24th Edition

NEWSLETTER September 2019

ICAI-GST

A Newsletter from The Institute of Chartered Accountants of India on GST

ICAI Survey on GST implementation

Participate at
http://idtc.icai.org/cc/apps/survey.php

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President's Communication

My Esteemed professional colleagues,

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, a dispute resolution scheme was announced by the Hon'ble Finance Minister while presenting the Union Budget – 2019-20. This niche scheme, whichcame into effect from 1st September, 2019 and shall continue till 31st December, 2019,aims to resolve nearly 1.5 lakh cases relating to Central Excise, Service Tax and Cessesinvolving an amount of ₹3.75 lakh crore which were pending under pre-GST regime. The scheme provides reliefto the taxpayersto the tune of 40% to 70% of the tax due from them depending on the amount under dispute and fullwaiver of interest and penalty.

As a proactive measure, the Government is making changes in the GST Laws on regular basis, based on the feedback received from stakeholders and recommendations of the GST Council. Recently, considering the difficulties being faced by the taxpayers in filing GST Annual Return, the GST Council has recommended to make filing of GST Annual Return Form GSTR-9 optional for taxpayer having Annual Turnover upto Rs. 2 crores for Financial Year 2017-18 and 2018-19. Additionally, it has also exempted the composition taxpayers from filing Annual Return for both the years. Earlier, on request of the stakeholders, the Government had also extended due date of filing of Form GSTR-9 and 9C (Annual Returns and Reconciliation Statement) from 31st August to 30th November, 2019.

The Institute of Chartered Accountants of India (ICAI) has always been at forefront with all its resources, expertise and efforts to make the GST regime in India an immense success. While, GST Council has deliberated on introduction of electronic-invoice (E-invoice) on voluntary basis from January 2020,ICAI supported Goods and Services Tax Network (GSTN) in drafting an e-invoice standard which has been recognised by the GSTN on their portal.

Further, in view of the extensive changes taking place in GST laws, regulations and processes, GST & Indirect Taxes Committee of ICAI is conducting a Survey on entire gamut of GST implementation to find out the achievements, problems and areas which needs attention going forward. Based on the survey, a report would be developed and submitted to the Government for consideration and taking suitable action.Kindly take active part in the said survey and encourage others to participate too to be a true partner in GST revolution.

I am happy to share that the Institute has organised more than 1400 workshops/seminars/conferences on GST which witnessed active participation of around 1.35 lakh participants. Additionally, 105 batches of certificate courses have been organised across the country where in 5681 members took part. Online webcasts on GST, e-publications, e-learning series on UAE VAT, regular GST/Customs updates, articles, information on upcoming courses, programmes/ seminars, E- Newsletter on GST etc.are also available on https://idtc.icai.org for the information and use of stakeholders at large.

Let's participate and contribute towards nation in achieving and sustaining a competitive edge in the area of GST.

With Best Wishes,

CA. Prafulla Premsukh Chhajed
President, ICAI

GST UPDATES

Amendments in Central Goods and Services Tax Rules, 2017

The Central Government vide Notification No. 33/2019- CT dated 18th July, 2019 has amended Central Goods and Services Tax Rules, 2017. Amendments made are explained below:

Amendment in Rule	Revised Provision
Sub-rule (1A) of Rule 12 : Insertion of provisions related to TDS	(1A) A person applying for registration to [deduct or] collect tax in accordance with the provisions of [section 51, or, as the case may be,] section 52, in a State or Union territory where he does not have a physical presence, shall mention the name of the State or Union territory in PART A of the application in FORM GST REG-07 and mention the name of the State or Union territory in PART B thereof in which the principal place of business is located which may be different from the State or Union territory mentioned in PART A.
Fourth proviso to Rule 46: Exception to issue of consolidated tax invoice	Provided also 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 the provisions of clause (b) of sub-section (3) of section 31 subject to the conditions. The amendment shall come into effect from the 1st day of September, 2019.
Insertion of sub-rule (4A) to Rule 54: Issue of electronic ticket by multiplex screens	"(4A) A registered person supplying services by way of admission to exhibition of cinematograph films in multiplex screens shall be required to issue an electronic ticket and the said electronic ticket shall be deemed to be a tax invoice for all purposes of the Act, even if such ticket does not contain the details of the recipient of service but contains the other information as mentioned under rule 46: Provided that the supplier of such service in a screen other than multiplex screens may, at his option, follow the regular procedure. The amendment shall come into effect from the 1st day of September, 2019.

Insertion of Rule 83B: Surrender of enrolment of goods and services tax practitioner	(1) A goods and services tax practitioner seeking to surrender his enrolment shall electronically submit an application in FORM GST PCT-06, at the common portal, either directly or through a facilitation centre notified by the Commissioner. (2) The Commissioner, or an officer authorised by him, may after causing such enquiry as deemed fit and by order in FORM GST PCT-07, cancel the enrolment of such practitioner.
Amendment in Rule 137	The Authority shall cease to exist after the expiry of [four years] from the date on which the Chairman enters upon his office unless the Council recommends otherwise. Comment: Earlier, there was an expiry period of two years.
Amendment in Rule 138E	Provided that the Commissioner may, [on receipt of an application from a registered person in FORM GST EWB-05] on sufficient cause being shown and for reasons to be recorded in writing, by order, [in FORM GST EWB-06] allow furnishing of the said information in PART A of FORM GST EWB 01, subject to such conditions and restrictions as may be specified by him.
Insertion of Form PCT-06: Application For Cancellation of Enrolment as Goods And Services Tax Practitioner Insertion of Form PCT-07: Order of Cancellation of Enrolment as Goods And Services Tax Practitioner Substitution of Statement 5B in Annexure 1 in FORM GST RFD-01 Substitution of Statement 5B in Annexure 1 in FORM GST RFD-01A Insertion of FORM GST EWB-05: Application for unblocking of the facility for generation of E-Way Bill Insertion of FORM GST EWB-06: Order for permitting / rejecting application for unblocking of the facility for generation of E-Way Bill	

Service by way of "giving on hire an electrically operated vehicle meant to carry more than twelve passengers" exempted from GST

The Central Government vide Notification No. 13/2019- CT (Rate) dated 31st July, 2019 have made following amendment in Notification No.12/2017- Central Tax (Rate), dated the 28th June, 2017:-

Clause (aa) to serial number 22 inserted:-

Services by way of giving on hire –

'(aa) to a local authority, an Electrically operated vehicle meant to carry more than twelve passengers; or

Shall be exempted from the levy of GST subject to the relevant conditions as specified.

Explanation.- For the purposes of this entry, "Electrically operated vehicle" means vehicle falling under Chapter 87 in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) which is run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicle.'

Clarification- Issues related to monthly subscription/ contribution charged by a Residential Welfare Association(RWA) from its members

The Central Government vide Circular No. 109/28/2019- GST dated 22nd July, 2019 has clarified the following issues that have been raised regarding the GST payable on the amount charged by a Residential Welfare Association for providing services and goods for the common use of its members in a housing society or a residential complex:-

Sl. No.	Issue	Clarification
1.	Are the maintenance charges paid by residents to RWA in a housing society exempt from GST and if yes, is there an upper limit on the amount of such charges for the exemption to be available?	Yes, an amount of Rs. 7500/- per month per member is exempt by way of reimbursement of charges or share of contribution for providing services and goods for the common use of its members in a housing society or a residential complex. This limit was increased from Rs. 5,000/- to 7,500/- per month per member with effect from 25th January 2018.
2.	A RWA has aggregate turnover of Rs.20 lakh or less in a financial year. Is it required to take registration and pay GST on maintenance charges if the amount of such charges is more than Rs. 7500/- per month per member?	No. If aggregate turnover of an RWA does not exceed Rs.20 Lakh in a financial year, even if the amount of maintenance charges exceeds Rs. 7500/- per month per member. It shall be required to pay GST on monthly subscription / contribution charged only if such subscription is more than Rs. 7500/- per month per member and the annual aggregate turnover of RWA is also Rs. 20 lakhs or more.
3.	Is the RWA entitled to take ITC of GST paid on input and services used by it for making supplies to its members and use such ITC for discharge of GST liability on such supplies where the amount charged is more than Rs. 7,500/- per month per member?	RWAs are entitled to take ITC of GST paid by them on capital goods (generators, water pumps, lawn furniture etc.), goods (taps, pipes, other sanitary/hardware fillings etc.) and input services such as repair and maintenance services.
4.	Where a person owns two or more flats in the housing society or residential complex, whether the ceiling of Rs. 7500/- per month per member on the maintenance for the exemption to be available shall be applied per residential apartment or per person?	The ceiling of Rs. 7500/- per month per member shall be applied separately for each residential apartment owned by him. Example: A person owns two residential apartments in a residential complex and pays Rs. 15000/- per month as maintenance charges of each apartment (Rs. 7500/- per month in respect of each residential apartment), the exemption from GST shall be available to each apartment.
5.	How should the RWA calculate GST payable where the maintenance charges exceed Rs. 7500/- per month per member? Is the GST payable only on the amount exceeding Rs. 7500/- or on the entire amount of maintenance charges?	The exemption from GST on maintenance charges charged by a RWA from residents is available only if such charges do not exceed Rs. 7500/- per month per member. In case the charges exceed Rs. 7500/-, the entire amount is taxable. For example, if the maintenance charges are Rs. 9000/- per month per member, GST @18% shall be payable on the entire amount of Rs. 9000/- and not on [Rs. 9000 - Rs. 7500] = Rs. 1500/- .

Clarification in respect of goods sent/taken out of India for exhibition or on consignment basis for export promotion

The activity of sending / taking specified goods out of India is not a supply as per section 7 of the CGST Act as there is no consideration at that point in time. Therefore, the Central

Government vide Circular No. 108/27/2019-GST dated 18th July, 2019 clarified following issues being faced by the trade and industry regarding procedure to be followed in respect of goods sent / taken out of India for exhibition or on consignment basis for export promotion:-

Sl. No.	Issue	Clarification
1.	Whether any records are required to be maintained by registered person for sending / taking specified goods out of India?	The registered person dealing in specified goods shall maintain a record of such goods as per the format of the given Annexure.
2.	What is the documentation required for sending / taking the specified goods out of India?	a) The activity of sending / taking specified goods out of India is not a supply. b) The said activity is in the nature of "sale on approval basis" wherein the goods are sent / taken outside India for the approval of the person located abroad and it is only when the said goods are approved that the actual supply from the exporter located in India to the importer located abroad takes place. c) The specified goods shall be accompanied with a delivery challan. d) Since the activity of sending / taking specified goods out of India is not a zero-rated supply, execution of a bond or LUT, as required under section 16 of the IGST Act, is not required.
3.	When is the supply of specified goods sent / taken out of India said to take place?	a) The specified goods sent / taken out of India are required to be either sold or brought back within the period of 6 months from the date of removal otherwise the supply would be deemed to have taken place if the specified goods are neither sold abroad nor brought back within the said period. b) If the specified goods are sold abroad, fully or partially, within the period of six months, the supply is effected, in respect of quantity so sold, on the date of such sale.
4.	Whether invoice is required to be issued when the specified goods sent / taken out of India are not brought back, either fully or partially, within the stipulated period?	a) When the specified goods sent / taken out of India have been sold fully or partially, within 6 months, the sender shall issue a tax invoice in respect of such quantity of specified goods which has been sold. b) When the specified goods sent / taken out of India have neither been sold nor bought back, fully or partially, within 6 months, the sender shall issue a tax invoice on expiry of 6 months from the date of removal, in respect of such quantity.
5.	Whether the refund claims can be preferred in respect of specified goods sent / taken out of India but not brought back?	The activity of sending / taking specified goods out of India is not a zero-rated supply since only such "supplies" which are either "export" or are "supply to SEZ unit / developer" would qualify as zero-rated supply. Therefore, refund claim cannot be preferred under rule 96 of CGST Rules as supply is taking place at a time after the goods have already been sent / taken out of India earlier.

For further detail and illustration, you may refer http://www.cbic.gov.in/resources//htdocs-cbec/gst/circular-cgst-108.pdf;jsessionid=848B939C6A215426A842948585D5BEB6

Clarification on doubts related to supply of Information Technology enabled Services (ITeS services)

The Central Government vide Circular No. 107/26/2019- GST dated 18th July, 2019 clarified issues related to supply of Information Technology enabled Services (hereinafter referred to as "ITeS services") such as call center, business process outsourcing services, etc. and "Intermediaries". The possible scenarios when a supplier of ITeS services located in India supplies services for and on behalf of a client located abroad have been discussed hereunder:

- **Scenario I:**

  In case the supplier of ITeS services supplies back end services, the supplier will not fall under the ambit of intermediary under section 2(13) of the IGST Act where these services are provided on his own account by such supplier. Even where a supplier supplies ITeS services to customers of his clients on clients" behalf, but actually supplies these services on his own account, the supplier will not be categorized as intermediary. In other words, a supplier "A" supplying services, on his own account to his client "B" or to the customer "C" of his client would not be intermediary.

- **Scenario II:**

  The supplier of backend services located in India arranges or facilitates the supply of goods or services or both by

the client located abroad to the customers of client. The supplier of such services will be considered as intermediary under section 2(13) of the IGST Act as these services are merely for arranging or facilitating the supply of goods or services or both between two or more persons. In other words, a supplier "A" supplying backend services as mentioned in this scenario to the customer "C" of his client "B" would be intermediary.

- **Scenario III:**

  In case the supplier of ITeS services supplies back end serviceson his own account along with arranging or facilitating the supply of various support services during pre-delivery, delivery and post-delivery of supply for and on behalf of the client located abroad, the supplier is supplying two set of services, namely ITeS services and various support services to his client or to the customer of the client. The supplier of such services would fall under the ambit of intermediary will depend on the facts and circumstances of each case. In other words, whether a supplier "A" supplying services as well as support services listed in Scenario -II above to his client "B" and / or to the customer "C" of his client is intermediary or not would have to be determined in facts and circumstances of each case and would be determined keeping in view which set of services is the principal / main supply.

Thus, it is also clarified that supplier of ITeS services, who is not an intermediary, can avail benefits of export of services if he satisfies the criteria mentioned for "export of services".

EXTENSION IN DUE DATES

Extension in due date for furnishing of annual returns in Forms GSTR -9, GSTR-9A and reconciliation statement in Form GSTR-9C for the FY 2017-2018 till 30th November,2019.

With a view to remove difficulties arising in filing annual return, the Central Government vide Order No. 7/2019-Central Tax dated 26th August 2019 brought in the Central Goods and Services Tax (Seventh Removal of Difficulties) Order, 2019 providing for extension in filing of annual return by substituting the figures, letters and word "31st August, 2019" with the figures, letters and word "30th November, 2019" under section 44 of the Central Goods and Services Tax Act, 2017.

Extension in the time limit for furnishing the Various Forms/ Returns:

Sl. No.	Particulars	Form No.	Existing/ Earlier due date	Extended due date	Notification No.
1.	The date from which the facility of blocking and unblocking of e-way bill facility as per the provision of Rule 138E of CGST Rules, 2017 shall be brought into force has been extended to 21.11.2019.	E-way bill	21st August 2019	21st November 2019	36/2019-Central Tax, dt. 20-08-2019
2.	Seeks to extend the due date for furnishing FORM GSTR-3B for the month of July, 2019 for taxpayers having principal place of business in flood affected districts of Bihar, Gujarat, Karnataka, Kerala, Maharashtra, Odisha and Uttarakhand and for registered persons whose principal place of business is in the State of Jammu and Kashmir.	FORM GSTR-3B	22nd August 2019	20th September 2019	37/2019-Central Tax, dt. 21-08-2019

FORTH COMING EVENTS UNDER THE AEGIS OF GST & INDIRECT TAXES COMMITTEE

2nd November, 2019

Place : Visakhapatnam • CPE Hours : 6 Hours

Title of the Seminar : Certificate Course on GST
Contact Details : CA Rajendra Kumar P. (CCM)
Mob: 94440 17087/93624 03430
Email: rk@icai.in

Title of the Seminar : One Day Workshop on GST
Contact Details : Visakhapatnam Branch of SIRC of ICAI
Ph: 0891-2755019
Email: icaivskpbranch@gmail.com; visakhapatnam@icai.org

9th November, 2019

Place : Bangalore • CPE Hours : 30 Hours

CUSTOMS UPDATES

Clarification regarding applicability of Notification No. 45/2017- Customs on goods exported earlier for exhibition purpose/ consignment basis

The Central Government vide Circular No. 21/2019- Customs dated 24th July, 2019 clarified that there is no requirement of filing any LUT/bond in case of goods sent / taken out of India for exhibition or on consignment basis for export promotion. Since such activity is not a supply, the same cannot be considered as 'Zero rated supply' as per the provisions contained in Section 16 of the IGST Act, 2017. Therefore, no integrated tax was required to be paid for specified goods at the time of taking these out of India, the activity being not a supply, hence the said condition requiring payment of integrated tax at the time of re-import of specified goods in such cases is not applicable.

Even in cases where exports have been made for participation in exhibition or on consignment basis, but, such goods exported are returned after participation in exhibition or returned by such consignees without approval or acceptance, the basic requirement of 'supply' cannot be said to be met and such reimport of goods will be exempted from so much of the duty of customs leviable thereon, provided re-import happens before six months from the date of delivery challan.

Clarification regarding Refunds of IGST paid on import in case of risky exporters

The Central Government vide Circular No. 22/2019- Customs dated 24th July, 2019 clarified that there is no requirement of 100% physical examination of each export related to risky exporters, as given in terms of Circular No. 16/2019-Customs dated 17.06.2019, provided no irregularity was noticed in earlier examinations of export consignments of export entities. It has been decided that Risk Management Centre (RMCC) shall take into consideration the feedback received from field formations with regard to the 100% examination conducted on exports of risk based identified entities and wherever the examination has validated the declaration made in the shipping bill, RMCC may review the risk assessment and gradually taper down the percentage of physical examination.

Clarification regarding Refunds of IGST paid on import in case of specialized agencies

The Central Government vide Circular No. 23/2019- Customs dated 1st August, 2019 clarified that the matter wherein specialized agencies have raised the matter of refund of IGST paid on imported goods. Under GST regime, Notification No.16/2017-Central Tax (Rate) dated 28.6.2017 has been issued which inter-alia provides that United Nations or a specified international organisation shall be entitled to claim refund of central tax paid on the supplies of goods or services or both received by them subject to a certificate from United Nations or that specified international organisation that the goods and services have been used or are intended to be used for official use of the United Nations or the specified international. A similar refund mechanism has been provided in respect of integrated tax vide notification No.13/2017-Central Tax (Rate). The above referred notifications envisage payment and then refund of taxes paid and thus specialised agencies ought to get the refund of the IGST paid on imported goods.

SURVEY ON GST IMPLEMENTATION

GST was introduced as the biggest tax reform on 1st July 2017 and even after the initial teething problem, GST has now started showing sign of establishing. Now, it has been thought fit to conduct a survey of the experience gain so that real issues can be recognised and addressed properly. Therefore, the GST & Indirect Taxes Committee of ICAI has come up with a survey on the journey to GST after 2 years of its successful implementation in India.

Main features of the Survey on GST implementation are:

- To gather experience gained by the members during the period of 2 years of GST implementation.
- To recognize and address the real issues properly.

Interested person
may spare few minutes
and participate in this survey
by clicking at the following link:

http://idtc.icai.org/cc/apps/survey.php
on the website of the GST & Indirect Taxes Committee.

For any clarifications, you may contact Secretariat,
GST & Indirect Taxes Committee at gst@icai.in or 0120-3045954

INSIGHTS INTO 'BUSINESS' OF AUDITEE IMPERATIVE

Introduction

A Travel agent in West Bengal claimed input tax credit of an invoice issued by Hotel at West Bengal where Client from Delhi stayed for a day. IGST was charged by the travel agent to his client and CGST-SGST paid to the hotel flowed into GSTR 2A. Only during departmental audit, the error was discovered that travel agent should have either issued invoice for commission to the Hotel with CGST-SGST of 18% or else, invoice with IGST of 5% should have been issued to Client from Delhi.

While this error was being committed, the travel agent did not realize that something was amiss and the client was happy that credit flowed in from West Bengal to Delhi. In fact, not even GSTN is designed to prevent such errors because the portal does not 'open / close' functionalities based on HSN of taxpayer. Credit-hungry Client has landed this business-hungry travel agent in trouble. What should the GST auditor do about this? The answer is easy, but the more important questions is how does the GST Auditor discover this error?

Innocuous errors

Insights into the business of Auditee is imperative while carrying out the GST Audit. There are scores of areas where current practices may not be in line with the GST law, for example:

- Advance received in April, 2017 by service provider issued invoice in July 2017 to Trader-Client with GST and credit was claimed;
- VAT-ST was paid by Works Contractor in respect of rate difference approved in August 2017;
- Goods given for 'trial' to prospective customer on non-returnable basis were expensed as 'business development expenses';
- Abnormal wastage of inputs by job-worker were included in cost of production;
- Employees of all group entities use travel desk of one entity who books and pays airline fees;
- And the list goes on……

Question still remains, how GST Audit discovers the errors in these seemingly compliant transactions. Press Release issued by Government advises the auditors to be responsible only to reconcile the books with GSTR 9. But, GAAP-basis of maintaining books DO NOT record transactions of barter and exchange because there is no financial record of these transactions (even if there is a transaction value in GST law). It is inconceivable for a GST Auditor to take shelter with this Press Release as if his expertise and qualifications don't provide enough guidance as to the role expected.

Auditor certifies 'zeros' too

The GST Auditor who certifies GSTR 9C, is not only responsible for the values in relevant tables, she / he is also responsible for tables where the value reported is 'zero'. For example, tables like 5D and 5J where taxpayer reports 'zero', cannot be readily accepted by the GST Auditor. By certifying the reconciliation, the GST Auditor would be certifying that 'there are no deemed supplies' or that 'all credit notes issued are, in fact, permissible under section 34'.

Where GSTR 9 and books are not matching, there is reason for the GST Auditor to inquire into the reasons and either reconcile the two or explain the items that remain unreconciled. That's the essence of the expectable from GST Auditor. But consider a case where GSTR 9 and books are perfectly matching. Is the GST Auditor's job done? Is there nothing to be inquired into?

Experts will say that they would be more worried about the cases where GSTR 9 and books are matching than the cases where there is a mismatch. And the reason is that GST relies on 'time of supply' for fastening the incidence of tax whereas the books rely on 'accrual of income'. With this fundamental difference in the premise on which both are prepared and presented, the GST Auditor must look for 'what ought to be' within 'what appears to be'.

Classification

"Sir, have you advised your clients on GST rates applicable to the goods supplied by them?" asked a GST faculty. "Yes Sir, I have" replied a participant with some sense of accomplishment. "Do you have a copy of Customs Tariff Act in your office?" asked the faculty. "No Sir, I don't practice in Customs. My areas of practice have been auditing and direct tax, now I've expanded my service offerings to cover GST".

Surely, everyone can relate to such a conversation. Para (iii) to notification 1/2017-CT(R) specifies in the explanation that:

> (iii) "Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).
>
> (iv) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification.

So, it is impossible for one to advise on GST tariff without first looking into Customs Tariff in respect of those goods.

Information technology software is classifiable both under HSN 4907 as well as HSN 8523. Please identify the circumstances when one of these will not apply. Classification issues are not (yet) a thing of the past. GST continues to require domain understanding to support interpretation of GST tariff.

Expenses or inward supplies

"Are all expenses inward supplies?" asked the faculty and the entire auditorium went quiet, wondering what kind of question this was. Isn't the answer obvious. Question was repeated but based on the way things turned out when some enthusiastic participants answered previous questions, no one ventured to offer an answer.

In the earlier tax regime, tax compliance required monitoring of 'purchases, sales and closing stock'. But GST has changed the rules of the game and new vocabulary needs to be embraced. GST knows nothing of this sort, that is, 'purchases, sales and closing stock'. GST only knows 'inward supplies, outward supplies and input tax credit'.

Except depreciation, provisions and opening stock, it seems all expenses (or debit balances in the Profit & Loss Account) are inward supplies. And all inward supplies must be outward supplies of one or other person. Either from another person or another distinct person. If taxable, either tax paid or tax escaped. And if non-taxable, either specifically exempt or excluded from scope of supply itself. Care must be taken to identify all inward supplies and whether any tax obligations remain on the Auditee must be examined. GST under section 9(4) will be a reality one day and that's the day the extent of inquiry by GST Auditor will be realized. What about the period from 1 Jul 2017 to 12 Oct 2017?

Valuation

"Is it lawful for price of supply between unrelated parties to be challenged?". Now, participants were sure that they can't go wrong with this one and replied "NO", in unison.

Section 15(1) provides three 'disqualifications' and then takes the transaction to 15(4) and the rules for determination of its transaction value. These disqualifications are (a) price (b) unrelated persons and (c) price being the sole consideration.

Test of 'sole consideration' is not automatically satisfied every time test of 'unrelated persons' is satisfied. Remember, if that were the case, only two disqualifications would have been sufficient. Parliament in its wisdoms recognizes the possibility that even among unrelated persons, the price charges 'may not' be the sole consideration. That is, there may be extraneous consideration (simple examples can be found in section 15(2) itself) or some part (or whole) of the consideration may be non-monetary form.

Insights into the business of Auditee helps the GST Auditor to locate transactions or expense heads where such non-monetary consideration could reside. Gift is a transfer that is taxable as an outward supply but disposal 'by way of' gift attracts reversal of credit. Now, there's no doubt that goods that are 'fit for sale' are not 'disposed' because the word 'disposal' is not used interchangeably with 'sale'. Generally, sale applies to goods that are 'fit for sale' and disposal applies to goods that are 'unfit for sale'.

Just because credit has been reversed under the impression that goods (although fit for sale were given away freely), will the demand for output tax be excused? Under which section? Before analysing 'given away freely', please consider the word for consideration in section 2(31) in vernacular language. UPGST Act (available in hindi) uses the word 'pratiphal' and now the meaning jumps out of the pages. When goods that were 'fit for sale' were given away, what was the pratiphal? In fact, the remainder of clause (b) to section 2(31) makes it abundantly clear that there is consideration flowing albeit in non-monetary form. And when consideration exists in non-monetary form, even among unrelated persons, rule 27 comes into operations to determine the transaction value to demand tax.

GST is a 'destination based' tax

In the run-up to introduction of GST, all position papers made it explicitly clear that GST is a 'destination based' tax. Where is it said in the CGST Act? Destination of supply is not a question that taxpayer is free to determine. Article 269A(5) makes it the exclusive privilege of Parliament to dictate what is the destination of any supply.

In exercise of this exclusive privilege, sections 10 to 13 of IGST Act declare what is the destination of supply a.k.a place of supply qua each supply with a residual provision also. So, destination of supply is to be seen in the law and not sought from the recipient of supply.

When hotel located outside India is booked by a supplier in India to a customer also in India, even though the immovable property is not in India, it is declared that the destination of this supply is in India. When a commission agent represents overseas principals with overseas customers, the destination of this supply is in India. When research and trials are carried out on specimen in India, then even though payment from overseas clients are realized in convertible foreign exchange, the destination of this supply is in India. And in the case of goods, bill to London and ship to Delhi, is not export and its liable to GST even if invoice is issued in foreign exchange.

Identifying which specific provisions declaring the place of supply attracts in each case is imperative to paying the right 'type' of tax. Export of goods and export of services have nearly nothing in common in their respective definitions in IGST Act.

Input tax credit

Even before any question could be posed, participants said, "input tax credit is an indelible right" and cited Eicher Motor's decision. "Of course, it is" said the faculty "but, when does this right come to vest? What are the vesting conditions? And unless

vested, it is an inchoate right that can be lost by prescription" replied the faculty. Now the auditorium went quiet again.

Vesting of rights is when the vesting conditions are met. Rights that are not yet vested (inchoate or in formation) can be lost if the vesting conditions are not met within the time permitted.

Limitation is well understood; it is the time limit within which any right can be enforced. Once the time limit prescribed or limitation is passed, the right is not lost, its enforceability is lost. Compared to this, consider something called 'prescription'. While the right remains intact and only its enforceability is lost in limitation, in prescription the right itself is lost. One may read section 25 to 27 of Limitation Act, 1963 for more insight, losing the right is very interesting.

When right over a thing is lost, it means the person who had that right has lost it and not that the thing has vapourized. Now, when right over a thing is lost, it also means that right over that thing could be acquired (by operation of the law of prescription) by another person. Yes, that is acquisitive prescription where a person who did not have right over a thing, gets all those rights (and that thing itself so as to enjoy the newly acquired right). And the mirror result is extinctive prescription where the person who had those rights but lost it (by operation of the law of prescription), will forfeit the thing in favour of the person who acquired it.

Although this explanation does not do justice to the concept of 'limitation v. prescription', it is important in the context of input tax credit, to know that only when all the conditions – conditions precedent and conditions subsequent – in section 16(2) are satisfied will any input tax credit will be a vested right. And until all these conditions are fulfilled, credit availed is only provisionally availed and can be denied if they are finally not fulfilled, even something as simple as rule 37.

While GSTR 2A is not the gateway to claim input tax credit, but the requirement to fulfil all the conditions in section 16(2) continues to beckon GST Auditor's inquiry.

Books of account

"What is unbilled revenue?" asked the faculty. And even before anyone could answer, the faculty added "Do you think unbilled revenue may sound like 'turnover escaping assessment' to a taxman?". There was not a whisper in the auditorium and then heads nodded in fearful agreement.

That's the nature of today's book-keeping. In fact, section 35(1) requires 'every registered person' to maintain books and records. And truth be said, registered person DOES NOT maintain books and records. Books and records, if at all, are maintained by the Person and NOT the Registered Person. Not because there's no intention to maintain books and records but today's computerized book-keeping has done away with the need to maintain separate branch-wise books due to concept of 'cost centre' and 'location' based tagging of each accounting entry. With that, books of accounts of each branch can be 'extracted'.

Is it sufficient that books and records of every registered person be 'extracted' or should it be 'maintained'. Maintained means, regularly and continuously. Extracted is not that. And nothing can be done when GST audit is being carried out in 2019-20 in respect of 2017-18.

It is with some sense of doubt that the GST Auditor will proceed to 'extract' a GSTIN-wise trial balance that is certified, at least by the management, before proceeding to work on the reconciliation. There's no reason to be anxious, because the GST Auditor knows his way around. How to test if the branch's trial balance is correct and complete, how it ties-up with the entity-level trial balance, what are the contra-ledgers that will cancel each other on consolidation and what are inter-branch supplies and inter-branch loans?

Identifying these aspects and putting together something that the tax authorities can understand is the task of GST audit. The clarity with which this exercise is to be conducted, is the job of an expert. And when something is amiss, a GST Auditor knows how to present the information without clouding the reader's mind and without arousing unmerited concerns.

Conclusion

Insight into the 'business' of Auditee is inevitable. Remember, the Government has come to an expert to help make sense of it all because today's books of accounts are so complex that simple-minded taxman may hardly appreciate. That's exactly why the expert is required. And the expert can do no less than bring his expertise to bear. GST Auditor's knowledge of accounting-auditing is well-known, understanding of GST law is assumed but insight into the 'business' of Auditee is implied. It is impossible for GST Auditor to discharge duties assigned in the law without the confluence of all three streams of understanding. And unfamiliarity with the business of Auditee is a clue to turn down those engagements, at least, this year.

Clearly, there is a job for an expert and the law acknowledges this. But the question is, does the GST Auditor recognize the role or is happy relying on Press Release that suggests that something far lesser is good enough, this time!

GST 2019-REAL ESTATE INDUSTRY

The one industry that occupied the Government's feverish attention was the Real Estate development segment to save the hapless homebuyers from the onslaught of the Developer to usher in a new rate-regime from 1 April, 2019. RERA does its bit in saving the very same homebuyer. Now, its GSTs turn to arm homebuyers with new rates of tax. Without concerning ourselves with the policy-thinking behind the amendments approved and rolledout from 1 April 2019, it makes for some very interesting learning about the muscles (in this law) that can be flexed to bring 'order and transparency' in an industry that's barrelling down at break-neck speed in growth and prices. Homes-for-all is a promise that the Government is resolved to deliver; and no GST is going to come in the way. After letting the dust settle down, it's time to understand the contours of these changes and analyse the 'hits' and 'misses'!

RERA applies only if a project is 'intended for sale' and thecurrent GST changes will apply even if there haven't been any sales as long as that intent exists. That is, RERA which does not require registration where the 'real estate developed' is 'intended' to be let-out, GST seems to rely on assertions made in this RERA application. 'Project' does not mean projectin-title as a whole but even a phase or a tower that are 'admitted'as a 'project' before the RERA-Authority. And 'apartment' isn't just a residential dwelling unit, but it includes shops, offices, showrooms, chambers, unit or godown, etc.that are intended-for sale as even covers 'plots for sale' (more on that later). So, it's apparent that the slew of changes in the GST Laws, that has come into effect from 1 Apr 2019, affects the real estate industry but within a narrow compass. Let's look into these changes and understand 'why it is, and what we think it is!'

Overview

GST rates have been moved down from 12% in case of affordable housing and 18% in case of non-affordable housingwith the benefit of input tax credit, to 1.5% and 7.5% without this benefit, respectively. And these rates are to be applied on a 'deemed value'. And this fiction is made possible by 'upgrading' the GST rate notifications to come within the Governments' power vested in section 15(5) of the CGST Act, to notify what ought to be the value and so notified notified with, of course, clearance by GST Council.

While all new projects commencing from 1 April 2019 'must' follow this new rate-regime,there's a choice, however, in respect of ongoing projects to continue under the previous rate-regime. This is somewhat of a 'put' option, where the Developer is to make hisdecision known to stay put, on or before the 20th of May, 2019. If not, the new rate-regime will be thrust upon the Developer even in respect of on-going projects.

So, not everyone can simply switchover to 1.5% in case of affordable housing or 7.5% in case of non-affordable housing, and give up all available credits. Careful evaluation of 'pros and cons' are required to be carried out in respect of on-going projects. Don't they say, "fools rush in"?

But, what about installments to be billed to buyers from 1 April 2019? Well, it needs to be billed 'as if' the decision (to stay or switch) was already known.

Firstly, all changes notified from 1st April 2019 apply only in respect ofreal estate development which is 'intended for sale'whether on owned-land or land obtained under joint-development arrangement with Landowner. So, development that is 'not for sale' stays out of the new rate-regime (discussed later).

Secondly, all changes are to affect 'ongoing' development unless 'opted out' by filing project-wise intimation to the jurisdictional Commissioner in Annexure IV by 20th May 2019. This evaluation of '12% (or 18%) with credit' or '1.5% (or 7.5%) without credit' must be undertaken on project-by-project basis. Each Phase in a single Project could be a 'project' for GST (explanation to section 3, RERA). Look for 'project' as stated in RERA application and not as per commercial project title or lay-person understanding. So, thedecision to opt-in or not, is to be taken project-wise and not across the enterprise.

Thirdly, commercial effects of the new rate-regime are that:

- 'prices' cannot be readily revised since agreements have already been entered into with the Buyers, housing loans approved, and may therefore, be commercially unthinkable to revisit the price;
- 'tax clause' in signed agreements carry clauses like 'GST extra' or 'GST as applicable' and such clauses only help to substitute 'output tax' on the invoice but one cannot go back and alter the contractedprice with the buyer.

Contract Costwill increase if, input tax credit that was available till now is no longer available. If Contract Price cannot be increased to recoup increase in Cost, it will result in additional cost being burdened on the Developer.

Lastly, one must recognize that the new rate-regime is riddled with pre/postconditions. Embracing these new rates will not be without examining compliance requirements on Developer-Landowner.

New Rate-Regime

Although a new rate-regime has been introduced, the previous rate-regime has not been abolished and continues to occupy the field that's not affected by these changes. New rate-regime comprises:

- affordable residential apartment at 1.5%**;
- residential apartment at 7.5%**; and
- commercial apartment (in RREP) at 7.5%**.

* RREP is term created by GST laws and meansa Residential Real Estate Project where the carpet area of commercial apartments is not more than 15% of total carpet area.

**When these rates of 1.5% or 7.5% are applied after 1/3rd abatement on total value, it reaches 'effective rate' of 1% or 5%.

Now, these rates are to be applied on 'deemed value' which is "2/3rds of Unit Price" (2/3P) prevalent contemporaneously. Para 2 which specifies that 1/3rdabatement is permitted towards land cost in notification 11/2017-CT(R)dated 28th June 2017 is made applicable to these new rates also. Authors caution that any attempt at artificial vivisection of total price of apartment into 'construction price' and 'price of undivided interest in land' and venture to apply tax only on construction price would not be permissible in view of this deeming fiction in valuation by the operation of this notification under section 15(5) of the CGST Act..

Since, 1/3rd abatement is allowed, this abatementis an 'exemption' and comes within the input tax restriction under Section 17(2) of CGST Act (#16(ii) to 12/2017 as updated by 03/2019 dated 29th March, 2019 vide (ii)(c) for all entries under new rate-regime).Experts are divided whether this abatement will attract reversal of common credits at all as abatement is only for purposes of discharging GST although activity remains well within section 2(119) as a works contract.

'Affordable residential apartment' is defined to mean a unitthat is less than 60 sq. mtrs. (non-metros*) or 90 sq. mtrs (metros) AND price is less than Rs.45 lacs. Each apartment needs to pass these tests 'cumulatively' at the time of sale, to avail the concessional rate.

* (xvi) in03/2019 dated 29th March 2019

So, a given project may involve units that are taxable at 1.5% or at 7.5%, depending on the conditions met at unit-level.

Sub-contractors are allowed to charge 12% where affordance residential apartments are < 50% of total carpet area. And if this fails, the differential 6% is payable by Developer on RCM basis. Authors point out an anomaly that clause (va) of the notification 03/2019 dated 29th March 2019 contains the words "Rs.45 lakhs or less"to attract this RCM-tax whereas it should be read as "Rs.45 lakhs or more"to attract this liability.

Development Rights

The Government seems unmoved by the outpouring of objections to the levy of 'tax on immovable property'. And reference to 'land' in schedule III of the CGST Act is clearly not meant to cover 'immovable property', as widely opined by experts to be either too obvious or deliberate. The issue remains to be debated whether term 'land' will include all 'immovable property' in its ambit and whether transfer of development right, is deliberately excluded by the phrase 'sale of land' as definition of landincludes all rights in land also. Author believes that 'land' is to precisely worded in schedule III and leaves no room to expand it in any direction just like 'sale of land' is equally precise that any arrangement 'less than' absolute sale of land, like lease, license, easement or interest for a consideration is expressly treated as a supply of sercice in para 2(a) of schedule II.

So construed, development rights (DRs) are taxable under #16(iii) in 11/2017 at 18%, but interesting changes made are:

- supply of DRs in respect of all projects that are 'intended for sale' is brought to tax under reverse charge, whether Landowner is registered or unregistered (05/2019); and
- supply of DRs in respect of residential projects that are 'intended for sale' is fully exempted from this tax (RCM) where units are sold before date of OC/CC (04/2019).

This means, supply of DRs is not taxable in the hands of a Landowner at all instead, the tax burden (of payment and compliance) is on Developer. But, in relation to residential apartments, even Developer is excused from payment of tax (RCM) except to the extent tax applies on unsold units (capped at 1% or 5% of total value of unsold residential units). So, development rights will go completely tax-free if all units in a residential apartment project are sold before date of OC/CC. And rightly so as all units have suffered tax at the prescribed rates already and there remains nothing more of economic value in this venture that still remains to be taxed.

Where tax is to be paid by a Developer, the time-of-supply will be the 'date of completion / occupancy certificate' but value-of-supply will be 'deemed value'. Yes, deemed value being derived from the valuation method in explanation 1A of 04/2019 on the date when development rights were transferred, that is, date of joint-development agreement. Care must be taken to ensure that 'nearest' is not 'last'. 'Last' has mathematical precision but 'nearest' has an equitable application of price that's before or after the actual supply.

Now, when 'all projects' are listed for payment of tax on RCM basis in 05/2019, it is interesting that only 'residential apartments' are allowed exemption from tax under 04/2019. Unless this is inadvertent, development rights with respect to all units of commercial apartments are liable to tax in hands of Developer on RCM basis. At the same time, without benefit of input tax credit, supply of construction service with respect to the same commercial apartments, are also taxable. Time of supply would be earlier of (a) percentage of completion or (b) date of OC/CC for project. Rate of tax and value of supply (of development rights) would be 18% on deemed value on RCM basis.

In case, omission of 'commercial apartments' in 04/2019 is inadvertent, these too would be liable to tax (RCM) to the extent they remain unsold. As the law stands today, development rights with respect to commercial apartments are liable to tax in hands of Developer on RCM basis.Time, Place and Value of supply would remain the same. Authors are of the view that since, tax paid (RCM) on development rights is non-creditable

on (all residential units and commercial units which are part of RREP) would anyway suffer tax on 'date of OC/CC', levying tax on DRs (on reverse charge) once and again on construction service (on forward charge) would result in double tax in respect of commercial apartments which arepart of RREP.

Since, tax is applied on 'deemed value', there is no requirement to include 'non-refundable deposit' paid by Developer as it would amount to double counting of consideration (to this extent) in taxable value.

So, Landowner is NOT required to register under GST, if and only if:

- JDA is on 'area sharing' basis;
- Project is 'intended for sale', even if not fully sold; and
- All units (belonging to Landowner) are sold after the date of OC/CC.

Since Landowners are seldom able to satisfy all these conditions, they may hardly escape requirement to be registered under GST even if they (somehow) manage to stay out of definition of 'promoter'under RERA.

Exchange

A Developer is required to pay tax on construction services as a continuous supply of services. Although supply of construction service is not the same as supply of construction pursuant to sale of apartment, following rate-options are provided:

- where tax on apartment sales is payable at 1.5% or 7.5% of 2/3P, construction service between Developer and Landowner, is to be taxed at 1.5% or 7.5% of 2/3P from contemporaneous sales (fourth proviso in conditions to 03/2019 dated 29th March 2019); and
- where tax on apartment sales is at 12% or 18% is opted for, construction service between Developer and Landowner,is to be taxed at 18% of 2/3P (03/2019 dated 29th March 2019 omits #3(ii) and updates #3(xii) in 11/2017).

And on resale of units (before OC/CC), a Landowner is required to pay tax at 1.5% or 7.5% of 2/3P of 'actual resale price' charged from buyers. Here, tax already paid on sale (by Developer) is allowed to be set-off against tax payable on resale (by Landowner) under a special internal credit scheme. Tax on sale (by Developer) will be paid based on 'percentage completion' and tax on resale (by Landowner) will be paid on 'actual billing or collection' from Buyer, as both (sale and resale) are considered to be continuous supplies of services.

Authors are of the view that this 'credit scheme' does not attract all conditions applicable under section 16 of CGST Act as it is specially allowed under this notification. Authors are also of the view that the ban on claiming input tax credit under this notification and condition that output tax be paid 'in cash only' does not annul this special set-off allowed under this 'internal credit scheme' created within this notificaiton.

Where some apartment units remain unsold and OC/CC is granted, construction services betweenDeveloper and the Landowner, is to be taxed at the same rates (stated earlier) with the date of OC/CC as their time of supply (06/2019 dated 29th March 2019).

Ban on Input Tax Credit but……

The new rate-regime places a total ban on 'input tax credit' in the hands of the Developer as well as a Landowner (registered). Authors are of the view that this ban will not affect set-off allowed on supply between Developer and a Landowner (discussed earlier) under the 'internal credit scheme'.

Now, where tax at 1.5% is applicable on affordable residential apartment sales, sub-contractors are allowed a special rate of 12% instead of default rate of 18%. On date of OC/CC, if it's discovered that 12% was wrongly applied for the reason that the project did not qualify (due to shortfall in 50% carpet area or the value being more than 45 lacs), Developer would be liable to pay the differential 6% on RCMbasis (#3(va) included by 03/2019 dated 29th March, 2019).

So, a Developerwould be liable to RCM (without credit) in following cases:

- Where the Development rights to the extent of Landowner's share of unsold (residential) units on date of OC/CC (discussed earlier);
- In situations where a sub-contractor is allowed concessional rate of 12% but a project that fails to qualify (carpet area of affordable units< 50% of total carpet area); and
- Liability towards new shortfall-tax (discussed later).

So, it is important to note that the new rate-regime imposes a total ban on input tax credit but with exceptions where the output tax rate at 1.5% or 7.5% is applicable. And where output tax is applicable at 12% or 18%, input tax credit is available as before without any interference by this new rate regime.

One very significant qualifying condition to avail output tax at 1.5% or 7.5%, is to find out if there's any overdrawn credit as at 31stMarch 2019. That is, credit in the normal course could be treated to 'accrue' at a certain rate linked to 'percentage-of-completion' of outward supplies that are 'billed-and-taxed'. Now, if credit availedup to 31 March 2019,is more than credit so accrued, it's a case of credit being 'overdrawn'.Annexure I and II to the notification 03/2019 dated 29th March 2019 provide the formula for calculating this overdrawn position of credit as on 31 March 2019 which is to be treated as follows:

- If credit accrued is less than that availed, then reverse credit to the extent it is overdrawn. Ifthis overdrawn credit has been utilized, it is to be paid back'in cash' (file GST ITC 03). And facility to pay in instalments is permitted if approved by Commissioner (Section 80 of the CGST Act); or

- If credit availed is less than that accrued, then the credit that is 'underdrawn' is permitted to be availed well into 2019-20, even though credit is generally banned under this new rate-regime. As regard how this credit will be utilized (when outward supply is taxed at 1.5% or 7.5% which is to be paid in cash only) is left to the ingenuity of the Developer who may have other taxable outward supplies where output tax is permitted to be paid by utilizing credit.

Please look into the illustrations provided in Annexure I and II of the notification 29th March 2019 to determine the ineligible extent of credit 'Tx'. Credit overdrawn / underdrawn is to be worked out ifa Developerdoes not opt to continue the previous rate-regime.

New 'Shortfall-Tax' on RCM-basis

Shortfall-Tax is just a moniker for RCM-tax liability that arises under 07/2019 in the following situation:

- Where output tax at 1.5% or 7.5% is applicable to a project;
- And inward supplies are from 'unregistered suppliers';
- And such inward supplies exceed 20% of total inward supplies (excluding development rights, electricity and 3 petro-products).

Then, Developer is required to pay this shortfall-tax (fifth to seventh proviso in the conditions to notification 03/2019 dated 29th March 2019) on RCM-basis:

- At the respective rates applicable, if shortfall is due to cement or capital goods; and
- At a flat rate of 18%, if shortfall is due to any other taxable inward supply of goods or services.

Special HSN is introduced with rate of 18% for payment of this shortfall-tax. Goods are listed in #452Q in schedule III of 01/2017 and services in #39 in 11/2017. This unique 'shortfall-HSN' will not apply tocement and capital goodswhich will fall under their respective HSN for rate of tax. Shortfall-tax on cement is to be paid monthly,while tax on all others to be paid by June 20XX.

Please note that 'place of supply' is to be carefully identified as this shortfall-tax is prescribed both under CGST Act and IGST Act. Since it is known which category of inward supply is from unregistered persons, a Developer is free to pick the ones to pay tax on that helps reach the threshold of 80%. Since, input tax credit is not available, it merits to reach 80% and not exceed it. Also, this notification is issued under section 9(4) of CGST Act and 5(4) of IGST Act.

Apartments 'intended' for Sale

All notifications refer to the word 'apartment' which is defined in RERA (section 2(e)). Units that are 'not for sale' do not come within scope of apartment under RERA. Real Estate Project (REP) is defined to mean development 'for the purpose of selling all or some' (section 2(zn) of RERA). So, application for RERA registration must state whether project is 'for sale' or not so as to come within requirement of RERA compliance.

If the development is 'not for sale', then it is out of scope of RERA and out of scope of this new rate-regime too. It is possible that some (or several) units may not be sold, that does not mean the project was not 'intended for sale'.

Where investors are identified who do not take up equity in SPV but present themselves as bulk-customers, then project qualifies as 'intended for sale' and tax consequences discussed above will equally apply.

Plots for Sale

As an aside, development of 'plots for sale' is included in this new rate-regime as 'taxable project' in respect of the external development works carried out on immovable property. Although views around whether 'sale of land' includes 'interests in land' or not have been raised, another new concern that emerges from the new rate regime notifications is about 'development of plots for sale'.

While it may seem that one may be reading too much into the law and imagining non-existent tax on 'development of plots for sale', let us quickly draw attention to the following aspects:

- Notification 3/2019 in fourth proviso while defining 'developer-promoter' uses these words "developer-promoter is a promoter who constructs or converts a building into apartments or develops a plot for sale.". Surely, these words in this definition are not surplusage;
- RERA makes no distinction between a 'plot for sale' or 'apartment for sale' when detailing the registration and compliance of a 'project'.

Without hurrying to dismiss any 'risk' of possible liability, please consider the following factors that the Authors have noted:

- Project (for sale of plots) is undertaken under the same form and structure of arrangements like an apartment project, which is, own land or land on joint-development;
- Development works are carried out with funds raised against 'agreement to sell' and rarely out of own (or loan) funds raised by Developer;
- Cost of land has no comparison with Selling Price of developed plots. Brand name of Developer along with external and sub-surface utilities provided are the main attractions to justify Selling Price;
- Development works are intimately linked with the plot even if there were two agreements for marketing the Plot-Project. And para 2 anyway admits and allows 1/3rd abatement towards the element of 'sale of land' embedded in the such conjoint contracts; and
- When exclusion of 'sale of land' is acceptable in the case of apartments, to argue that similar value being excluded towards the element of 'sale of land' present in a 'development of plot' would be double standards.

Of course, our Courts will have final say in the matter but, it is inescapable in the Authors minds that GST notifications have enough teeth to impose tax on 'development of plots for sale' while it is admitted that one may be able to come to terms

after the initial shock subsides, just like it did in the case of apartments.

Now, viewed commercially, Developer has to look at the following two consequences:

- Either, collect-and-pay tax of 5% from customers and include GST paid on development works to sub-contractors and other suppliers as a cost of project;
- Or, pay tax at 18% on best-assessment value of development works under a separate agreement and fact the risk of additional tax demand by way of (a) differential output tax (5% on total minus 18% on split price) (b) recovery of input tax credit (which is not allowable if the new rate regime is found to be applicable) and (c) applicable interest, assuming penalties would (somehow) be waived.

Details of the workings are provided below as an illustration:

Components	Base Cost	Dev. Cost	Total
Land*	100	100	200
Dev. Works	0	300	300
	100	400	500
Selling Price			1500

	GST Payment Option**		
Components	**Taxable Value#**	**Rate**	**Tax Amount**
Land*	1170	0%	0
Dev. Works	330	18%	59.4
	1500		59.4
Input tax availed and utilized			54

	Additional Tax Demand		
Components	**Adjusted Taxable Value@**	**Rate**	**Tax Amount**
Land*	600	0%	0
Dev. Works	900	18%	162
	1500		162
Less: Tax already paid			-59.4
Add: Credit utilized			54
Addl. tax (plus int.)			156.6

* Saleable area will be half, hence land cost will double

** Only dev. works is taxed {9954 (3) (xii)]

Taxable value offered is cost+10% with full@ computed on pro-rata basis of costs incurred for each component

Note : Tax at 5% on Rs. 1500 will be Rs. 75 and credit foregone on cost of Rs. 300 will be Rs. 54 Total GST on plot Rs. 129.

Authors caution against being overly confident about non-taxability of 'development of plots for sale'.

Conspicuous by their absence

In all the notifications under this new rate-regime, there's no mention of TDR-Certificates. View held so far, that TDR-Certificates are actionable claim appear to continue and can be argued to be non-taxable.

Previously, revenue-sharing JDA attracted tax on development rights on forward charge basis, without the benefit of deferment of time of supply (as 4/2018 dated 25th January 2018 was never applicable). Now, revenue-sharing JDA is rescued from this incidence, but only in case of development that's 'for sale'. Development that's 'not for sale' (for rental returns) will attract previous rate-regime on supply of development rights i.e. 04/2018 dated 25th January, 2018.

Though REP is defined in RERA, RREP is not defined. 03/2019 defines RREP as 'REP with commercial carpet area (CCA) not greater than 15% of total carpet area (TCA)' which works out to be 17.64% of developed residential area. So, based on this definition, commercial apartments are allowed concessional rate of 7.5% under the new rate-regime. Further, if RREP has CCA > 15% of TCA, then the project does not qualify for the new rate-regime.

Special dispensation is made available to pay GST on construction service by a Developer to Landowner on the date of OC/CC under 06/2019 dated 29th March 2019. But, where the units are offered for sale before OC/CC, out of Landowner's share of units, this special dispensation is forfeited. And Developeris required to pay tax on intermittent supply to the extent of these units offered for sale by Landowner. GST applicable is at 1.5% or 7.5% on 2/3P on 'percentage of completion' basis,and Landowner to charge GST at 1.5% or 7.5% to Buyerbut with special benefit of off-set with tax paid earlier by Developer.

Deemed Value

Concept of 'deemed value' brought into rate notification because of 'upgrade' of notification 11/2017 dated 28th June 2017 from being a notification issued under section 11(1) to be the one issued under section 15(5). So, where specified, tax applies on deemed value, which is price of similar units sold to independent buyers. And where such deemed value does not apply, fall back to rules is inevitable.

Actual 'cost of construction' will not have any bearing on the valuation for payment of tax when the project is 'intended for sale' as 'deemed value' is made applicable to such projects.

Deemed value is 'all in' price and no separate tax is applicable on utility deposits, legal and registration charges, PLC, club membership, car parking, etc. But then there are transactions between the parties that occur outside their relationship of 'Promoter-Buyer'. For example, claim for liquidated damages, modification-enhancement works (by altering scope of original works or in addition to scope of original works), complements (white goods, car, holiday package). Please take care that these may fall outside the 'scope of 9954' and hence will be treated as a supply on stand-alone basis. GST will apply accordingly and will be unaffected by credit-ban under 3/2019. And to determine the 'scope of 9954', look into RERA application and find out what was the 'offering' and everything outside that offering will be subject to GST independently.

Then there's marketing fee (charged by Developer for sale of Landowner' units) which also is an independent supply taxed separately with benefit of credit, where available. And if the marketing fee were to be remodelled as 'amendment to area sharing' where Developer retains a few units out of Landowner share as compensation for marketing efforts, GST requires unbundling such arrangements for it to be taxed appropriately.

Status Quo Ante

As stated earlier, the new rate-regime affects the real estate development sector within a very narrow compass. There lies beyond in this sector, a far greater space that continues to bear the GST treatment under the previous rate-regime. But the current changes bring much needed clarity (though some experts continue to express reservations) as to the Government's view of 'taxable supplies' in this sector, namely:

- Development rights supplied by Landowner to Developer is taxable;
- Supplies between Developer and Landowner is a 'taxable exchange';
- Development 'not for sale' continues to be taxable to the extent of units involved in 'exchange';
- 'Value of exchange' will be based on 'cost of construction' (as deemed value not applicable outside of 03/2019); and
- Input tax credit will be available to the extent of taxable outward supplies.

With this background, some key pointers regarding the continuance of status quo ante in this sector in respect of all developments that are 'not meant for sale':

- Notification 4/2018 continues to exist and extends time of supply to 'date of OC/CC';
- Development rights supplied is taxable on forward charge basis in hands of Landowner;
- To avail the benefit under 4/2018 (deferment of time of supply to date of OC/CC), Landowner must be a registered person;
- On the date of OC/CC, Landowner is to pay tax (in cash) on supply of development rights, which is available as input tax credit to Developer;
- Immediately thereafter, a Developer is to pay tax, by utilizing the input tax credit cited supra, on his supply of construction service to the Landowner vide 3(xii) of 11/2017 and this tax paid by the Developer is not available as input tax credit in the hands of the Landowner (as no further sale is intended);
- Valuation of exchange to be 'cost of construction' as the concept of deemed value (in para 2 and 2A of 11/2017 as amended by 03/2019) is not applicable in case of development that is 'not for sale'; and
- Developer to carry out construction on his inward supplies from registered suppliers without any RCM liability on development rights (05/2019 applicable only to 'for sale' development) and without any shortfall-tax liability on inward supplies from unregistered persons (again 07/2019 applies only to 'for sale' development).

So, new rate-regime does NOT apply to:

- All commercial projects in REP;and
- All 'not for sale' projects.

Ongoing projects are those that:

- Commencement certificate is issued;
- Certificate of actual commencement is issued by Architect, Engineer or Surveyor;
- Completion certificate is not issued; and
- Apartments partly booked.

All these events to have occurred before 31 March 2019. And where Developer opts-in to continue under current rate-regime, Landowner too may be compelled to follow this option so as to maintain harmony in tax payments.Please note that projects that have received OC/CC but some finishing-work is underway, tax treatment applicable would not be affected by the present changes.

Conclusion

New rate-regime applies to all new 'for sale' projects and to all ongoing projects where continuance of previous rate-regime has been opted for (by 20thMay 2019). From detailed discussion of the 'pros and cons', following is the rate matrix applicable:

Description	New Rate Regime	Old Rate Regime
Development rights	05/2019	11/2017 at #16(iii)-
Exchange	06/2019	04/2018
Unit sales	11/2017 r/w 03/2019 at #3(i) to (if)	11/2017 at #3(xii)

Development rights and construction service are both taxable, in Developer's hands. New rate-regime is not an omnibus scheme that is 'in lieu' of tax under this Act. It is just a rate notification that applies over a very small space within the vast expanse of development undertaken in real estate industry.

Government has issued an office two-part FAQ which has brought a lot of clarity on the intent of these notification that may be referred even though one may find some aspects not harmonious with law but then, it's better than just having the notifications without any guidance on its interpretation.

* F.No.354/32/2019-TRU dated 7th May 2019 and 14th May 2019.

And though not prohibited, Authors see it's not for faint-hearted to 'collect 5% but pay 12%'.Numerous notifications to accommodate the changes that can bring the house down on Developers if they don't make their calculations about the new rate regime!

DONATIONS, GRANTS AND MORE....

Donation is gratuitous contribution and promise to contribute is unenforceable in a Court of law. Any person who imperils himself or exposes himself to some liability towards third parties, acting on the basis of that promise or where he would not have contracted such liability but for the promise, equitable relief will be available in law. Hear about quantum meruit?

Whether the contribution made, was made gratuitously or contractually, is never an easy task to agree on which is which. But one thing seems sure that contributions entitled 'donations' can be quite confusing particularly due to blurring of lines between 'sources of funds' and 'use of funds'. It's important to identify 'who' is engaged in charitable work – is the donor engaged in charity or is the organization carrying out the work engaged in charity?

Consideration is quid pro quo, that is, where there's something in return for Payer (of money). Consideration, as you know already, is a two-way street and both parties to a transaction receive consideration although not both, in monetary terms. Though there's a lot to be discussed about consideration, the one thing that can straight away be laid down is that claim for consideration is 'enforceable' because it's 'earned'.

With 'donation' and 'consideration' located at either ends of this spectrum, 'grants' make up all the grey that's in between. Reaching the answer whether a given grant is donation or consideration is easy but, gathering relevant facts will be daunting. And the reason is NPOs assume they are the ones engaged in charitable activity.

You see, NPOs are organized as a Trust or Society with charitable objects where distribution of operational surplus, if any, is barred. Since predictable cashflows is important to regularly and consistently carry out activities that fulfil its charitable objects, NPOs decouple 'fund raising' and 'projects'. The needs of society (which are plenty) and showcased along with NPOs domain expertise and track record to seek contributions. Contributors respond to this kind of propaganda and pledge support (aka money) for one or more projects. And these two converge to bring to fruition a viable project.

So, who's really doing 'charity' here?

Few principles from Indian Contract Act, 1872:

- Consideration is the motivation for carrying out the activity. In other words, consideration impels performance of agreed activity. And that's the reason why non-payment is enforceable particularly when performance is completed;
- Consideration must be the reason for the performance. Payment in appreciation of past performance is not consideration because that payment (claimed to be consideration) did not occasion performance. Payment partakes character of reward and promise (to reward performance) after completion or performance is not consideration;
- Consideration can flow from the beneficiary of the performance or from any other person. As long as the promise of consideration caused (or motivated) performance, it does not matter who pays. It's not even important to inquire into 'why' would a stranger contribute consideration without benefiting from the activity performed. Perhaps, the stranger has interest in or derives satisfaction from, welfare of beneficiary;
- Consideration flowing from the Payer need not reach the one who has promised to perform that agreed activity (Promisor). When consideration does not reach this Promisor, why would the agreed activity be performed. As long as the flow of consideration impels performance, transaction stays complete;
- Consideration may be partly contributed by beneficiary and party by a third party (who's still a stranger to this contract). Consideration is the total amount (if consideration is in monetary form) received by the one promising to perform the activity (Promisor) and not just (portion of) the amount paid by the beneficiary. Inquire whether the activity would still be performed just for the portion contributed by beneficiary or would it have been performed only if the total amount were paid, whatever be the proportion in which payment is made by beneficiary and by stranger (or third party);
- Condition for performance is not consideration for performance. Since consideration need not be in monetary terms, conditions attached to performance cannot be treated as consideration. Consideration must be valuable in the eyes of a reasonable person and not just nominal to constitute a contract; and
- Adequacy of consideration is no concern for its enforceability. Adequate or not, is for the parties to decide. As long as there's no compulsion to accept, seemingly inadequate consideration is no bar. But, such (allegedly inadequate) consideration must nevertheless be valuable (not merely a token) in the eyes of law and a reasonable person.

Court judgements in support of them are not cited here to save readers from labouring through heavy language that ultimately lays down these first principles.

Some additional guidance from Income-tax Act, 1961 may be considered:

- Exemption from income tax is available with respect to surplus generated from 'specified objects' undertaken by entities organized either as Trusts or as Societies. Terms of their constitution must bar distribution of surplus and even bar application of funds to other objects;
- Delay in application of funds raised will affect tax exemption. Timing differences between raising of funds and its application for stated objects, is closely monitored. And non-application or inexcusable delay, results in forfeiture of tax exemption;
- Diversion of funds is permitted but only to other Trusts of Societies with 'similar objects'. Mutual contribution where objects are not similar is also barred; and
- Nearly no regulation exists on the 'sources' of funds. If it is out of gratuitous contributions, then tax benefits are allowed to Donor also. And if it is not, then, Donee still enjoys tax exemption based on end-use or application of funds by a clever carry-forward system.

Seems, Income-tax law is paying attention to the 'net income' and not the 'gross income'. And when source of funds is not the subject matter of oversight under Income-tax law, divergence in treatment under GST is well accommodated. That is, GST being applicable on the source of funds (from non-charitable activities) while Income-tax stays exempt on application of those funds (towards charitable activities). It's a different matter that definitions of charitable activities are not nearly the same in GST and Income-tax.

Indian standards on accounting for grants, aligned with international standards, prescribes two methods of reporting grants, in IndAS 20:

- Income approach, if grant is 'earned'; and
- Capital approach, if grant is 'gratuitous'.

These two approaches also make it clear that grants which (supposedly) fall within the grey area between donation and consideration, need to be examined based on substantive tests and forced to move one way or other such that eventually there's nothing grey anymore. Consider carefully and even as objectively as possible, if the contribution is received 'gratuitously'.

Following conditions belie gratuitous character of grants:

- Will non-payment of grant result in a cause-of-action to compel or enforce payment?
- Will grant require 'utilization reporting' with consequences for misuse or disuse of funds?
- Will non-application of grant (to specified end-use) trigger refund or repayment?
- Will proposed project proceed whether or not grant is available?
- Will proposed project be undertaken only after securing 'financial closure' from grants?

Events or circumstances when (anticipated) grants suddenly stop due to supervening inconvenience must be excluded while examining above tests. And based on results of these tests, it might well appear that the NPO is NOT undertaking charitable activity. Then, it would be the Payer who is undertaking charitable activity. NPO would then merely be an 'intermediary' with the expertise and reach among beneficiaries to carry out agreed-upon-procedures to satisfy 'charitable aspirations' of the Payer.

GST law provides one exemption in #9C to 12/2017-Central Tax (Rate) dt. 28 Jun 2017 which states:

"9C. Chapter 99 – Supply of service by a Government Entity to Central Government, State Government, Union territory, local authority or any person specified by Central Government, State Government, Union territory or local authority against consideration received from Central Government, State Government, Union territory or local authority, in the form of grants."

This exemption implies that 'consideration in the form of grants' is otherwise taxable but when provided in the specified circumstances and between stated parties, it will be exempt. And, by implication, taxable in all other circumstances and between all other parties.

There's another exemption in #1 to 12/2017-Central Tax (Rate) dt. 28 Jun 2017 which states:

"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."

Here, outward supply is exempt from GST if they are 'by way of' charitable activities. Clearly, this exemption does not apply to 'sources of funds' but the 'activities' performed. In other words, to be exempt charitable activities must be 'billed to: Donor' and 'shipped to: Beneficiary' in one continuous and unbroken sequence of events. But, if the transaction is broken or interrupted between raising of funds and expending it on specified projects, then such transactions may evade ingredients of this entry and fail to enjoy exemption from GST.

Further, there is no exemption in respect of 'donation' in GST law and their establishes that only when a transaction is taxable, would there be any need to notify any exemption for donation. As to what exactly is donation, may be discovered by studying concept of 'consideration' in Contract law.

Unlike Income-tax law, GST law is not concerned with 'application of funds' but with the 'sources of funds'. If the sources of funds are from 'charitable voluntary contributions', then GST does not apply. But, if the sources of funds are 'business like', then even though Income-tax exemption is available, GST will be applicable.

Further, no support can also be drawn from the fact that persons engaged by NPO have come together in the spirit of service which is evident from the nominal remuneration being paid to them although they are highly qualified and capable of securing plum placements if they were to opt for commercial engagements or employment.

It merits to mention one judgement of Supreme Court in 2002 in the case of Sai Publication Fund, a Trust sought to be taxed by the revised definition of 'dealer' in respect of sale of books, brochures, pamphlets, photos, stickers, and other publications, under Bombay Sales Tax Act, 1969. In the facts of this case, Deputy Commissioner passed an order on 29 Sept 1989 assessing these publications to tax owing to an amendment with retrospective effect from 16 Aug 1985, where 'profit motive' no longer formed part of the definition of 'business'. And the Court held that "On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was "dealer" or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a "dealer" as its main object is to spread message….". So, except by contesting that the GST law in its entirety is not applicable to NPOs, no support can be drawn from this decision. And readers are spared another long explanation on the scope of s.2(17) qua NPOs.

It is trite to borrow judicial interpretations from other laws but only where those laws (where the interpretation has been rendered by Courts) and GST law are in parimateria. When the two legislations (on seemingly comparable subjects) are taken up for comparison of interpretation rendered in one legislation to throw light on the other, are occupying different fields, no guidance avails. And even though decisions of the highest Court may be available, they may still not be able to guide interpretation, if the scope and framework of each legislation are found, to sit on different pedestals.

So, except where contributions are 'gratuitous', GST will apply on the funds generated by NPOs. NPOs being 'engaged in business like' activities addressing needs (or opportunities) in the market where contributors are seeking efficient 'implementation intermediaries'.

Further, contributions received from overseas sources will NOT be excluded from GST as somewhat of an 'export', merely because payments are realized in foreign exchange. In respect of exports, exclusion from tax is not available if the services are 'location dependent' and that location is within India. That is, where the execution of services is dependent on the location and this location is within India, such transactions will not qualify export to be free from GST.

Reference may also be had to exemption #10 to 9/2017-Integrated Tax (Rate) dt. 28 Jun 2017 in respect of cross-border transactions which states that:

"10. Chapter 99 – Services received from a provider of service located in a non- taxable territory by – (a)…… (b) an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or……".

This exemption refers to import of services from a person outside India and not inward repatriation of foreign exchange. So, this exemption has not application to the case of NPO whose Donor is located outside India.

Lastly, if GST law were to exact tax from activities of NPOs, that would be great disservice to entire NPO movement in India and can severely dampen motivation of contributors. This would even compel several projects to shut down for want of funds. But GST law is (required to remain) unsympathetic in some sense to such consequences as any tax exemption avails only in two situations (a) where the payment is indubitably gratuitous or (b) where a specific notified exemption squarely covers given transaction. And where taxable, it would be taxed on gross receipts and, of course, with benefit of input tax credit, where eligible.

It is hoped that NPOs will be able to answer, who's really doing 'charity' and recognize that an 'intermediary' engaged cost-efficiently satisfying charitable aspirations of conscientious contributors, is a business enterprise making taxable supplies in the domain of social welfare.

And before wrapping up, quick mention of another variation to such intermediaries, which is 'nodal agency' like organizations. It's a Trust or Society or even a body corporate, established to implement charitable objects of Government or other benefactors. When this form of organization is at work, it is important to identify if NPO is itself, 'Government'. Government means an arm of the Government (Central or State) or owned by the Government.

In order to identify whether this NPO is Government, reference may be had to the various judicial authorities under art.12 of our Constitution. Those authorities are not detailed here and suffice to state that inquiry may be directed into (a) whether employees of this NPO are servants of the President of India or Governor of the State and (b) in the event of dissolution of this NPO, would the liquidation estate belong to the Consolidated Fund.

Once established that it's the Government itself acting through the machinery of this NPO, then exemption under #9C (cited earlier) would apply. And if the sphere of activity is listed in schedule XI and XII of our Constitution, that would straight away be exempt as sovereign functions and not some adventure by the sovereign. But, if not saved from tax incidence, such NPOs established to be nodal agencies will also be a 'charity-intermediary' and liable to GST.

In conclusion, here's a list of facts that are misleading NPOs to claim exemption from GST:

- Organization is Trust or Society or such other form where distribution of surplus is barred;
- Registration under 12A/12AA or 10(23BBA) or 10(23C) of Income-tax Act is granted;
- Funds are contributed by persons with philanthropic or CSR objectives;
- Funds are used to directly for the benefit of society, subject to overhead expenses;
- Individuals who are involved are highly accomplished persons in society who are contributing their time without any market-rate based remuneration or compensation;
- Contributions have impacted society positively and has received accolades from all; and
- Paucity of funds is an ever-present reality and frugality is palpable in all working aspects.

FAQs ON SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME, 2019

Q 1. Who is eligible to file declaration under the SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME, 2019?

Ans. Any person falling under the following categories is eligible, subject to other conditions under the Scheme, to file a declaration:

(a) Who has a show cause notice for duty or one or more appeals arising out of such notice pending and where the final hearing has not taken place as on 30.06.2019.

(b) Who has been issued show cause notice for penalty and late fee only and where the final hearing has not taken place as on 30.06.2019.

(c) Who has recoverable arrears pending.

(d) Who has cases under investigation and audit where the duty involved has been quantified and communicated to party or admitted by him in a statement on or before 30th June, 2019.

(e) Who want to make a voluntary disclosure.

Q 2. What are the acts covered under the Scheme?

Ans. This Scheme is applicable to the following enactments, namely:-

(a) The Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or Chapter V of the Finance Act, 1994 and the rules made thereunder;

(b) The following Acts, namely:-

(i) The Agricultural Produce Cess Act,1940;

(ii) The Coffee Act, 1942;

(iii) The Mica Mines Labour Welfare Fund Act, 1946;

(iv) The Rubber Act, 1947;

(v) The Salt Cess Act, 1953;

(vi) The Medicinal and Toilet Preparations (Excise Duties) Act, 1955;

(vii) The Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(viii) The Mineral Products (Additional Duties of Excise and Customs) Act, 1958;

(ix) The Sugar (Special Excise Duty) Act, 1959;

(x) The Textiles Committee Act, 1963;

(xi) The Produce Cess Act, 1966;

(xii) The Limestone and Dolomite Mines Labour Welfare Fund Act, 1972;

(xiii) The Coal Mines (Conservation and Development) Act, 1974;

(xiv) The Oil Industry (Development) Act, 1974;

(xv) The Tobacco Cess Act, 1975;

(xvi) The Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Cess Act, 1976;

(xvii) The Bidi Workers Welfare Cess Act, 1976;

(xviii) The Additional Duties of Excise (Textiles and Textile Articles) Act, 1978;

(xix) The Sugar Cess Act, 1982;

(xx) The Jute Manufacturers Cess Act, 1983;

(xxi) The Agricultural and Processed Food Products Export Cess Act, 1985;

(xxii) The Spices Cess Act, 1986;

(xxiii) The Finance Act, 2004;

(xxiv) The Finance Act, 2007;

(xxv) The Finance Act, 2015;

(xxvi) The Finance Act, 2016;

(c) Any other Act, as the Central Government may, by notification in the Official Gazette, specify.

Q 3. If an enquiry or investigation or audit has started but the tax dues have not been quantified whether the person is eligible to opt for the scheme?

Ans. No. If an audit, enquiry or investigation has started, and the amount of duty payable has not been quantified on or before 30th June, 2019, the person shall not be eligible to opt for the scheme.

Q 4. If a SCN covers multiple issues, whether the person can file an application under the scheme for only few issues covered in the SCN?

Ans. No. A person has to file declaration for entire amount of tax dues as per the SCN.

Q 5. What is the scope of tax relief covered under section 124(1) (b) with respect to SCN for late fee and penalty only where the amount of duty in the said notice has been paid or is nil?

Ans. The tax relief shall be the entire amount of late fee or penalty.

Q 6. I have filed an appeal before the appellate forum (Commissioner (Appeals) /CESTAT) and such appeal has been heard finally on or before the 30th day of June, 2019. Am I eligible for the scheme?

Ans. No, you are not eligible in view of section 125(1) (a) of the said Scheme.

Q 7. What is the scope under the scheme when adjudication order determining the duty/tax liability is passed and received prior to 30.06.2019, but the appeal is filed on or after 01.07.2019?

Ans. No, such a person shall not be eligible to file a declaration under the Scheme.

Q 8. I have been convicted for an offence punishable under a provision of the indirect tax enactment. Am I eligible for the Scheme?

Ans. A person who has been convicted for any offence punishable under any provision of the indirect tax enactment for the matter for which he intends to file a Declaration shall not be eligible to avail the benefits under the Scheme.

Q 9. I have been issued a SCN, under indirect tax enactment and the final hearing has taken place on or before the 30th day of June, 2019. Am I eligible for the Scheme?

Ans. No, you are not eligible as per section 125(1) (c) of the Scheme.

Q 10. I have been issued a SCN under indirect tax enactment for an erroneous refund or refund. Am I eligible for the scheme?

Ans. No, you are not eligible as per section 125(1)(d) of the Scheme.

Q 11. I have been subjected to an enquiry or investigation or audit under indirect tax enactment and the amount of duty involved in the said enquiry or investigation or audit has not been quantified on or before the 30th day of June, 2019. Am I eligible for the Scheme?

Ans. No, you are not eligible as per section 125(1) (e) of the Scheme.

Q 12. I have been subjected to an enquiry or investigation or audit under indirect tax enactment and I want to make a voluntary disclosure regarding the same. Am I eligible for the Scheme?

Ans. No, you are not eligible as per section 125(1) (f) (i) of the Scheme.

Q 13. I want to make a voluntary disclosure after having filed a return under the indirect tax enactment, wherein I have indicated an amount of duty as payable but the same has not been paid. Am I eligible for the Scheme?

Ans. You cannot make a voluntary disclosure in such a case. However, you can still file a Declaration under Section 125(1) (f)(ii).

Q 14. I have filed an application in the Settlement Commission for settlement of the case. Am I eligible for the Scheme?

Ans. No, you are not eligible to file a Declaration for a case for which you have filed an application in the Settlement Commission.

Q 15. I deal with the goods which are presently under Central Excise and is mentioned in the Fourth Schedule to the Central Excise Act, 1944. I want to make declarations with respect to those excisable goods. Am I eligible for the scheme?

Ans. No, you are not eligible to avail the benefits under the Scheme.

Q 16. How will I apply for the said scheme?

Ans. All such persons who are eligible under the Scheme will be required to file an electronic declaration at the portal https://cbic-gst.gov.in

Q 17. Will I get an acknowledgement for filing a declaration electronically?

Ans. Yes, on receipt of declaration, an auto acknowledgement bearing a unique reference number will be generated by the system. This unique number will be useful for all future references. The declaration will automatically be routed to the designated committee that will finalize your case.

Q 18. How will I come to know about the final decision taken by the designated committee on my declaration?

Ans. Within sixty days of filing of a declaration, you will be informed electronically about the final decision taken in the matter.

Q 19. What is the difference between 'Tax Dues' and 'Tax Relief'?

Ans. 'Tax Dues' is the total outstanding duty demand. 'Tax Relief' is the concession the Scheme offers from the total outstanding duty demand.

Q 20. A SCN has been issued to me for an amount of duty of ₹1000 and an amount of penalty of ₹100. In the Order in Original (OIO) the duty confirmed is of ₹1000 and an amount of ₹100 has been imposed as penalty. I have filed an appeal against this order before the Appellate Authority. What will be the tax dues for me?

Ans. The amount of duty which is being disputed is ₹1000 and hence the tax dues will be ₹1000.

Q 21. A SCN has been issued to me for an amount of duty of ₹1000 and an amount of penalty of ₹100. In the OIO the duty confirmed is of ₹ 900 and penalty imposed is ₹ 90. I have filed an appeal against this order. The department has not filed any appeal in the matter. What would be the tax dues?

Ans. The amount of duty which is being disputed is ₹ 900 and hence the tax dues are ₹ 900.

Q 22. A SCN has been issued for an amount of duty of ₹ 1000 and an amount of penalty of ₹ 100. In the OIO the duty confirmed is of ₹ 900 and penalty imposed is ₹ 90. I have filed an appeal against this order before the Appellate Authority. Further, Department has also filed an appeal before the Appellate Authority for an amount of duty of ₹ 100 and penalty of ₹ 10. What would be the tax dues?

Ans. The amount of duty which is being disputed is ₹ 900 plus ₹ 100 i.e. ₹1000 and hence tax dues are ₹1000.

Q 23. A SCN has been issued for an amount of duty of ₹ 1000. The Adjudicating Authority confirmed the duty of ₹1000. I have filed an appeal against this order. The first appellate authority Commissioner Appeals/ CESTAT reduced the amount of duty to ₹ 900. I have filed a second appeal (before CESTAT/High Court. The department has not filed any appeal. What will be the tax dues for me?

Ans. The amount of duty which is being disputed is ₹ 900 and hence the tax dues are ₹ 900.

Q 24. I have been issued a SCN under any of the indirect tax enactment on or before the 30th June, 2019, what will be the tax dues?

Ans. As per section 123(b), the tax dues will be the amount of duty/tax/cess stated to be payable in the SCN.

Q 25. I have been issued a SCN, wherein other persons apart from me are jointly and severally liable for an amount, then, what would be the tax dues?

Ans. As per section 123(b), the amount indicated in the SCN as jointly and severally payable shall be taken to be the tax dues payable by you.

Q 26. What is the coverage of SCNs under the Scheme with respect to main noticee vis-à-vis co-noticee particularly when the tax amount is paid?

Ans. In case of a SCN issued to an assesse demanding duty and also proposing penal action against him as well as separate penal action against the co-noticee/s specified therein, if the main noticee has settled the tax dues, the co-noticee/s can opt for the scheme for the waiver of penalty.

Q 27. What is the scope of coverage of periodical SCNs under the scheme?

Ans. Any SCN whether main or periodical, issued and where the final hearing has not taken place on or before 30.06.2019 is eligible under the Scheme.

Q 28. What are the benefits available under the Scheme?

Ans. The various benefits available under the Scheme are:

- Total waiver of interest, penalty and fine in all cases
- Immunity from prosecution
- In cases pending in adjudication or appeal, a relief of 70% from the duty demand if it is ₹ 50 Lakh or less and 50%, if it is more than ₹ 50 Lakh.The same relief is available for cases under investigation and audit where the duty involved is quantified on or before 30th June, 2019.
- In case of an amount in arrears, the relief is 60% of the confirmed duty amount if the same is ₹50 Lakh or less and it is 40% in other cases.
- In cases of voluntary disclosure, the declarant will have to pay full amount of disclosed duty.

Q 29. Shall the pre deposit paid at any stage of appellate proceedings and deposit paid during enquiry, investigation or audit be taken into account for calculating relief under the scheme?

Ans. Any amount paid as pre-deposit at any stage of appellate proceedings under the indirect tax enactment or as deposit during enquiry, investigation or audit, shall be deducted while issuing the statement indicating the amount payable by the declarant.

Q 30. How the declaration made by the declarant under the Scheme would be verified?

Ans. The declaration made under section 125 except when it relates to a case of voluntary disclosure of an amount of duty shall be verified by the Designated Committee based on the particulars furnished by the declarant as well as the records available with the department.

Q 31. Whether the declarant will be given an opportunity of being heard or not?

Ans. Yes, as per section 127(3), after the issue of the estimate under sub-section (2), the Designated Committee shall give an opportunity of being heard to the declarant, if he so desires, in case of a disagreement.

Q 32. What will be procedure and time period of payment to be made by the declarant?

Ans. The declarant shall pay electronically withina period of 30 days ofthe statement issued by the Designated Committee, the amount payable as indicated therein.

Q 33. What procedure will be followed for withdrawal of appeals where the person has filed a declaration under the Scheme?

Ans. Where the declarant has filed an appeal or reference or a reply to the SCN against any order or notice giving rise to the tax dues, before the appellate forum, other than the Supreme Court or the High Court, then, such appeal or reference or reply shall be deemed to have been withdrawn. In case of a writ petition or appeal or reference before any High Court or the Supreme Court, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, he shall furnish proof of such withdrawal to the Designated Committee.

Q 34. Whether any certificate will be provided to declarant as proof to payment of dues?

Ans. Yes, on payment of the amount indicated in the statement and production of proof of withdrawal of appeal, wherever applicable, the Designated Committee shall issue a discharge certificate in electronic form, within 30 days of the said payment and production of proof, whichever is later.

Q 35. Whether a calculation error in statement may be rectified or not?

Ans. Yes, within 30 days of the date of issue of a statement indicating the amount payable by the declarant, the Designated Committee may modify its order only to correct an arithmetical error or clerical error, which is apparent on the face of record, on such error being pointed out by the declarant or suo-motu.

Q 36. What will be the benefits of discharge certificate issued under the scheme?

Ans. Every discharge certificate issued under section 127 with respect to the amount payable under this Scheme shall be conclusive as to the matter and time period stated therein, and (a) the declarant shall not be liable to pay any further duty, interest, or penalty with respect to the matter and time period covered in the declaration; (b) the declarant shall not be liable to be prosecuted under the indirect tax enactment with respect to the matter and time period covered in the declaration; and (c) no matter and time period covered by such declaration shall be reopened in any other proceeding under the indirect tax enactment.

Q 37. Can I take input tax credit for any amount paid under the Scheme.

Ans. No.

Q 38. Can I pay any amount under the Scheme through the input tax credit account under the indirect tax enactment or any other Act?

Ans. No.

Q 39. Can I take a refund of an amount deposited under the Scheme?

Ans. No.

Q 40. In cases where pre-deposit or other deposit already paid exceeds the amount payable as indicated in the statement of the designated committee, the difference shall be refunded or not?

Ans. No, it shall not be refunded.

Q 41. Is there any benefit, concession or immunity on the declarant in any proceedings other than those in relation to the matter and time period to which the declaration has been made?

Ans. No, as per section 131, nothing contained in this Scheme shall be construed as conferring any benefit, concession or immunity on the declarant in any proceedings other than those in relation to the matter and time period to which the declaration has been made.

Q 42. Whether the discharge certificate under the scheme would serve as immunity against issuance of any further SCN (i) for the same matter for a subsequent time period; or (ii) for a different matter for the same time period?

Ans. No, as per section 129 (2)(b), the issue of the discharge certificate with respect to a matter for a time period shall not preclude the issue of a SCN,(i) for the same matter for a subsequent time period; or (ii) for a different matter for the same time period.

Q 43. What action would be taken against a declarant who makes false voluntary disclosure under the scheme?

Ans. As per section 129(c), in such cases of voluntary disclosure, where any material particular furnished in the declaration is subsequently found to be false, within a period of one year of issue of the discharge certificate, it shall be presumed as if the declaration was never made and proceedings under the applicable indirect tax enactment shall be instituted.

[Note: The 'sections' referred above are those of the Finance (No.2) Act, 2019.]

Workshop on GST Audit & GST Annual Return at Sonipat

Two Days National Conference on GST at Pune

Workshop on Practical Approach to GST Annual Return & Audit at Vijaywada

Certificate Course on GST at Hubli

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