A

Presentation

on

"GST & Critical issues"

at

the 'JNANA DASOHA (Virtual CPE Meetings)'

Organized by

Bengaluru Branch of SIRC of ICAI

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Concept of Aggregate Turnover, Taxable Supply, Exempt Supply , Non-taxable supply & Zero rated supply under GST

Concept of Aggregate Turnover, Taxable Supply, etc

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❖ **Relevant statutory provisions of the CGST Act/IGST Act:**

S.2 (6) - "aggregate turnover" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

(17) -) "business" includes ––

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

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(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;

(19) "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

(47) "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;

(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

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(62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy;

(63) "input tax credit" means the credit of input tax

(78) "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

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- (84) "person" includes—
- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a firm;
- (e) a Limited Liability Partnership;
- (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;
- (h) any body corporate incorporated by or under the laws of a country outside India;
- (i) a co-operative society registered under any law relating to co-operative societies;
- (j) a local authority;

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(k) Central Government or a State Government;

(l) society as defined under the Societies Registration Act, 1860;

(m) trust; and

(n) every artificial juridical person, not falling within any of the above;

(87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council;

(94) "registered person" means a person who is registered under section 25 but does not include a person having a Unique Identity Number;

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

Explanation.–– For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;

- (107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;
- (108) "taxable supply" means a supply of goods or services or both which is leviable to tax under this Act;

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(112) "turnover in State" or "turnover in Union territory" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a State or Union territory by a taxable person, exports of goods or services or both and inter State supplies of goods or services or both made from the State or Union territory by the said taxable person but excludes central tax, State tax, Union territory tax, integrated tax and cess;

S.11. Power to grant Exemption. —

(1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

(2) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an exceptional nature to be stated in such order, exempt from payment of tax any goods or services or both on which tax is leviable.

- (3) The Government may, if it considers necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

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Explanation.––For the purposes of this section, where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both.

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- **S.2 (6) – "Aggregate Turnover"**
- **S.2(112) – "turnover in State" or "turnover in Union Territory"**
- Aggregate Turnover [S.2 (61)]

- Includes:
  - ✓ all taxable supplies
  - ✓ exempt supplies
  - ✓ export of goods or services or both
  - ✓ inter-state supplies of a person having a same PAN to be computed on all India-basis.
- Excludes:
  - ✓ Value of inward supplies on which the tax is payable under RCM.
  - ✓ CGST, GST/UTGST, IGST or GST, Compensation Cess.
- Term is widely defined compared to the expression 'aggregate value of clearances' or 'aggregate value' used in :
  - ✓ Not. No. 8/2003-CE dt. 01.03.2003 as amended (SSI Exemption)
  - ✓ Not No. 33/2012-ST dt.20.06.2012 as amended (small SPs exemption)
- Significant departure in the matter of inclusion of 'exports' and 'wholly exempt clearances/supplies'
- Except taxes/cess payable under GST laws, all other taxes, fees, duties, etc. to be included in the 'value' [See S. 15 (2)(a)]

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❖ Registration threshold – S. 22

- Different thresholds for the supplies of goods and suppliers of services and for the special category of States and other States.
- The expression 'aggregate turnover' is used in S. 22 (1)
- Clause (i) of Explanation:
  - 'For the purposes of this section,-

  The expression "aggregate turnover" shall include all supplies made by the taxable person, whether on its own account or made on behalf of all his principals;'
- Scope and purpose of the Explanation
- Clause (ii) of Explanation

  'The supply of goods, after completion of job work, by a registered job worker shall be treated as the supply of goods by the principal referred to in S.143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker'
- 'Aggregate Turnover' and 'Composition Scheme' (S.10)
- Eligibility threshold:
  - ✓ Aggregate turnover in the preceding financial year not exceeding Rs. 150 lakhs (limit applicable w.e.f. 01.04.2019) For the States, namely, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand, the eligibility threshold is Rs. 75 lakhs w.e.f. 01.04.2019

(Not. No. 14/2019-CT(R) dt. 07.03.2019 refers]

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❖ Explanation 1:

- 'Aggregate turnover' to include:
  - ✓ value of supplies made from 1st April of a F.Y. upto the date of becoming liable for registration
    - BUT to NOT include:
  - ✓ value of exempt supply of services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

❖ Explanation 2:

- 'turnover in a State or turnover in a Union territory' shall NOT include:
  - ✓ Supplies from the 1st April in a FY upto the date of the person becoming liable for registration under the Act;
  - ✓ 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.

  [Explanation 1 and 2 inserted by the Finance (No.2) Act, 2019]
- Different rates prescribed under the scheme for:
  - ✓ the manufacturers [S.10 (1)(a)]
  - ✓ the Restaurants/Outdoor caterers [S.10 (1)(b)]
  - ✓ Other suppliers [S.10(1)(c)

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- Rates to be applied on the 'turnover in State or turnover in Union Territory'
- Implications

Issues for consideration:

- Whether the 'aggregate turnover' and/or 'turnover in State or turnover in Union territory' would include value of 'exempt supply'?
- Whether the 'aggregate turnover' or 'turnover in State or turnover in Union Territory' would include the value of non-taxable supply or the turnover of the activities/transactions covered by Sch.III?
- Whether the taxes, duties, cess, fees, etc. levied under any other law (other than GST laws) would be includible for the purpose of 'aggregate turnover' or 'turnover in State or turnover in Union territory'?

- Whether a RTP will be eligible for the threshold limit of Rs. 40/20/10 lakhs if he has exceeded the limit in the preceding F.Y.?
- Whether the small business exemption will be available separately to the co-owners of a property if the rent is collected together and then divided amongst them?
- **In Re: Elambrancheri Khadoom – 2018-TIOL-187-AAR-GST**
- S.26 of the Income Tax Act, 1961
- CBDT Circular No. 715 dt. 08.08.1995
- Whether a Composition taxpayer is liable to pay tax at the prescribed rate in case of wholly exempt supply?

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❖ **Concepts of 'Taxable Supply', 'Exempt Supply' and 'Non Taxable Supply '**:

❖ 'Taxable Supply' [S.2 (108)]

- Supply of goods or services or both **leviable** to tax under the Act (i.e. CGST Act')
- Meaning of the word 'leviable':
  -
  - ***"That which may be levied. That which is a proper or permissible subject for levy' as a "leviable interest" in land."***
    - ***(***Black's Law Dictionary Sixth Edition)

❖ 'Exempt Supply' (S.2 (47)]

- Supply of any goods or services or both attracting nil rate of tax
- Supply of any goods or services or both which may be wholly exempt from tax under S.11 of the CGST Act/S.6 of the IGST Act
- Non-taxable supply
- Poor language of the provision
- Concept of 'exempt supply' under GST vis-à-vis 'exempted goods' or 'exempted service' defined under Rule 2(d) and 2€ respectively of CCR, 2004.

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❖ 'Non-taxable supply' [S.2 (78)]

- Supply of goods or services or both which is not **leviable to tax** under the CGST Act opr IGST Act.

❖ 'Zero-rated supply' [S.2 (23) r/w S. 16 of the IGST Act)

- S.2 (23) – "Zero rated supply" shall have the same meaning assigned to it in Section 16".
- S.16(1) – "zero rated supply" means any of the following supplies of goods or services or both namely:-

(a) Export of goods or services or both; or

(b) Supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

- **Issues for consideration:**
- Whether the 'exempt supply' would include the value of activities/transactions specified in Sch.III?
- Whether the 'exempt supply' would include the value of:
  - ✓ Alcoholic beverages for human consumption
  - ✓ Petroleum crude
  - ✓ Petrol
  - ✓ Diesel
  - ✓ Natural Gas
  - ✓ Aviation Turbine Fuel

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- Art. 366 (12A)
- Art. 279A(5)
- Amendments to Seventh Schedule – List I & II [S.17 of the Constitution (101st Amendment) Act, 2016].
- S.5(2) of the IGST Act
- Whether 'electrical energy' is 'exempt goods'?
  - ✓ Tariff heading 2716 00 00
  - ✓ Not. No. 2/2017-CT(R) dt. 28.06.2017 (Sl.No. 104)
  - ✓ **Tariff rate on the 'Electrical energy'**?
- Taxability of and exemption to 'interest on loans, advances or deposits' and its implications.
  - ✓ Entry 27 of Not. No. 12/2017-CT® dt. 28.06.2017 as amended
  - ✓ Is 'interest on loans, etc.' 'supply' or 'consideration'?
  - ✓ **In Re: Shree Sawai Manoharlal Rathi – 2020-TIOL-130-AAR-GST.**
  - ✓ **In Re: Anil Kumar Agarwal – 2020-TIOL-95-AAR-GST (KAR)**
- What is the significance of the deeming fiction contained in S.17(3) with regard to 'exempt supply'?

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Levy of GST on liquidated damages, forfeiture of deposit, penal interest, etc.

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- Statutory provisions

- S.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;

  (d) [*****]

  (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.

- **S.15**. Value of Taxable Supply.— (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

  (2) The value of supply shall include–––

  (a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

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(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation: For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

Entry 5(e) of Sch.II

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; and

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- Levy of GST on liquidated damages, forfeiture of deposit, penal interest, foreclosure charges, early termination fees, etc.
- Whether such payments/charges constitute '**consideration**' for the alleged '***supply of service***' of '***agreeing to – tolerate an act or a situation***'?
- Lack of clarity on the issue
- Controversial Rulings of the AAR on these issues.

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- ❖ Service Tax vis-à-vis GST
- ✓ Legal position during the Service Tax regime
- ✓ Pre-Negative List regime – no controversy
- ✓ Introduction of the 'Negative List-based levy of service tax' w.e.f. 01.07.2012.
- ✓ S.66E – Declared Service
- ✓ Clause (e) of S.66E:

"66E. The following shall constitute declared service, namely:-

(a) …

(b) …

(c)…

(d)…

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

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- Negative List-based levy of Service Tax introduced w.e.f 01/07/2012
- Judicial view:

✓ **M/s. Jaipur Jewellery Show vs. CCE & ST, Jaipur**

-2017 (49) STR 313 (Tri)

✓ **Amit Metalics Limited vs. CCGST, Bolpur**

✓ **M/s. K.N. Foods Industries Pvt.Ltd. vs. CCGST & C.Ex. Kanpur.**

✓ **CST, Chennai vs. M/s. Repco Home Finance Ltd.**

- **2020-TIOL-1039-CESTAT-MAD-LB**

- Courts/Tribunal are consistent in reaching a '**No-tax**' verdict in service tax regime in respect of foreclosure/early termination charges, cancellation charges, compensation/damages, etc.

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- Legal position under GST regime
- Entry 5 (e) of Sch.II to the CGST Act:

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

- S.7(1) & (1A) of the CGST Act
- The opening words of Entry 5

  "The following should be treated as supply of service, namely…"
- Clause (d) , before its omission, by the CGST (Amendment)Act,2018 retrospectively w.e.f. 01.07.2017 read as under:
-

  "(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II".

- Was 'Schedule II' a "deeming provision" or merely "categorising provision"?
- Did the opening words of Entry 5 of Sch.II r/w the **erstwhile clause (d) of S.7(1)** make Entry 5 a 'deeming provision' in so far as the activities enumerated therein were concerned?
- S.66E of the FA vs. S.7(1)(d) of the CGST Act.

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- The thought process of AAR and its rulings (Pre-amendment of S.7):

✓ **Re: Maharashtra State Power Generation Company**
- **2018-TIOL-33-AAR-GST**

✓ **Re: Maharashtra State Power Generation Company**
-2018-TIOL-14-AAAR GST

✓ **Re: Zaver Shankarlal Bhanushali**
-2018-TIOL-84-AAR-GST

✓ **Re: Bajaj Finance Ltd.**
-2018-TIOL-264-AAR-GST

✓ **Re: Bajaj Finance Ltd.**
-2020-TIOL-84-AAAR-GST

✓ **Re: North American Coal Corporation India Pvt. Ltd.**
- (2018) 98 taxmann.com 331 (AAR – Maharashtra)

✓ **Re:Dholera Industrial City Development Project Ltd.**
-2019-TIOL-266-AAR-GST

✓ **Re: Rashtriya Ispat Nigam Ltd.**
-2019-TIOL-479-AAR-GST

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- Rulings of AA on liquidated damages, etc.
- Fallacious thought process and controversial rulings
- Sch.II considered as 'Deeming Provision'
- Retrospective Amendment to S.7 by the CGST (Amendment) Act, 2018 and its implications
- Relevance and binding effect of the AAR/AAAR rulings after the retrospective amendment.
- All-round confusion and erroneous thinking on the nature and scope of Sch.II.
- 'Consideration' and 'Business' – pre-requisites for an activity/transaction to be considered as 'supply' u/s. 7(1) of the CGST Act.
- Clause (b) of S.7(1) – "Business" element dispensed with in respect of import of service for a consideration
- Clause (c) of S.7(1) – 'consideration' element dispensed with in respect of activities specified in Sch.I
- Absurd and anomalous result would follow if Sch.II is considered a 'deeming provision'.

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❖ Judicial views under EU VAT laws and other International VAT/GST Jurisdictions.

- VAT on retention of deposit money by hotel on account of cancellation of the booking.
  - ✓ **Societe Thermale d'Eugenie-les-Bains vs. Ministere de I' Economie, des Finances et de I' Industrie – decision dated 18th July 2007 in case C-277/05]**
  - ✓ ECJ's decision dt. 18th July, 2007
- VAT/GST on unused air tickets (non-refundable) on account of 'No show' by the passengers/non-claim of refunds or non-exchange of ticket

✓ **Air France –KLM & Hop! – Brit Air SAS vs. Ministere des Finances et des Comptes Publics – decision dated 23rd December 2015 in cases C 250/14 and C/289/14**.

  - ✓ ECJ's decision dt. 23rd December, 2015
- **Commissioner of Taxation vs. Qantas Airways Ltd. [2012] HCA41**
  - ✓ Judgement dt. 2nd October, 2012 of the High Court of Australia
- GST on the forfeiture of deposit in case of sale of real estate subsequent to the recession of the contract upon default.
  - ✓ **Commissioner of Taxation vs. Reliance Carpet Co.Pty. Ltd. (2008) 236 CLR 342**
  - ✓ Judgement dt. 22nd May, 2008 of the High Court of Australia.
- **VAT treatment of early termination of subscriptions and damage/compensation payments.**
  - ✓ **MEO-Services de Comunicacoes e Multimedia [Case C-295/17]**
  - ✓ **ECJ's judgement dt. 22nd November, 2018**
  - ✓ **Vodafone Portugal-Comunicacoes Pessoais SA (Case C-43/19)**
  - ✓ ECJ's Judgement dt. 11th June, 2020.

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- **Revenue and Customs Brief 12 (2020) – VAT on early termination fees and compensation payments.**
  - ✓ HMRC's revised guidelines published on 2nd September, 2020.

- **GST Ruling GSTR 2001/4 (GSTR)** issued by the Australian Tax Office.
- GST on the judgement sum – Does it result in a supply being a release by the judgement creditor of the obligation to pay the judgement?
  - ✓ **Case 577 (1996)** 17 NZTC 7483
  - ✓ **Interchase Corporation Limited** v.ACN 010 0873573 Pty Ltd. & Ors. [2000] QSC 13

"A taxable supply is made if the supply is made for consideration [s9-5(a)]. Consideration includes matters done pursuant to orders of a court [s 9-15(2A)(a)] but that does not of itself constitute a supply. The receipt of payment by a judgement creditor does not obviously involve the creation, grant, transfer, assignment or surrender of any right or the entry or release from an obligation [s 9-10 (2)(e)(f)]. When the judgement is satisfied the debt created by the judgement is thereby extinguished and does not depend on the surrender of any rights or the release of the judgement debtor."

- **Shaw v. Director of Housing and State of Tasmania (No.2)**
  -[2001] JASSC 2
  - ✓ Judgement dt. 8th February, 2001 delivered by the Supreme Court of Tasmania.

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Issue:
S.16(2)(c) of the CGST Act, 2017 – A Pre-condition for availment of ITC – Scope & Issues

S.16(2)(c) - 'Buyer Beware'!

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❖ **Relevant Statutory Provisions :**

- **"S. 16. Eligibility and conditions for taking input tax credit**.— (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person:

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,––

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.— For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services––

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;

S.16(2)(c) - 'Buyer Beware'!

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❖ **Relevant Statutory Provisions…**

(c) subject to the provisions of section 41 or Section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that... (XXX)
Provided further that... (XXX)
Provided also that...(XXX) "

"Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon."

S.16(2) (c) – 'Buyer Beware'!

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❖ S.16(2) – Conditions for availing ITC

- 4 (Four) conditions prescribed
- Clause (c) of S.16(2)
  - Payment of tax by the supplier, in cash or through debit in ITC
  - In case of supplier's failure to pay the tax, recipient/buyer not entitled to avail ITC.
- Condition is a legacy from State VAT regime – no such condition ever existed in C.Excise/Service Tax regime
- Non-fulfilment of the condition can have serious implications in the present COVID-19 era.
  - Recipient RTP to lose the ITC if its supplier does not pay the tax.
  - If a RTP (Vendor) fails to pay, then its buyer, mostly Large Businesses to lose the ITC
  - Failure of the RTP to pay the tax due to liquidity problem, closure of unit, Bankruptcy and many other reasons during COVID-19.
  - Acute pain may be felt in the coming days.

S.16(2) (c) – 'Buyer Beware'!

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- Constitutional validity of the Provision:
  - Challenge before the Calcutta HC in
  - P & H HC in Vij Engineers' case

  -2020-TIOL-1323-HC- P & H – GST
  - Tarapore and Company vs. State of Jharkhand

  -2020-TIOL-93-HC-JHARKHAND-VAT
  - Ghenu Lal Bal Chand vs. State of Haryana

  -2012 (2) SCC 781 (P & H)

  1. Shri Lakshmi Textiles Vs. CCT & Ors. – 2015-TIOL-2403-HC-MAD-VAT
  2. Shri Vinayaga Agencies Vs. Asst.Comm (Ct)Chennai – [2013(60) VST 283(Mad.)]
  3. Gujarat High Court in the State of Gujarat Vs. Modi Oil Industries – [STR No.2/2001 dt. 01.07.2016] – 2016 – TIOL – 1504 – HC-AHM-VAT
  4. CCE Vs. Tata Motors Ltd. – 2013 (294) ELT 394 (Jhar.)
  5. CCE Vs. Juhi Alloys Ltd. – 2014 (302) ELT 487 (All.)
- ECJ's landmark judgements:
  - Joined cases C-354/03 (optigen), C-355/03 (Fulcrum) and C-484/03 (Bond House Systems)
  - Joined cases C-439/04 (Axel Kittel) and C-440/04 (Recolta Recycling)

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Issue:
S.16(4) of the CGST Act, 2017 –
Time limit for availing ITC – An analysis

S.16 (4) – Time limit for availing ITC

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❖ **Relevant Statutory Provisions**

- **"S. 16 (4) -** A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

  Provided that... (XXX) "

S.16 (4) – Time limit for availing ITC

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- Availment of ITC is subject to many prescribed conditions as laid under S.16.
- S.16(4) – Time limit prescribed for availing ITC
  - Due date for furnishing return **under S.39** for the month of September following the end of F. Y. to which the invoiced debit note relates; OR
  - Due date for furnishing of the relevant annual return – whichever is earlier.

- Invoice pertaining to F.Y.2019-20 – Time limit for availing ITC expired on 20.10.2020.
- S.16(4) read with Rule 61 (5)
- Is the Return in form 3B a return in lieu of Return in Form 3 prescribed under S.39?
- Rule 61 (5) – Frequent amendments
- Original text as on 01.07.2017 – **return in FORM GSTR-3B, in lieu of FORM GSTR-3**
- Substituted by Not. No. 17/2017-CT dt. 21.07.2017 w.e.f. 01.07.2017 [CGST (4th Amendment) Rules, 2017]
- Substituted by Not. No. 49/2019-CT dt. 09.10.2019 w.e.f. 01.07.2017 [CGST (6th Amendment) Rules, 2019].

- Whether the provisions of S.16(4) read with R.61(5) are valid?
- Does the time limit prescribed under S.16(4) for availing ITC is valid and applicable?
- Challenge to S.16(4) & Rule 61(5) before the High Courts:
- Karnataka HC in Bagmane Developers Pvt. Ltd's case

- **SC in UOI vs. Aap and Co. -2020-TIOL-543-SC-GST against Gujarat HC judgement in 2019-TIOL-1422-HC-AHM-GST**

- **"Notice Issued".**

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Issue:
Rule 36 (4) of the CGST Rules, 2017 – Restriction on availment of ITC – An analysis

Rule 36 (4) – Restricted ITC

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❖ **Relevant Statutory Provisions**

- **" Rule 36- Documentary requirements and conditions for claiming input tax credit.-**

(1) XXX
(2) XXX
(3)XXX
(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 10 per cent of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37."

Notes:

a. Sub -rule (4) inserted by Not. no. 49/2019-CT dt. 09.10.2019 [CGST (6 th Amendment) Rules,2019 w.e.f. 09.10.2019.

b. The figure and words " 10 per cent " substituted for " 20 per cent" by Not. no. 75/2019 -CT dt. 26.12,2019 [CGST (9th Amendment) Rules, 2019] w.e.f. 26.12.2019

Rule 36 (4) – Restricted ITC

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❖ **Relevant Statutory Provisions**

- **"Rule 61. Form and manner of submission of monthly return.-**

(1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

(2) Part A of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods.

(3) Every registered person furnishing the return under sub-rule (1) shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in FORM GSTR-3.

4) A registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in Part B of the return in FORM GSTR-3 and such return shall be deemed to be an application filed under section 54.

Rule 36 (4) – Restricted ITC

(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 or in FORM GSTR-2 under section 38 has been extended, the return specified in sub-section (1) of section 39 shall, in such manner and subject to such confitions as the Commissioner may, by notification, specify, be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner;

Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR 3."

[Sub-rule (5) substituted by Not.no. 49/2019-CT dt. 09.10.2019 [CGST (6th Amendment) Rules,2019] w.e.f. 01.07.2017]

Rule 36 (4) – Restricted ITC

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❖ Restriction in availment of ITC

- Insertion of sub-rule (4) in Rule 36 of the CGST Rules, 2017
- Not.No. 49/2019-CT dt. 09.10.2019 issued under S.164 of the CGST Act, 2017 –CGST (6th Amendment) Rules, 2019 – Rule 3 inserting sub-rule (4) in Rule 36 w.e.f. 09.10.2019.
- Restrictions in availment of ITC in respect of invoices or Debit Notes, the details of which are not uploaded on the common portal by the Vendors – ITC to be taken to the extent of 20% of the eligible ITC
- CBIC Circular No. 123/42/2019-GST dt. 11.11.2019
- Quantum of restricted credit available reduced from 20% to 10% - Not. No. 75/2019-CT dt. 26.12.2019 [GST (9th Amendment) Rules, 2019].
- Not. No. 30/2020-CT dt. 03.04.2020 – Restrictions not to apply for the period from February, 2020 to August, 2020
- Adjustment to be made before filing of GSTR-3B for September, 2020 on 20.10.2020.
- Challenge to the validity of Rule 36(4) before
  - **Karnataka HC in M/s. Calvin Klein case & Bagmane Developers Pvt. Ltd's case.**
- Recovery and other action (like freezing of ITC Account) by the Department – legality thereof.

S.16 – ITC & Failure to pay the supplier

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- S.16(2) – Various conditions prescribed for availing ITC
  - 2nd & 3rd Proviso to S.16(2) –
  - Payment to Supplier within 180 days of the date of issue of invoice by the supplier
  - Failure to result into the addition of the ITC to the output tax liability along with interest thereon
  - On payment being made, the TP to be entitled to take the ITC
  - Interest payable under S.50(1) [R.37(3)]
  - Time limit under S. 16(4) to Not. Apply for the re-credit [R.37(4)]

- Details of ITC payable/reversible in terms of S. 16(2) to be provided under FORM GSTR-2.
- Issues for consideration:

- Whether the provisions of the 2nd Proviso to S.16(2) read with R.37(1) valid?
- Whether the provisions of S.50(1) be made applicable for recovery of the amount in terms of 2nd proviso to S.16 (2)?
- Whether the amount of ITC ineligible under 2nd proviso to S.16(2) is payable as 'tax' or 'ITC'?
- The implications of the amended R.61(5) on the provisions of R.37(1).

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