Contentious issues in GST

ISSUE

GST council vs. Executive

- **Whether the GST council decisions binding on the government?**
- **Can the executive depart from the recommendations ?**

ISSUE

Sec. 3 of CGST Act, 2017 –

Validity of the appointment of officers under CGST law?

- **Sec. 3 deals with appointment of officers under the CGST Act, 2017.**
- **It provides power to '*Government*' to appoint classes of officers by way of issue of notification for the purpose of implementation of Act.**
- **Notification No. 02/2017-CT dt. 19.06.2017 has been issued in this regard.**
- **Notification no. 14/2017-CT dt. 01.07.2017 appoints DGGST**
- **Sec. 2(53) of CGST Act, 2017 gives the definition of 'Government' as – 'Government' means the Central Government.**
- **In the Notification the appointment of officers has been made by the 'CBEC (CBIC).' Therefore, the question is can CBIC appoint officers under CGST law when the provision specifically confers power on Central Government?**

ISSUE

Article 366(29a) Vs Service under GST

- **Are entries relating to erstwhile deemed sales found in Article 366(29a) of the Constitution now classified as services hit by the vice of un-constitutionality?**

Is the charge of integrated tax valid?

- Interface between Article 246 and 246A. Scope of Article 269A.
- What happens to Section 5 of IGST 2017 which is the charging section?
- Can you charge tax on actual imports?

ISSUE

Works contract – A Composite supply ?

- **Whether works contract would qualify as composite supply? Which is the principal supply, whether goods or service??**

ISSUE

Development and sale of apartments- how to classify?
5(b) or 6(a) of Schedule II?

- **Development and sale of apartments- how to classify? 5(b) or 6(a) of Schedule II?**
- **5(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier**
- **6 (a) works contract as defined in clause (119) of section 2;**
- **SC decision in the case of L&T, [2008] 17 VST 1 (SC sub contractor is the supplier of works contract and not the main contractor) would be relevant now also?**

ISSUE

Construction and sale of residential buildings/complexes/flats – *Which entry to be preferred?*

- **In case of construction of residential buildings, complexes, flats which involves supply of goods and services as well as transfer of land/undivided share in land, which entry should be adopted under Notification no. 11/2017-CT(R) dt. 28.06.2017 under heading 9954, entry (i) or entry (ii).**
- **Entry (i) – Under this value of land is deemed to be 1/3rd of total amount charged (i.e. machinery provisions exist).**
- **Entry (ii) – Deals with composite supply of works contract. If adopted the assessee should consider only the value of goods and services supplied excluding value of land.** *(assessee should maintain sufficient records to opt for this entry)*
- **Is it mandatory to opt for entry (i) on the premise that it may be more specific?**

ISSUE

Notification No. 4/2018-CT (R) – *Does it presume supply exists? Valuation mechanism?*

- **Notification no. 4/2018-CT(R) dt. 25.01.2018 prescribes time of supply for remitting GST for 'Developers' and 'Land owners' in case of development agreements/collaboration agreements wherein developer undertakes development of plot of land.**
- **Whether Notification presumes the taxability? Karnataka VAT Tribunal in the case of Bren Corporation 2018-TIOL-01-Tri-KAR VAT- held that JDA is not liable to VAT. It is a barter.**
- **The notification does not deal with the valuation aspect.**
- **The question that arises is what is the valuation method to be adopted by developer to discharge GST on land owner's share considering supply exists between the parties. How to value *development rights viz. consideration* which is provided by land owner to developer, builder?**
- **Should Developer adopt Rule 30/31?**

ISSUE

Entry 5(e) of Schedule II – *Will liquidated damages get covered under this entry?*

- **Entry 5(e) of Schedule II treats 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as supply of services.**
- **Can 'Liquidated damages' deducted from the amount payable to vendor on account of delay/default on the vendor's side be treated as 'supply' requiring discharge of GST?**
- **Can it be treated as mere re-determination of the consideration of the same supply? i.e. it leads to reduction in original consideration and there exists no separate supply.**
- **Sec. 15(2) provides that interest/late fee/penalty for delayed payment of consideration shall be included in value of supply. This contemplates a situation wherein supplier tolerates the delay by recipient in making payment towards the supply. Additional amount in the nature of**

- **interest is added to the value of same supply. In other words, it is not treated as additional supply. Can similar position be taken in case of 'liquidated damages?'**

- **When the main intention between the parties is not to 'tolerate' an act or a 'situation', does any supply exist under Sec. 7?**

- **Validity of AAR- Maharashtra State Power Generation Company Ltd. [TS-187-AAR-2018-NT]**

ISSUE

Job work – *Distinction between 'treatment or process' and 'manufacture.'*

- **Sec. 2(68) defines Job work – means any *treatment or process* undertaken by a person on goods belonging to another registered person.**
- **Sec. 2(72) defines manufacture – means *processing of raw material or inputs* in any manner that results in emergence of new product…**
- **Manufacture involves a *series of processes* i.e. manufacture may be treated as a bigger cluster under which 'treatment or process' gets covered.**
- **If the job worker undertakes a certain kind of process which results in manufacture (i.e. series of process resulting in new product), can it be still classified as *job work undertaken with more than one process undertaken on goods*? Or is the identity of the goods supplied to job worker to be retained in order to get covered under definition of job work?**

- **Job Work is not defined in a manner so as to say if the process amounts to manufacture, it will be excluded from definition of job work.**
- **Notification no. 214/86-CE dt. 25.03.1986 provided exemption to specified items if manufactured in a factory as a job work and used in manufacture of final products or cleared as such from factory. *It recognised a situation where job work amounted to manufacture*.**
- **Under the service tax regime, if the job work did not amount to manufacture, service tax was chargeable. *It recognised a situation where job work amounted to manufacture*.**
- **Should 'Job Work' definition be interpreted in a manner to exclude 'a series of process / more than one process' undertaken as the words used are '*treatment or process*' and not '*treatments or processes*'?**

Sale of goods

What is the place of supply under each of the following scenarios:

[redacted]

a)Rs. 2950/- per set of cookware: The goods would be packed and delivered at the location of dealers. Terms of delivery is that risk passes to the dealer on taking delivery from transporter.

[redacted]

c) Rs. 2600/- per set where the goods would be handed over to the representative of the dealer of who has to take further steps for transportation to the dealer. The risk passes on to the buyer as soon as the representative takes delivery

[redacted]

Sale of goods

Provisions: Section 10(1)(a)

[redacted]

Under each of the scenarios the supply involves movement of goods.

[redacted]

Bill to ship to

Bill to Ship to scenario

[redacted]

Buyer instructs the seller to deliver the goods to Factory A located in Nagpur

[redacted]

What is the place of supply

[redacted]

25

ISSUE

Place of supply for online coaching to students.

- **Falls under Section 12(3) which is general or**
- **Under Section 12(5) which covers Training and performance appraisal.**
- **Whether online coaching falls under 'online information and database access services'?**

Product development activity

[redacted]

Scope of the activity would be to undertake development based on the existing products. For this they would manufacture sample products and send the same to their customer who is located outside India along with development notes

[redacted]

Issue- What is the place of supply

[redacted]

28

Product development

Statutory provisions- Section 13

[redacted]

Product development

Analysis

[redacted]

However, in the present case, the products (sample) are manufactured by the supplier and analysis of the same is sent along with the sample production for further verification to the recipient

[redacted]

Intermediary Services

Intermediary

[redacted]

In terms of the agreement, A&C would get a fixed amount of remuneration from D&E for marketing /sale promotion activity.

[redacted]

Presently, less than 50% of the confirmed sales to India are being through A&C

[redacted]

31

Intermediary

Statutory provisions- Section 13

[redacted]

32

Intermediary

Statutory provisions-

[redacted]

Section 2((30) "composite supply" *means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;*
Illustration. - Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply

[redacted]

Intermediary

Analysis

[redacted]

View 2: Once the supplier facilitates the supply of goods / services belonging principal then entire gamut of activities fall under the heading 'intermediary services'. Therefore, the provisions of Section 13(8)(b) would apply to entire activity.

[redacted]

SUPREME COURT AND HIGH COURT

CASE LAWS

- **UOI vs. Mohit Mineral Pvt. Ltd. 2018-TIOL-05-SC-GST**

1. Validity of GST (Compensation to States) Act, 2017 and GST Compensation Cess Rules, 2017 was challenged.
2. The Court held that Constitution provision empowers the Parliament to provide for Compensation to the States for loss of revenue by law, the expression 'law' is of very wide import which includes levy of any cess. Parliament has legislative competence to enact the Compensation to States Act, 2017.
3. It was observed that 'compensation cess' is 'with respect to' goods and services tax and it is a tax.
4. Held that impugned act does not violate Constitution (One hundred and First Amendment) Act, 2016 nor is against objective of the said Act.

CASE LAWS

5. Also held that GST imposed under 2017 Acts and levy of cess on supply of goods or services or both are two separate imposts in law and are not prohibited by any law so as to declare it invalid.
6. Regarding the petitioner's contention to off-set clean energy cess paid upto 30.06.2017 against compensation cess, it was held that both these cesses were collected for different purposes and petitioner contention cannot be accepted. Giving credit or set-off in payment is legislative policy which had to be reflected in the legislative scheme.

Challenge to Section 174 Ker. GST Act

Leisure Stays vs. State of Kerala [WP(C) 15851 of 2018]

[admission stage- interim stay granted]

The entry relating to levy of Luxury Tax (i.e. Entry 62 of List II) or relating to levy of VAT (i.e. Entry 54 of List II) has either been deleted or substituted in entirety.

The State would have no power to recover VAT / Luxury Tax, whether disputed or undisputed, as it is denuded by the Constitutional Amendment Act. Hence, the savings provisions of Section 174 are ultra vires the Amendment Act.

Transitional provisions Section 140(3)

JCB INDIA LIMITED Vs. Union of India 2018 (15) G.S.T.L. 145 (Bom)

Validity of the time limit of 1 year for claiming credit on goods in stock for traders was upheld.

CASE LAWS

- **Filco Trade Centre Pvt. Ltd. vs UOI 2018-TIOL-120-HC-AHM-GST:**

1. Sec. 140(3)(iv) in transitional provision restricting the credit to one year prior to 01.07.2017 was challenged.
2. Court considered the nature of right enjoyed by petitioner under earlier laws and observed that they had a '*vested right.*'
3. Court observed that condition of 1 year has retrospective operation and takes away an existing right and no just reasonable or plausible reason is shown for taking away the vested rights.
4. Court disagreed with the decision of Bombay High Court in ***JCB India Ltd. vs UOI .***
5. Sec. 140(3)(iv) is held to be unconstitutional.

CASE LAWS

- **Willwood Chemicals. vs UOI [TS-451-HC-2017(GUJ)-NT]:**

1. HC upholds validity of second proviso to Section 140[1] of Gujarat GST Act, 2017 (GGST) which limits right of a dealer to carry-forward transitional credit in relation to inter-state sales, branch transfers or export sales, unless necessary declarations in Forms C, F & H are produced.
2. upholds validity of Rule 117 of Central GST Rules, 2017 (CGST Rules) / Gujarat GST Rules, 2017 (GGST Rules) which prescribes a time for making a declaration of available tax credits as on June 30, 2017 .

ADVANCE RULINGS-

Liquidated damages- Taxable

[TS-464-AAAR-2018-NT] Maharashtra Power Generation Company:

Damages collected in terms of the contract on account of delay in completion of the contract is liable to GST

Turnkey EPC contract for 'solar power plant' erection constitutes 'composite' 'works contract' supply

[TS-461-AAAR-2018-NT] Girija Renwable Pvt Ltd.

Damages collected in terms of the contract on account of delay in completion of the contract is liable to GST

Supply of solar inverter, controller, battery, a "composite supply", "Solar Power Generating System" being principal supply

[TS-490-AAR-2018-NT]

supply of solar inverter, controller, battery and panels would be covered under "Solar Power Generating System" as a whole in terms of Sl. No. 234 of Schedule-I of the Notification No. 01/2017-Central Tax (Rate) when supplied for said specified purpose, taxable at 5% being "composite supply

Inter office cross charges are liable to GST

Columbia Asia Hospital Pvt. Ltd. [TS-368-AAR-2018-NT]

Cross charge of costs by head office or corporate office on the branches outside the state constitutes supply.

Employee of the corporate office cannot be termed as employee of the branch office. Therefore, the services of employee of head office is not covered under Schedule III as non taxable supply for the purpose of cross charge.

Thank You

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