**: If hospital is engaged exclusively in providing exempt services, it is not liable to be registered *vide* section 23.

(ii) **Hospital is engaged in providing exempt as well as taxable services:** In this situation, if its aggregate turnover exceeds ₹ 20 lakh, it is liable to be registered in States from where it makes a taxable supply of goods or services or both.

(iii) **Hospital is engaged exclusively in providing exempt services but liable to pay GST under RCM**: In this situation, it is liable to be registered compulsorily *vide* section 24, irrespective of its aggregate turnover.

**Q175. A charitable trust is running a hospital and also a medical store. Total turnover of medical store is more than ₹ 40 lakh and hence the trust obtains registration under GST. Whether tax is payable on the turnover of medical store, hospital and on donation received by the trust?**

**Ans.** 'Aggregate turnover' in section 2(6) includes all transactions of supply and therefore registration would become necessary when the aggregate turnover crossed the threshold including turnover of medical store. Tax is, however, payable only on taxable turnover and not on exempt turnover. Registration is not a pre-condition to pay tax

on taxable supplies made. Registration is a procedure required in order to be able to pay tax on taxable supplies.

For the purposes of aggregate turnover, (unconditional) donation received must be excluded as it is not a supply. 'Aggregate turnover' will include-

(i) taxable but exempt supplies of healthcare services and

(ii) taxable supplies of sale of medicaments in medical store.

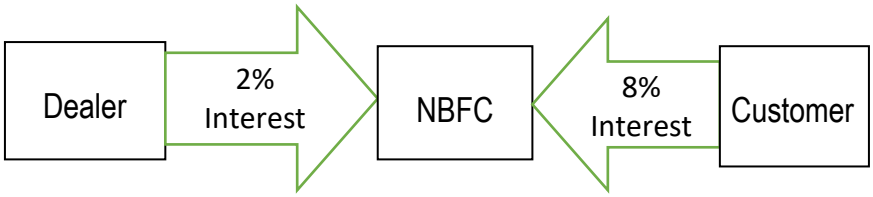
**Q176. Whether an unregistered party whose turnover is below ₹ 20 lakhs can make supply of service to foreign country without GST Registration?**

**Ans.** Yes, it is permitted without getting registered under section 24(i). Refer *Notification No. 10/2017- I.T., dated 13.10.2017* which permits inter-State supplies below threshold limit under section 22 to be made without registration.

**Q177. A NBFC operates its business wherein a product is purchased by customer from dealer at "No Cost EMI" and the payment to dealer is made by the NBFC. The income earned by NBFC from dealer is termed as "subvention income". Clarify the taxability of such subvention income under GST.**

**Ans.** *A. SUBVENTION INCOME*

A customer who purchases goods from the dealer requires financing. NBFC acts as a financier and provides loan to the customer. At this juncture, there is an MOU between the dealer and the NBFC to provide this finance to the customer either at a lower interest rate or as no cost EMI, in order to make the financed purchase more attractive. The differential interest rate or the element of interest in such EMI offered without any cost to the customer is recovered by the NBFC from the dealer. Thus, NBFC earns this income which is popularly known as 'Subvention Income', 'Interest Subvention' or 'Interest Subsidy'.




C. As per section 7 (1), the expression *'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;

The GST Implication on such subvention income under the GST shall be as under:

*SCENARIO #1 – Exemption as interest income*

- Money received from dealer by the NBFC is in lieu of the interest payable by the customer on the loan or EMI advanced to the customer, for financing the goods.
- Consideration as per section 2(31) [extract given below], may be paid not only by the recipient of the supply but by any other person.

"*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 amount of subvention income may be calculated as an interest on the loan or EMI as per the underlying MOU between dealer and NBFC.
- Such payment of interest subvention could be subject to tax deduction under section 194A of the Income Tax law, re-establishing that the money received is in the form of interest.

On the above lines, if the subvention income is treated as interest income, taxpayer may have the possibility of claiming it as an exempted supply under entry no. 27 to *NN 12/2017-CTR-28.06.2017* [For extract of entry-Refer the answer given above in Q No.88].

*SCENARIO #2 – Taxable as Business Support Service*

- Interest subvention provided by dealer to the NBFC may not be a mere reimbursement of finance cost which otherwise could have been born by the customer.
- The lesser interest rate or no cost EMI scheme extended by the NBFC to the customer may not be for all the products but only those cases where the NBFC has an underlying MOU with the dealer, with the objective of supporting the sales of the dealer's goods.
- Thus, the NBFC is indirectly supplying the service of business support to the dealer by extending lesser rate interest or no cost EMI, thereby supporting to accelerate sales of the dealer.
- Accordingly, such transaction can be treated as a business support service provided by NBFC to the dealer.
- In such case, the subvention income received by the NBFC from the dealer could be treated as business support services and subject to tax @ 18 per cent under SAC 9985999 Other Support Services.

- Such view may be supported if the MOU between the NBFC and the dealer specifies about the promotion and facilitation of the sales of the dealer in a collaborative manner.

*SCENARIO #3 – Taxable as Service – Agreeing to act*

- The lower interest rate or no cost EMI offered by NBFC to the customer is a result of an MOU between the NBFC and the dealer.
- Thus, the NBFC's agreement to act in accordance with the MOU is a supply provided by the NBFC to the dealer, for which consideration is received by the NBFC from the dealer in the form of subvention income.
- Such agreement to act is covered under supply of service as per Schedule II para 5(e).

*'SCHEDULE II*

*ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES*

*5. Supply of services - The following shall be treated as supply of services, namely:*

*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;'*

- Though Schedule II is not a form of deemed supply rather only a direction on the classification of supply of goods or services, if the transaction between NBFC and dealer otherwise falls within the scope of supply, then the classification would be under the said category.
- In such scenario, Classification would be under SAC 999792 '*agreeing to do an act*' and the same would be taxable @ 18% as per entry no. 35 of *NN 11/2017-CTR-28.06.2017* (as amended).

C. Since multiple views are possible in the case of such subvention income received by NBFC from the dealer, the taxability or exemption of such supply would largely be dependent on how the financing is structured between the three parties read along with the terms and conditions of the MOU. Hence, one must exercise caution in

evaluating the taxability on such subvention income on a case-to-case basis.

**Q178. Whether sale/redemption of cryptocurrency constitutes supply?**

**Ans.** Supply includes all forms of supply of goods or services or both. The term 'goods' has been defined in section 2(52) to include, every kind of movable property other than money and securities.

Money has been defined in section 2(75) to mean *"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;".* As on date, cryptocurrency has not been recognised by the RBI. Therefore, it cannot be covered by the definition of 'money'.

Securities has been defined in section 2(101) to have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956. [For the definition of the term '*securities*' under section 2(h) of the Securities Contracts (Regulation) Act, 1956, - Refer the answer given above in Q No.10].

It can be seen that cryptocurrency is not covered by any of the above parts of the definition of securities. Goods under the GST law includes every kind of movable property. Here, cryptocurrency is not tangible and therefore cannot be considered as '*goods*' under GST. But it is a well-known fact, that cryptocurrency is being accepted as a mode of payment in many parts of the county. Hence RBI, at best, can recognise cryptocurrency as a *'currency'*.

Services under GST means '*anything other than goods'*. Therefore, cryptocurrency may be classified as a 'service'. There is another view that it should be classified as goods in line with software. Thus, ambiguity still remains on the classification of cryptocurrency and its taxation.

Recently, the Central Economic Intelligence Bureau ('CEIB') recommended 18 per cent GST on cryptocurrency platforms. The

CEIB has suggested that bitcoin might be categorized as an 'intangible assets' class, and GST could be imposed on all transactions.

The key points of the proposal are –

- Treatment of cryptocurrency ₹mining' as a supply of service since it generates cryptocurrency and involves rewards and transaction fees.
- Taxing of ₹wallets' storing keys. Wallet service providers should be registered under GST.
- Registration of cryptocurrency exchanges under GST and levy of tax on their earnings.
- Trading in cryptocurrency to be taxed @18 percent.
- Buying and selling of cryptocurrencies to be considered as a supply of goods.
- Other related facilitating transactions, including supply, transfer, storage, accounting to be treated as services.
- Determination of value of cryptocurrency.
- Where both buyer and seller are in India, transactions to be treated as a supply of software and taxable at the buyer's location.
- For transfer and sale, the place of supply to be the location of the registered person. However, where the sale is to a non-registered person, the supplier's location is considered a place of supply.
- Integrated GST payable on transactions outside the taxable territory and considered as import or export of goods.

The CBIC will have to put forth the proposal on taxation of cryptocurrency before the GST Council for consideration. Due to the absence of clarity, one needs to factor in the applicability of taxes that can be imposed on cryptocurrency.

**Q179. At the time of physical verification of assets, a mismatch is found as no entry was passed in the books of accounts due to pending differences. Can the said difference be considered as a deemed supply?**

**Ans.** If the stock is found to be less than the stock as appearing in the books of accounts, or is found to be more than the stock appearing in the books of account, valid reasons are required to be given along with reconciliation of the difference. If the difference is not explained, the gap in case of shortage may be considered by the revenue authorities as removal of goods or that of dislodged goods without invoice and in case it is found to be more, the same may be considered as unaccounted stock being traded without GST invoices. Thus, the same is not amounting to deemed supply under Schedule I. Other implications in terms of penalty and prosecution depending on the quantum of the difference in the stock may arise under the GST Act(s).

**Q180. G Ltd is engaged in manufacturing business, sells car from block of assets.**

**Whether it will be treated as supply of goods? Whether GST is leviable on the transaction value?**

**Ans.** Section 7 which provides the scope of supply reads as under:

*"(1) For the purposes of this Act, the expression —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) ……..*

*(c) ……*

*(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II…."*

- Schedule II contains the list of activities which shall qualify as either supply of goods or supply of services. The relevant extract of Schedule II is reproduced herein below:

*"SCHEDULE II*

*[See section 7]*

*ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR 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, such transfer or disposal is a supply of goods by the supply of goods by the person"*

- On a reading of the above provisions, it is apparent that section 7(1A), provides that a transaction that qualifies as 'supply' under section 7(1), then by virtue of Schedule II, it needs to be determined whether it is supply of goods or supply of services.
- Sale of car forming part of block of assets is a 'supply' by virtue of section 7(1)(a) and such sale would qualify as a supply of 'goods' under section 7(1A) read with para 4(a) of Schedule II.

  Thus, sale of car from the block of assets by G Ltd., would qualify as supply of goods by virtue of section 7 read with Schedule II.
- Under *NN 8/2018-CTR-25.01.2018*, it is mentioned that in case of supply of old and used motor vehicle GST shall be charged on the value that represent margin of the supplier, on supply of such goods. The value that represents the margin of the supplier for levy of GST is determined as under -

  i. in case of a registered person who has claimed depreciation under section 32 of the Income-Tax Act, 1961 on the said goods, the value that represents the margin of the supplier shall be the difference between the consideration received for supply of such goods and the depreciated value of such goods on the date of supply, and where the margin of such supply is negative, it shall be ignored; and

ii. in any other case, the value that represents the margin of supplier shall be, the difference between the selling price and the purchase price and where such margin is negative, it shall be ignored.

Accordingly, in respect of the sale of car from the block of assets by G Ltd., GST should not be levied on the transaction value. However, in such scenario, GST shall be levied on the value that represent the margin of the supplier (assuming G Ltd. has not availed the ITC in respect of such old car/motor vehicles) to be determined in accordance with the method provided under the above notification.

**Q181. Whether there is any concessional rate of tax for sale of old vehicle? Discuss the related provisions.**

**Ans.** Sale of old vehicle by a registered person is a taxable supply whether such person is in the business of buying and selling of used vehicles or is engaged in any other business [Refer the answer given above in Q No.183].

*NN 8/2018-CTR-25.01.2018 / Notification No. 38/2017-I.T. (Rate), dated 13.10.2017* provide concessional rate of tax on supply of old and used motor vehicles provided the supplier of such goods has availed ITC. The reduced rates are as under:

1. Old and used, petrol liquefied petroleum gases (LPG) or compressed natural gas (CNG) driven motor vehicles of engine capacity of 1200 cc or more and of length of 4000 mm or more –18 per cent

2. Old and used, diesel driven motor vehicles of engine capacity of 1500 cc or more and of length of 4000 mm– 18 per cent

3. Old and used motor vehicles of engine capacity exceeding 1500 cc, popularly known as Sports Utility Vehicles (SUVs) including utility vehicles – 18 per cent

4. All old and used vehicles other than those mentioned at S. No. 1 to S.No.3 above – 12 per cent.

The above concessional rates are applied on the value which represents the margin of the supplier, on supply of such goods. In case of a registered person who has claimed depreciation under

section 32 of the Income-Tax Act,1961 on the said goods, the margin of the supplier shall be the difference between the consideration received for supply of such goods and the depreciated value of such goods on the date of supply. Where the margin of such supply is negative, the same is to be ignored and no tax is required to be charged.

It may be noted that while income tax law requires depreciation to be computed on the block of assets, for the purpose of computing the margin of supplier, under GST law, depreciation needs to be computed on the specific motor vehicle being sold. For this purpose, the rate of depreciation is to be borrowed from the income tax law.

In any other case, the value that represents the margin of supplier shall be, the difference between the selling price and the purchase price and where such margin is negative, it shall be ignored.

It is interesting to note that value of second-hand goods has also been prescribed under rule 32(5). However, the difference between rule 32(5) and *NN 8/2018-CTR-25.01.2018/ Notification No. 38/2017-I.T. (Rate), dated 13-10-2017* is that while rule 32(5) is applicable only in case of persons dealing in buying and selling of second-hand goods, the said notifications are applicable for all kinds of taxpayers. Further, while the notifications provide a separate value for goods on which depreciation has been claimed under the Income-tax Act, 1961, rule 32(5) provides only one value (margin of supplier) for all kinds of second-hand goods. It is worthwhile to note here that rule 32(5) is optional and not mandatory.

**Q182. Whether late delivery charges deducted by the buyer against the invoice payment exigible to GST?**

**Ans.** As per para 5 (e) of the Schedule II , *"agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" shall be treated as supply of service and the same is exigible for GST at the rate of 18 per cent , SAC 9997, under entry no. 35 of *NN 11/2017-CTR-28.06.2017*, as other miscellaneous services. The issue is whether the deduction of late delivery charges by buyer against invoice payment would be treated as supply of service and be exigible to GST. There are contrary views on this.

One view is that the contract between the parties is for supply of goods or services. The late delivery charges clause is there only as a deterrent to ensure that the delivery is not delayed beyond schedule or in other words, inducement to supplier to make supply within committed time. It cannot be interpreted as another agreement between parties that delay would be acceptable and tolerated by the buyer against the late delivery charges payment. A supply of service has to be agreement based and there is no such agreement from the buyer in the arrangement. Further, such payment is only a compensation for damage and no element of service can be read in the arrangement. Again, it can be said that to the extent of delay, the value of supply reduces as the buyer only pays less amount if, he receives the supply beyond a point of time. In the Service Tax regime, CESTAT Delhi in *M/s South Eastern Coalfields Ltd. [TS-1120-CESTAT-2020]* has held that delayed delivery charges do not attract service tax under a similar entry in service tax as "*Declared Service*." When the assessee receives such charges from the defaulting contractors it cannot be said that the assessee is tolerating the non-performance or delayed performance. Moreover, a contract cannot be read to be agreeing to a breach of a contract. A breach of contract is not tolerated and that is why an amount is imposed to deter breach. This contract is for execution and not for the breach. It was also held in *Commissioner of Central Excise, Hyderabad-IV v.Victory Electricals [2013 TIOL 1794 Tribunal MAD LB]* that wherever the taxpayer, as per the terms of the contract and on account of delay in delivery of manufactured goods is liable to pay a lesser amount than the agreed price as a result of the contractual terms, such reduced price should be treated as the '*transaction value'*, regardless of whether the clause is titled '*penalty*' or '*liquidated damages*'.

International jurisprudence also supports the view that liquidated damages cannot be a consideration for supply/tolerance an act. It was also upheld by the *Australian Tax Office vide their Ruling GSTR 2001/4 (GSTR) & GSTR 2003/11*, wherein it has been clarified that damage or loss or injury does not constitute a supply under the provisions of Australian GST. The European Court of Justice in the case of *Societe Thermal v. Ministere de I'Economie [(2007) S.T.I 1866, Celex No. 605J0277]* has held that where the client exercises

the cancellation option available to him as compensation for the loss suffered and which has no direct connection with the supply of any service for consideration, it is not subject to tax. The Court of Appeal (UK) in case of *Vehicle Control Services Limited [(2013) EWCA Civ 186],* has said that payment in the form of damages or penalty for parking in wrong places or in wrong manner is not a consideration for service as the same arises out of breach of contract with the parking manager.

However, the other view is that by deducting late delivery charges, the buyer is tolerating the act or situation of delay in delivery and refraining from any legal action against the supplier for consequences of such delay. To that extent, the action of the buyer falls within the scope of this service and the deducted amount is exigible to GST. The latter view has been taken by the Revenue since the service tax days and in GST Advance Rulings also it has been held that such late delivery charges are exigible to GST. It is quite likely that the buyer may decide to go with this later view, treat the late delivery charges as liable for GST and deduct the amount including GST at 18 per cent. In such situation, the buyer will have to then issue a tax invoice for the same.

A related issue is whether the supplier can avail ITC against the tax invoice issued by the buyer for the above late delivery charges. Though there is no specific guidance available in this regard, it can be said that once the activity is held to be supply of service, the supplier can claim that such services are used or intended to be used in the course or furtherance of his business and eligible for ITC as per section 16 as in the absence of such clause of late delivery charges, he may not get the order itself.

There is also one more aspect for analysis. As per entry no. 5 of *NN 13/2017-CTR-28.06.2017*, in respect of services supplied by the Central Government, State Government, UT or local authority to a business entity excluding a few services specified therein, the liability to pay GST is on the recipient business entity located in India under RCM. If the late delivery charge is liable to tax as supply of service, then, where the buyer who deducts late delivery charges happens to be Central Government or State Government or UT or local authority, whether the supplier himself is required to pay GST on such

deduction under RCM? The answer is that the supplier is not required to pay tax under RCM in such a situation because as per entry no. 62 of *NN 12/2017-CTR-28.06.2017*, Services provided by the Central Government, State Government, UT or local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Central Government, State Government, UT or local authority under such contract is exempted from GST. As the service itself is exempt the liability for paying GST under RCM does not arise.

**Q183. Whether GST is leviable on sale of franchise rights**?

**Ans.** While the GST Law has not defined "franchise", the definition from the Finance Act, 1994 can be borrowed. The Act provides that franchise, "*means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved."*

Franchising is a mode by which one party is allowing the use of its branch, business model, name, and other intellectual property to another party in return for consideration - generally known as royalty payments.

GST at the rate of 18 per cent is leviable on franchise fee and royalty payment under HSN 9983.

When someone starts a franchise, the owners of the company must approve the person first. If approved, the person can then start the franchise business and run it. However, they are under certain limitations and restrictions as to how they run their business. The said restrictions apply when they want to sell their franchise rights as well the person to whom the sale is made should be approved by the company.

Franchising is akin to opening a new branch of an existing business from where the franchisee will carry out the commercial activities. In case of sale of franchise rights by a franchisee to any other person, care must be taken to verify whether the Franchisor has permitted to retransfer the Franchise as a transferable right. In such cases, transfer of the business of Franchisee with an intention to continue

the operation with all the assets and liabilities of the business the same is covered by entry no. 2 of NN 12/2017-CTR-28.06.2017 - Services by way of transfer of going concern, as a whole or an independent part thereof and is exempt from tax. However, this is not the case, and the Franchisor will retain the 'transferability' of these rights and the transfer of the business will not amount to 'going concern' transfer by the Transferor (Franchisee) to the Transferee (New Franchisee) and in such cases it will be an itemized transfer of assets and liable to tax at applicable rates.

**Q184. Whether GST is leviable on ocean freight in case of import on FOB or CIF basis? If yes, whether under forward charge or reverse charge basis?**

**Ans.** As per section 7(1)(b), supply includes - *(b) import of services for a consideration whether or not in the course or furtherance of business.*

Further as per Section 2(11) of the IGST Act, ''*import of services*" means the supply of any service, where the supplier of service is located outside India, the recipient of service is located in India and the place of supply of service is in India.

Thus, ocean freight is an import of service.

Pursuant to section 5(3) read with entry no. 10 of *NN 10/2017-ITR-28.06.2017,* GST shall be paid on reverse charge basis by the importer on '*Services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India'.*

Further, as per the Corrigendum to *Notification No. 8/2017-Integrated Tax (Rate), dated the 28.06.2017*, *'Where the value of taxable service provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India is not available with the person liable for paying integrated tax, the same shall be deemed to be 10 % of the CIF value (sum of cost, insurance and freight) of imported goods.'*

Hence, it can be inferred that if an exporter transports the goods through a vessel from outside India to India, then the importer is liable to pay GST on transportation services, irrespective of the fact

whether consideration for that service will be paid by the exporter or importer. In case of import on FOB basis, since the freight cost is borne by the Indian Importer, GST on RCM shall be calculated on such freight value. In the case of import on CIF basis, where freight cost is borne by the overseas exporter, abovementioned notification prescribes the mechanism to calculate the taxable value for RCM purposes.

However there exist an issue that: 'Importer' is specifically termed as the person who is liable to pay tax on RCM basis as per the above-mentioned notification. Whereas, in the case of CIF basis transaction, the liability to pay ocean freight to the shipping line is that of the overseas exporter and not that of the Indian importer. Thus, an issue arises as to whether the importer can be treated as recipient of service when the services from the shipping line is actually received by the overseas exporter. The question arises as to whether the notification can expand the scope of '*service recipient'* when the section has empowered to levy RCM only on the recipient.

*Gujarat High Court landmark ruling:*

Entry no. 10 of *NN 10/2017-ITR-28.06.2017* stating 'Importer' as the person responsible to pay tax under RCM was challenged on the ground that it was ultra-virus of section 5 of the IGST Act which makes only the 'recipient' liable to pay tax under RCM.

In the case of *Mohit Minerals v. UOI & Others [2020-TIOL-164-AHMDGST]*, the Gujarat High Court pronounced landmark judgement on 23/01/2020. Key aspects are as follows:

- Entry no 10 of *NN 10/2017-ITR-28.06.2017*, is ultra-virus of section 5(3). The importer is not the recipient of services of transportation of goods. The exporter who is located outside has contracted with the shipping line, the recipient of service. Hence tax can't be demanded from the importer. The importer cannot be considered as an indirect recipient of service, too, as 'recipient of service' is defined explicitly in the statute.
- The importer cannot determine the value of services under section 15 of the GST Act. The value would be determined by the exporter of goods.

- Entry no.10 of *NN 10/2017-ITR-28.06.2017* is unconstitutional as the tax on ocean freight services and making the importer pay GST is not constitutional as there is no statutory sanction.

The aforesaid decision has been appealed against before the Supreme Court and the issue is still pending. There is no interim order passed by the Supreme Court staying operation of the judgment of the Gujarat High Court in the case.

**Q185. Whether Liaison Office in India is liable to pay GST on services rendered to the Head Office?**

**Ans.** The Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) (Amendment) Regulations, 2018 dated 31.08.2018 ('*FEMA Regulations*') place a restriction on liaison office (LO) from undertaking 'activity in the nature of business' but this is in respect of activities of such LO in India. The activities of LO towards its Head Office (outside India) in accordance with Regulations, is to act as a channel of communication from India to its Head Office outside India.

When LO is under a bar in undertaking 'business' and the LO is operating in compliance with this regulatory restriction, it is not permissible to vivisect its activities qua Head Office and hold that such activities are in of a business nature. The LO is either carrying out business-like activities (and hence in violation of RBI Regulations) or it is in compliance with RBI Regulations (and not undertaking any business activities). Without carrying out nay business or business-like activities, LOs activities DO NOT attract the incidence of tax under section 9 read with section 7 of the CGST Act. Also, the funds received from HO to sustain its activities in India, the same is NOT in the nature of consideration but financial assistance. And all expenses incurred in India are, in fact, treated as expenses of the Head office.

In the case of other forms of establishments in India, such as, Branch Office or Project Office or any of Permanent Establishment, entry no.10F of *Notification No. 9/2017-Integrated Tax (Rate), dated 28.06.2017* grants an exemption for supply of services *inter se*, provided the 'place of supply' is outside India. This entry DOES NOT apply to LO because existence of exemption requires existence of supply in the first place. In the case of LO, when there is no business,

there can be no supply. And without supply, extending the exemption is not relevant.

**Q186. Some capital goods were imported from Japan under EPCG scheme. However, on account of quality issues, the said capital goods were returned to Japan.**

**Explain the tax implications.**

**Ans.** As per para 5.03 of the FTP, imported capital goods shall be subject to actual user condition till export is completed. Para 5.13(c) of the handbook of procedures ('HBP') provides that except for few sectors, capital goods imported under EPCG shall not be allowed to be transferred for a period of 5 years even if export obligation is completed. Para 5.23 of the HBP provides that if, the EPCG authorisation holder fails to fulfil the export obligation or wishes to exit from the scheme, he shall pay customs duty along with applicable interest as prescribed by customs authority. Alternatively, importer can also pay duty and interest on the basis of self/own calculation as per procedure prescribed in paragraph 4.50 of HBP.

As per Para 5.23 of the HBP, in case capital goods imported under EPCG scheme are found unfit for use, the same may be re-exported to foreign supplier (within 3 years) or exported (within 2 years) from the date of clearance by Customs, with permission of Regional Authority / Customs Authority. There would be no requirement to pay customs duty or IGST on the said transaction. Export Obligation would be re-fixed accordingly.

**Q187. Whether GST is payable on royalty paid for mining (building Stone) to State Government? Explain with some legal decisions.**

**Ans.** In the 45$^{th}$ GST Council Meeting, it has been clarified by the Government *vide press release dated 17$^{th}$ September, 2021 that services by way of grant of mineral exploration and mining rights attract* the rate of 18 per cent GST *with effect from 01$^{st}$ July, 2017.*

Further, though not binding, the sectoral FAQs published by the CBIC categorically state that royalty payment made towards licensing services for exploration of natural resources is treated as supply of services and tax is to be paid on royalty. The relevant extracts from CBIC FAQs on Government Services are reproduced below:

'*Question 30: Whether an amount in the form of royalty or any other form paid/payable to the Government for assigning the rights to use of natural resources is taxable?*

*Answer: The Government provides license to various companies including Public Sector Undertakings for exploration of natural resources like oil, hydrocarbons, iron ore, manganese, etc. For having assigned the rights to use the natural resources, the licensee companies are required to pay consideration in the form of annual license fee, lease charges, royalty, etc. to the Government. The activity of assignment of rights to use natural resources is treated as supply of services and the licensee is required to pay tax on the amount of consideration paid in the form of royalty or any other form under reverse charge mechanism."*

The relevant extracts from CBIC FAQs on Mining which talks about GST applicability on royalty under mining lease is also reproduced below:

"*Question 22: Whether GST is payable on royalty (to be paid to Government) for mining lease granted by State Govt.*

*Answer: Yes, on royalty GST will apply under reverse charge mechanism. Further, such payment of GST under reverse charge mechanism would be eligible as ITC in the hands of the recipient of supply for payment of GST."*

In view of the above, GST on royalty paid towards mining shall be paid under reverse charge by the recipient.

It may be noted that under the erstwhile indirect tax laws, Courts have held that royalty paid under a mining lease is in the nature of tax and thus service tax cannot be imposed on royalty since a tax cannot be in the nature of a payment for services rendered by the Government.

Recently the Hon'ble Supreme Court has stayed payment of GST on royalty paid for grant of mineral rights in the case of *Lakhwinder Singh v. Union of India [(2021) 131 taxmann.com 168 (SC)].*

The Rajasthan High Court in the case of *Udaipur Chambers of Commerce and Industry v Union of India [2018 (8) G. S. T. L. 170 (Raj.)]* held that royalties paid on assignment of right to use natural

resources were a consideration and found no illegality on levy of service tax on royalties. However, the judgment of Rajasthan High Court has been challenged before the Supreme Court, which has stayed the payment of service tax on royalties.

It is also worth noting the case, *Goa Mining Association and Anr v Union of India and Ors [2017 (8) TMI 1632],* where Bombay High Court at Goa stayed the imposition of service tax on royalties under section 9 of the Mines and Minerals (Regulation and Development) Act, 1957. A similar stay has come from Madras High Court too.

The power to levy tax on mineral rights vests solely with the State Governments under entry 50 of List II (State List) under the Indian Constitution. It is noteworthy that entry 50 of List II has not undergone any change because of GST i.e., legislative field to tax mineral rights still vests with the States.

Further, the power to tax mineral rights specifically flows from entry 50 of List II. In such a situation, the power to tax under entry 50 of List II being more specific, resort cannot be had to entry 97 of List I and/or Article 246A to levy service tax/GST on royalties paid for grant of right to mine *vide* mining leases.

The differences in the concept of fees for services and fees for license has been constitutionally recognized. Therefore, royalty payments *ipso facto* does not become fees for services as they are in the nature of license fees.

It is being argued by the trade that GST is not leviable on royalty paid for mining, but the issue is far from resolved and is pending consideration by the Apex Court [in case of *Mineral Area Development Authority Vs Steel Authority of India & Ors].* While it needs to be noted that tax on mineral rights under GST may be a revenue neutral exercise for those in the mining industry since their output is liable to GST and hence the input GST on royalties may be available as credit. Further, it may be noted that if the demand for tax (on royalties) is made under section 74, credit may be blocked under section 17(5)(i) of the CGST Act.