

GST

INTERPRETATIVE CHALLENGES *AND* POTENTIAL AREAS OF CONFLICT

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GOODS OR SERVICES

- In the pre-GST era, goods attracted ED, VAT or CST while services attracted Service Tax.
- Goods Vs. Services was a subject matter of dispute in many segments such as
 - Intellectual Property Rights
 - Works Contracts
 - Restaurants
 - Software
 - Lease of equipment
- This led to double taxation of the same transaction in some cases by the State and Centre.
- Aspect theory based decisions.
- Internationally goods and services are treated as the same for levy of GST or VAT.

GOODS OR SERVICES

- Under Article 246A, Parliament and the Legislature of every State has the power *to make laws with respect to Goods and Services Tax imposed by the Union or by such State.*
- Article 366(12A) defines 'goods and services tax' to mean any tax on the supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption.
- The CGST Act, IGST Act, State GST Act and UTGST Act all seek to levy GST on supplies of goods or services or both.

GOODS OR SERVICES

- The charging provisions provide for a levy at a rate to be notified by the Government on the recommendations of the Council
- **Distinction between goods and services have been brought out through rates**
- Exemption, zero rating, 0.125%, 3%, 5%, 12%, 18% and 28% are the rates applicable to goods
- Exemption, zero rating, 5%, 12%, 18%, 28% are the rates applicable for services
- *There is no tariff like in excise or customs*
- *There is no schedule of goods as part of the Act*
- *Rate is notified through notifications*
- *The rate notifications have been amended multiple times*

GOODS OR SERVICES

- 'Goods' means
 - *every kind of movable property*
 - *other than money and securities*
 - *but includes actionable claim, growing crops and things attached to or forming part of the land which are agreed to be severed before supply or under contract of supply*
- 'Services' means
 - *anything other than goods, money and securities*
 - *but includes activities relating to the use of money or its conversion by cash or by any other mode from one form, currency or denomination for which a separate consideration is charged.*
- Can services be 'anything other than goods'?

GOODS OR SERVICES

- The place of supply provisions for goods is governed by Section 10 and Section 11 of the IGST Act
- The place of supply provisions for services is governed by Section 12 and Section 13 of the IGST Act
- Section 12 is applicable where the location of the supplier and recipient is in India
- Section 13 is applicable where the location of the supplier or location of recipient is outside India

ISSUE NO. 1 - SOFTWARE

- Permanent transfer of Intellectual Property (IP) right in respect of Information Technology software attracts GST at the rate of 18% under Notification No.1/2017 applicable to 'goods'
- Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of information technology software attracts GST at the rate of 18% under Notification No.11/2017 applicable to 'services'
- Place of supply for 'goods' would be governed by 'delivery'
- Place of supply for 'services' would be governed by 'location of recipient'

SOFTWARE

- Packaged software
- Download of software
- *Whether download of software and usage under licence should be considered as supply of goods or supply of services?*
- *Can the medium of delivery alter the nature of the transaction?*

SOFTWARE

- The Supreme Court in the case of ***Associated Cement Company Vs. Commissioner of Customs (2001) 128 ELT 21*** had held that
 - All tangible moveable articles would be goods for the purposes of Customs Act, 1962
 - Any media, whether in the form of books or computer disks or cassettes which contain information technology would necessarily be regarded as goods
 - The moment information or advice is put on a media whether paper or diskettes or any other thing, that what is supplied becomes chattel.
- The Constitutional Bench of the Supreme Court in the case of ***TCS Vs. State of Andhra Pradesh (2004) 178 ELT 22*** has held that since software is capable of abstraction, consumption, use, transmission, transfer, delivery, storage, possession it would be goods for the purpose of levy of sales tax.

SOFTWARE

- Justice S.B. Sinha in his concurring judgment in para 71 observes that *a software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like – floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining the question as regard levability of the tax under a fiscal statute it may not make a difference. What is essential for an article to become goods is its marketability.*

SOFTWARE

- The ECJ in the case of *UsedSoft GmbH Vs. Oracle* in case C-128/11, vide decision dated 03.07.2012 has held that
 - Downloading of a copy of a computer program and the conclusion of a user license agreement for that copy form an indivisible whole.
 - Downloading of a copy of a computer program is pointless if the copy cannot be used by its possessor. These two operations must therefore be examined as a whole for the purpose of legal classification.
 - Where a customer of Oracle downloads the copy of the program and concludes the license agreement and receives the right to use that copy for an unlimited period on payment of a fee, there is a transfer of right of ownership of the copy of the computer programme.

SOFTWARE

- The Delhi Bench of the Tribunal in the case of ***Atul Kaushik Vs. Commissioner of Customs (2015) 330 ELT 417*** has held that
 - Electronic download of software from a server located abroad amounts to import of goods.
 - There is no mechanism for levy of duty on download of software.
 - Entire Customs Act in the present form only provides for collection of customs duty on tangible goods.
 - In the absence of mechanism of collection of tax, the levy paid.
 - *Electronically downloaded software is not leviable to customs duty.*
- Civil Appeal of the Revenue against this decision dismissed by the Supreme Court holding that there is no reason to interfere with the order passed by the Tribunal. **(2016) 339 ELT A136.**

SOFTWARE

Import of goods

- If download of software is considered as import of goods, there is no mechanism for levy of customs duty under Section 12
- IGST on import of goods is levied at the point of time of levy of customs duty under Section 12
- If Section 12 of the Customs Act is not applicable there cannot be a levy of IGST on import of goods

Import of service

- What is acquired is only a right to use a copyrighted article
- If the same is considered as service there is an import of service
- Import of service attracts IGST under reverse charge mechanism

ISSUE NO.2 - WORKS CONTRACT

- Section 2(119) of the CGST Act, 2017 defines “works contract” to mean a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning **of any immovable property** wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract
- In the pre-GST regime, works contract was a composite supply involving material and labour.
- In the GST regime it should be connected with immovable property
- *The 101st Constitutional Amendment Act has not deleted Article 366(29A)*

WORKS CONTRACT

- Transfer of property in goods involved in the execution of works contract is one of the limbs of Article 366(29A) in the context of *tax on the sale or purchase of goods*
- The definition of supply under Section 7 of the CGST Act includes a sale
- *Is it still possible to have a species of works contract without involving immovable property?*
- *Whether contract involving material and labour and not connected with the immovable property should only be seen as a composite supply under GST?*
- *What is immovable property for the purpose of GST?*

ISSUE NO.3 - INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- In the pre-GST era, inter-State sale of goods was subject matter of Entry-92A, Union List and the CST Act provided for a levy of GST
- Intra-State sale of goods was subject matter of Entry-54, State List and States levied sales tax and subsequently VAT
- CST sale Vs. Local sale
- Stock transfer related disputes
- Constitution of separate CSTAA based on the directions given by the Supreme Court

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- Section 7 of the IGST Act provides where the location of the supplier and the place of supply of goods are in two different States or in two Union Territories or in a State and UT, it shall be treated as *supply in the course of* inter-State trade or commerce
- When A from Tamil Nadu sells goods and as per the IGST Act the place of supply is Gujarat, A would charge IGST
- The Gujarat buyer would take the IGST as credit and set it off against the IGST or SGST payable in Gujarat on his supplies

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- Section 8 of the IGST Act provides that where the location of supplier and the place of supply of goods are in the same State or same Union Territory, it shall be treated as an intra-State supply of goods
- Intra-State supply would attract CGST and SGST
- *Assuming the purchase order has come from the Gujarat office and the buyer has an office in Tamil Nadu which has no connection with the supply, what will happen if the transaction is not considered as an inter-State supply by the Government of Tamil Nadu at a later date?*
- *Can there be a CGST and SGST levy after the transaction has been considered as an IGST transaction?*

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- Section 19 of the IGST Act provides that where IGST has been paid by a registered person considering the supply as an inter-State supply and subsequently *it is held to be an intra-State supply, he shall be granted refund of the IGST paid in such manner and subject to such conditions as may be prescribed*
- Section 19(2) provides that where a person has paid CGST and SGST on a transaction considered by him as an intra-State supply but it is subsequently held to be an inter-State supply, he shall not be required to pay any interest on the amount of IGST payable
- *Assuming 28% IGST is paid and subsequently another 14% CGST and SGST of 14% is demanded, it can have a huge impact*
- ***The law should have provided for backend adjustment between the Governments as against double payment and refund***

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- W from West Bengal imports goods into India through Mumbai port
- Basic customs duty and IGST on imports is discharged
- Goods sold to customer in Maharashtra
- W does not have any place of business in Maharashtra
- Location of supplier of goods is not defined in the IGST Act
- *Should W pay IGST in West Bengal based on his registered address?*
- *Should W obtain GST registration in Maharashtra and charge CGST and Maharashtra GST?*

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- G from Gujarat places a purchase order for supply of equipment on D, New Delhi
- G sends his employee to New Delhi to receive the goods
- Risk and title passes at the factory gate in New Delhi
- **In the pre-GST, situs of the goods played an important role.**
- In the GST law
 - *Recipient is defined as the person who is liable to pay the consideration.*
 - *Address of delivery is defined as the address of the recipient of goods as indicated in the tax invoice issued by the registered person for delivery of such goods.*
 - *'Agent' means a person who carries on the business of supply or receipt of goods or services or both on behalf of another.*
 - *As per Section 10(1)(a), where the supply involves movement of goods whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient.*

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

IGST

- Recipient is the person who pays the consideration.
- Recipient is located in Gujarat.
- Goods terminate for delivery only when the goods are delivered to the recipient.
- The emphasis is on 'termination for delivery to the recipient'.
- The employee who takes custody of the goods in Delhi is not the recipient.
- The employee is not the agent of the recipient since he is not engaged in the business of supply or receipt of goods on behalf of another.
- Risk and title may not have a bearing in GST.

CGST + SGST

- Sale takes place when the goods are located in New Delhi.
- There is a notional delivery to the employee when he receives the goods in New Delhi as per the instructions of his employer.

INTER-STATE SUPPLY Vs. INTRA-STATE SUPPLY

- C from Cochin carries out repair and servicing of ships that dock in Cochin port.
- The ships are owned by a company based out of Madhya Pradesh.
- C has registration in Kerala and hence location of supplier of service is Kerala.
- **Any treatment or process which is applied to another person's goods is a supply of services – Schedule II, CGST Act.**
- Repair and servicing falls under the default provision namely Section 12(2) of the IGST Act and hence location of the recipient is relevant.
- *Should C charge IGST since the location of the ship owner is in Madhya Pradesh?*
- *Should C charge CGST and Kerala GST since servicing involves replacement of part or supply of spares?*
- *If the transaction of repair or work on goods belonging to another is declared as a service by law, whether usage of goods in the course of providing service should even be relevant?*

ISSUE NO. 4 – WHETHER EXPORTS CAN BE SUBJECTED TO GST

- Article 246A(2) provides that Parliament has exclusive power to make laws with respect to Goods and Services Tax where the supply of goods or of services takes place in the course of inter-State trade or commerce.
- Explanation to Article 269A provides that supply of goods or services or both in the course of import into the territory of India shall be deemed to be supply in the course of inter-State trade or commerce.
- ***Similar provision not available for export.***
- Article 286(2) provides that Parliament may by law formulate principles for determining when a supply of goods or services or both takes place in the course of export out of the territory of India.
- Section 7(5) of the IGST Act provides that supply of goods or services or both when the supplier is located in India and the place of supply is outside India shall be treated to be a supply of goods in the course of inter-State trade or commerce.
- ***Can an export transaction be treated as a supply in the course of inter-State trade or commerce?***
- *If Article 246A is the source for Section 7(5), the said Article only permits legislation when the supply takes place inter-State.*
- *If Article 286(2) is the source for Section 7(5), the said provision does not determine when the supply takes place in the course of export.*

EXPORTS

- In the pre-GST, Section 5(1) of the CST Act was enacted in exercise of powers available under Article 286.
- Section 5(1) covered sale or purchase that occasions export as well as a sale or purchase that is effected by transfer of documents of title to goods after the goods have crossed the customs frontier of India.
- Section 6 of the CST Act provided for a levy only on sale of goods in the course of inter-State trade or commerce.
- Proviso to Section 6 provides that there is no liability to pay tax on the sale in the course of export falling within the ambit of Section 5(3).
- The effect of all these provisions are that
 - Inter-State sales were subject to CST
 - There was no levy of tax on exports
 - What qualified as an export was set out through Section 5(1)
 - A sale in the course of export which was otherwise taxable was exempted through Section 5(3) of the CST Act.

EXPORTS

- Section 16 of the IGST Act, considers export of goods or services or both as 'Zero Rated'.
- Section 16(3) contemplates **payment of IGST on exports** with a subsequent refund on application or alternatively export without IGST subject to conditions and procedures to be followed.
- Entry 83, List I, VII Schedule provides for levy of duties of customs including export duty.
- Section 2 of the Customs Tariff Act provides for levy of customs duty as specified in the First Schedule and Second Schedule.
- Second Schedule deals with export tariff which contains 49 items out of which many of them have been exempted. Some items such as leather, snake skins, etc. attract export duty.
- ***Can there be a levy of IGST on export of goods?***

ISSUE NO. 5 – CAN THERE BE A LEVY OF IGST UNDER THE CUSTOMS TARIFF ACT ON IMPORTS?

- Section 5 of the IGST Act, 2017 is a charging section for levy of IGST
- The proviso provides that *integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act on the value as determined under the said Act at the point when the duties of customs are levied on the said goods under Section 12 of the Customs Act*
- *On imports the IGST is not levied under the IGST Act, but the Act contemplates levy and collection through the Customs Tariff Act*

IGST ON IMPORTS

- Section 3 of the Customs Tariff Act provides for *levy of additional duty equal to excise duty, sales tax, local tax and other charges*
- The levy is as a duty of customs equivalent to some other tax that is leviable
- Concept of CVD & SAD
- The Constitution Bench of the Supreme Court in the case of ***Hyderabad Industries Ltd. Vs. UOI (1999) 108 ELT 321*** has held that:
 - The charging Section for the levy of Additional Duty is not Section 12 of the Customs Act, but Section 3 of the Customs Tariff Act
 - There are different types of Customs duties viz. duty of customs under Section 12 of the Customs Act; duty under Section 3(1) of the Customs Tariff Act; additional duty under Section 3 of the Customs Tariff Act; duty under Section 9A of the Customs Tariff Act
 - Additional Duty can be levied only if on a like article excise duty could be levied

IGST ON IMPORTS

- The Supreme Court in the case of *Ahujasons Shawl Wale Pvt. Ltd. Vs. CC (2015) 319 ELT 576* has observed that the purpose of additional duty under Section 3 of the Customs Tariff Act is to protect the domestic market from unhealthy competition. Once there is no excise duty on the goods produced domestically, question of levying additional duty in the form of giving protection does not arise at all
- Section 3(7) of the Customs Tariff Act introduced by the Taxation Laws (Amendment) Act, 2017 provides that any article which is imported into India shall, in addition, be liable to IGST at such rate, not exceeding 40% as is leviable under section 5 of the IGST Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8)
- *Can IGST be levied through the Customs Tariff Act?*
- Can there be a levy of IGST through sub-Section (7) when Section 3 itself contemplates levy of additional duty
- *Will the levy be valid without the additional duty being identified as IGST?*
- *Will the levy be valid without even a definition of IGST in the Customs Tariff Act, 1975?*

THANK YOU