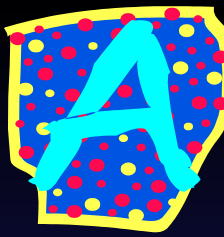


TAXCON-2022



Certain Controversies on Supply and Classification

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Organised Jointly by

WIRC, BCAS, CTC, AIFTP, GSTPAM, MCTC

❖ WIRC

❖ BCAS

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❖ AIFTP

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❖ MCTC



Acknowledgment

Scope and Purpose of session

- Broad overview of provisions. [warm up!]
- No exhaustive coverage of provisions.
- Highlighting certain controversies in the concept of 'supply' and 'classification'



Supply – Controversies

- GST is a tax on **Supply** of **Goods** and / or **Services**
- Three definitions significant
 - 'supply';
 - 'goods' ; and
 - 'services'

What is 'Supply' [S. 7]

Supply includes

All forms of supply of **goods / services or both** such as sale, transfer, barter, exchange, licence, rental, lease or disposal



for a **consideration**
(except certain specified activities)



in the course or furtherance of **business**

Exclusion from GST

- Activities or transactions that are neither supply of goods nor supply of services [**Schedule III**]
- Exempted Supply – Supply exempted u/s. 11 of CGST Act
- Non-taxable supply – supplies which are not included within the ambit of GST

Composite and Mixed Supply

A. Composite Supply

Composite Supply comprises of:

- Two or more supplies
- Naturally bundled
- One of which is a 'principal supply' [by contrast other is 'ancillary' supply]
- Tax liability based on 'principal supply'

B. Mixed Supply

- Two or more 'individual' supplies combined
- for a single price
- Not a composite supply [basically no principal & ancillary supplies]
- Tax liability based on supply attracting highest rate of tax

Any other Supply 

SUPPLY SOME PRACTICAL CONTROVERSIES

Doctor's health care services – is exempt [“Supply of health care services by doctor sl. No. 74 of Notification No. 12/2017-CT(R) dated 28.6.2017]

ISSUE

Sale of old beds

Rs 1,00,000

Doctor's fees

Rs 1 crore [Exempt]

Whether Doctor has to register and pay tax on Rs 1,00,000 as 1 crore is beyond threshold?

Views - Two views Possible

ONE VIEW – No taxability on sale of old furniture

23. Persons not liable for registration.—

(1) The following persons shall not be liable to registration, namely:—

- (a) any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under this Act or under the Integrated Goods and Services Tax Act;
- (b) an agriculturist, to the extent of supply of produce out of cultivation of land.

(2) The Government may, on the recommendations of the Council, by notification, specify the category of persons who may be exempted from obtaining registration under this Act.

- Sale transactions (old beds) is only a subsidiary activity integral to the main business activity of providing health care services. Doctor not in the business of sale of old hospital beds. Hence he may argue that he would still be considered as engaged exclusively in the business of supplying health care services that are wholly exempt from tax.
- Doctor need not obtain registration even if he has supplied old hospital beds. Hence transaction not liable since it is not a supply by a taxable person [(107) “taxable person” means a person who is registered or liable to be registered under section 22 or section 24]

SECOND VIEW

Doctors fees	Rs 1 crores
If sale of old hospital beds	Rs 1,00,000

- The doctor is not '**exclusively**' in the business that is wholly exempt since the definition of business is very wide.
- Definition of business u/s. 2(17) very wide and includes–
 - (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity,
 - (b) Any activity connected with or incidental or ancillary to (a)
 - (c) Any activity or transaction in nature of in (a) whether or not there is volume, frequency, continuity or regularity of such transaction.

SUPPLY SOME CONTROVERSIES

Whether Dividends received from investments would be considered as a supply?

It is a transaction in the nature of distribution of profits. It is received as a result of mere ownership of the securities. It is not in the nature of a consideration for provision of any service or carrying out any activity.

There is no enforceable contractual obligation to receive dividends. Hence it is not a consideration for supply.

[EC] judgment in *Sofitam SA [formerly Satam (SA)] v. Ministre Charge du Budget* Case C-333/91. The proposition relevant not directly connected. Getting Dividend is not pursuant to an economic activity - a factor relevant to come within VAT under their law.]

SUPPLY SOME CONTROVERSIES

Whether Receipt of Profit share by partners of a firm would be considered as a supply?

- whatever the partner does for the furtherance of the business of the partnership, he does so only for advancing his own interest as he has a stake in the success of the venture. There is neither an intention to render a service to the other partners nor is there any consideration fixed as a quid pro quo for any particular service of a partner.
- A contractor-contractee or the principal client relationship which is an essential element of any supply is absent in the relationship amongst the partners.
- the element of consideration i.e. the quid pro quo for services, which is a necessary ingredient of any taxable supply is absent.

[Service tax regime decision in *Mormugao Port Trust v. CCCE & ST* (2016) 48 STR 69 (Tri-Mum); Department's Civil Appeal dismissed by SC [(2018) 19 GSTL J118 (SC)]

SUPPLY SOME CONTROVERSIES

Whether Payment of Salary to the partner would be considered as a consideration for supply? If yes would it be considered as exempt supply for reversal of ITC

On principle payment of salary to a partner represents a special share of the profits and is, therefore, part of the profits – See CIT vs R.M. Chidambaram Pillai [1977] 106 ITR 292 (SC)

Hence tax treatment same as 'receipt of profit share'

SUPPLY SOME CONTROVERSIES

“Consideration” vs. “Compensation”

Para 5(e) of Schedule II – provides for following deemed supply viz.,

“agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;”

Consideration	Compensation
<ul style="list-style-type: none"> ▪ Received for performance of contract ▪ Object of the contract ▪ Agreed and specified for successful performance 	<ul style="list-style-type: none"> ▪ Received if the other party reneges or fails to perform as per contract ▪ Not the object of the contract ▪ Maybe un-liquidated (awarded by the court) or liquidated (agreed by the parties) ▪ May also be paid if performance not in accordance with conditions of the contract such as delays in performance ▪ Merely because liquidated damages are agreed it is not consideration. It is only a compensation. It is a fall back option if one of the party fails to perform

Rajasthan Rajya Vidyut Prasaran Nigam Ltd. vs. Comm (2022) 135 Taxmann.com (Tri-Del) (para 9)
 [“RRVFN case” in the context of service tax on Notice Pay Recovery]

- Amount received for agreeing to
 - The Obligation to refrain from an act;
 - Tolerate an act or a situation
 - To do an act

would be attracted if the above are the 'purpose or the essence of the contract'

- If there is no agreement cl. 5(e) of Sch. II not attracted [RRVPN case supra]

Illustrations

- No service tax can be charged on loan pre-payment charges [*CST vs. Repco Home Finance Ltd.* (2020) 42 GSTL 104 (Tri-LB)]
- Damages, compensation, penalty and forfeiture of EMD by coal mining companies from coal buyers for non-compliance of contract not liable for service tax [*South Eastern Coal Fields v. CST* 2020-TIOL- 1711-CESTAT-DEL]

Illustrations

- Ex-gratia charges received by a job worker from his principal to compensate for financial loss that may be caused due to non-utilisation of production capacity by the principal not liable for service tax. [*KN Food Industries Pvt Ltd v CCGST (2020) 38 GSTL 60 (Tri-All)*]
- Compensation received from Government for cancellation of coal blocks [*MNH Shakti Ltd. vs. CGST (2021) 132 taxmann.com 115(Tri-Kol)*]
- Amount received from maintenance contractor for non-availability of machines as per norms not liable u/s. 66E [*Ruchi Soya Ltd. vs. CC (2021) 129 taxmann.com 368 (Tri-Del)*]
- Notice pay recovery by employer from employee for not giving agreed notice period for leaving employment is 'compensation' not 'consideration'
[*Rajasthan Rajya Vidyut Prasaran Nigam Ltd. vs Comm (2022) 135 Taxmann.com (Tri-Del)*
relying on *GE T & D India Ltd. vs. Dy CCE (2020) 35 GSTL 89 (Mad)* foll. in *Shriram Piston and Rings Ltd. vs. CCT (2020) 42 GSTL 79 (Tri-All)*, *Street Syntel Services Pvt. Ltd. v. Comm* [ST Appeal No. 8975 of 2018 dated 25.11.2020], *CST vs Intas Pharmaceuticals* [ST Appeal No. 12436 of 2008 dated 25.6.2021]

SUPPLY SOME CONTROVERSIES

- However amount paid to employee for not joining a competing business would be liable to be taxed as being paid for providing the service of forbearance to act liable since it is consideration for an agreement to the obligation to refrain from an Act [Education Guide Para 2.9.3]
- From illustrations, the proposition that emanates is-
 - 'Compensation' [distinct from 'consideration'] received by provider from recipient is not extension of consideration - not liable.
 - 'Compensation' received by recipient/payer of consideration from provider not liable.

SUPPLY SOME CONTROVERSIES

Whether the payment made by the assessee to its parent company towards the salary and other perks of the employees deputed by the foreign parent company to assessee would be liable for service tax under reverse charge mechanism

- *payments made by Indian Companies to foreign parent companies for deputation of employees who work under the direction, supervision and control of the Indian companies would be considered as payments made towards employment services – subject of course to the fact that in substance the payments are treated as payment of salaries for the deputed employees [Reliance on service tax regime decision in Nissin Brake India Pvt. Ltd. 2018-TIOL-1976-CESTAT-DEL upheld by the Supreme Court in 2019-TIOL-151-SC-ST]*

SUPPLY SOME CONTROVERSIES

- *Applying the similar proposition the transaction may be treated as employment services falling under Schedule III of GST i.e neither supply of goods or service.*
- *domestic scenario - payments remitted by the HO to a branch (which comprises of payments towards salaries of the branch employees) subjected to levy of GST (Cross charge) by virtue of deeming fiction*

SEVERAL ISSUES 

Classification - Controversies

CLASSIFICATION SOME CONTROVERSIES

Supply of Software – whether Supply of goods/ supply of service

Historically Department's view – Service

Arguments under ST regime in support of department's view –

- ISODA's case – (2010) 20 STR 289 (Mad) – not a sale of software but only the contents of the data stored in software
- Software is sold under an EULA-Licence agreement- which only grants a licence to use.

Historically Assessee's view – Sale of goods –not liable for service tax

Arguments under ST regime in support of above view –

- Tata Consultancy Services vs. State of Andhra Pradesh reported in (2005) 1 SCC 308 has all attributes of goods viz., capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc.

CLASSIFICATION SOME CONTROVERSIES

Arguments under ST regime in support of Assessee's view (contd...)-

- EULA is only to protect from infringement
- Downloads also sale of goods – Delhi Tribunal decision in Atul Kaushik vs CCE (2015) 330 ELT 417 (Tri-Del) - Civil Appeal dismissed by SC
- ECJ judgment in case of UsedSoft GMBH vs Oracle International Corp – wherein it was held that there is no grant of user right /license to computer programme but a sale of copy of the computer programme
- Transaction is in the nature of sale of a copy of computer program
Bombay High Court in Mahyco Monsanto Biotech (India) Pvt. Ltd. Vs. Union of India reported in (2016) 44 STR 161 (Bom.).

CLASSIFICATION SOME CONTROVERSIES

Under GST Regime

(Flier) issued by the Government on IT/ ITES sector which mentions -

*"if a pre-developed or pre-designed software is supplied in any medium/storage (commonly bought off-the-shelf) or **made available through the use of encryption keys**, the same is treated as a **supply of goods** classifiable under heading 8523"*

Consequences of Classifying downloaded software as Supply of goods / services

Issue	Classified as Supply of goods	Classified as supply of service
Rate of tax	18%	18%
Chapter Heading	Any Chapter [Sl. No. 452P or Sl. 453 of Schedule III of Not. No. 1/2017-CT(R) dated 28.6.17	9973 [Sl. No. 17 of Not. No. 11/2017-CT(R) dated 28.6.2017]
Description of supply	Permanent transfer of IP in IT software	Temporary / permanent transfer/permitting the use or enjoyment of IP in IT software
Time of Supply	Date of issuance of invoice.	Earlier of <ul style="list-style-type: none"> • Date of issuance of invoice /date of completion of service <li style="text-align: center;">or • date of receipt of payment
Exports	May not be considered as exported under Customs law as no shipping bill involved	Considered as exported and accordingly eligible for benefits of zero rated supply
Imports	May not be considered as imported under customs law as no BOE involved	Considered as imported and accordingly liable for tax under reverse charge
Domestic POS	Supply where movement of goods terminate [s. 10(1)(a)]- challenges in determining place where downloaded	Location of recipient [S. 12(2)]

CLASSIFICATION SOME CONTROVERSIES

Repairs to a car where cost of spare parts and cost of labour are separately shown in single invoice

- whether Supply of spare parts / accessories and labour are distinct supplies naturally bundled together? Rate of tax for labour supply is 18% & supply of spare part / accessory rate of tax is 28%?
- Is the supply a mixed supply of parts and labour for a single consideration?
- Is it a single supply of repair service the parts being consumed or integral to the supply of repair and the entire supply is taxable @ 18%?

- From the facts it may appear that the entire supply is that of a repair service since the SR did not intend to purchase the spare parts. Very often he does not even know what spare parts are needed for repairs. Object is a contract of skill and labour not of sale of parts even if billing is itemized; [*Sundaram Motors v State of Mysore* (1967) 19 STC 290 (Mysore); *Sundaram Motors v State of T.N* (1958) 9 STC 687 (Mad)]
 - Entry 3 Schedule II- 'Any treatment or process which is applied in another person's goods is 'supply of services'.
 - Classification List – SAC – 998714 "Repairs and Maintenance of transportation Equipment".
- Hence arguable case to consider single supply for 18%.

Whether it is two distinct supplies ?

- Practical View Board Circular No. 47/21/2018 – GST dated 8.6.2018

Sl. no.	Issue	Clarification
2.	How is servicing of cars involving both supply of goods (spare parts) and services (labour), where the value of goods and services are shown separately, to be treated under GST?	<p>2.1 The taxability of supply would have to be determined on a case to case basis looking at the facts and circumstances of each case.</p> <p>2.2 Where a supply involves supply of both goods and services and the value of such goods and services supplied are shown separately, the goods and services would be liable to tax at the rates as applicable to such goods and services separately.</p>

GST leviable on supply of labour @ 18% & on supply of spares @ 28%

CLASSIFICATION SOME CONTROVERSIES

In a slump sale of business where the terms of the business transfer agreement require the seller not to engage in similar line of business for a specified period whether some portion of the consideration received by the seller can be attributed as a consideration for providing services of agreeing to tolerate an act or refrain from an act?

- Business transfer agreement is in respect of a **single transaction** viz., i.e. one of transferring the business as a going concern for a single price / consideration more popularly known as "slump sale" – sale consideration exempted under Entry 2 of Not. No. 12/2017-CT (R) dated 28.6.17 [Even otherwise a "business" may not be "goods" or "Services". The Act uses 'business' distinctly from 'goods' or 'services' - hence may not be taxable at

CLASSIFICATION SOME CONTROVERSIES

- the non-compete obligation is only one of the terms of the agreement
- The purpose of Clause it appears is to safeguard the interest of buyer and preempt seller from carrying on similar business for certain period of time. The intention is not to consider the non-compete obligation of seller as a separate agreement with a separate price specially considering that the transaction is of a business as a going concern lock-stock and barrel without attributing any separate value to the non-compete obligation.
- Hence may not be a separate supply of services but part of the contract for slump sale of business (i.e. supply of service) and hence the exemption would apply to the consideration as a whole.

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