

ICAI - ERNAKULAM
GST @5 – INDUSTRY PERSPECTIVE

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INDIA STORY

- India is now the 5th Largest Economy in the world.
- India has the 5th Largest Foreign Exchange Reserves in the world.
- India's external debt as a percentage of GDP is 17.6%.
 - Singapore is 476.3% of GDP
 - US is 124.2% of GDP
 - UK is 289.8% of GDP
- India is the second most top destination for investment – US CFO Survey.
- Consumer spending is back to pre-covid levels.
- Unemployment trends are lowering.
- Hotel occupancy is at a peak.
- Service export is growing.
 - Goods export is not growing.

INDIA STORY

- Bank, credit card / POS upgrade / downgrade ratio is 5:1.
- Bank impaired loans are down.
- Industrial loan growth has increased.
- Bank margins have increased.
- Credit to and by NBFCs have increased.
- India is the fastest growing nation as per IMF.

INDIA STORY

- Progress card
 - 11.7 crores household toilets under Swachh Bharat Mission
 - 9.6 crore LPG connections under Ujjawala
 - 220 crore covid vaccination of 102 crore persons.
 - 47.8 crore PM Jan Dhan bank accounts
 - Insurance cover for 44.6 crore persons under PM Suraksha Bima and PM Jeevan Jyoti Yojana
 - Cash transfer of 2.2 lakh crore to over 11.4 crore farmers under PM Kisan Samman Nidhi.

INDIA BUDGET NUMBERS

- The total receipts other than borrowings for 23-24 is estimated at **Rs.45 lakhs crores** (*In the 1947 Budget, it was Rs.171 crores*)
- Revised estimate of fiscal deficit is 6.4% of GDP
- Fiscal deficit is estimated for the next year to be 5.9% of GDP and
- Fiscal deficit would be below 4.5% by 2025-26.
- Net market borrowing for 2023-24 would be 11.8 lakh crores from dated securities and the balance would come from small savings and other sources. Gross market borrowings is estimated at 15.4 lakh crores.

GST COLLECTIONS

- Economic Survey 2022-23
 - Rising average monthly gross GST collection
 - High YoY growth in cumulative Gross GST collections from April to December
 - Continued momentum in monthly Gross GST collections over the years
 - Increase in GST taxpayers, from 70 lakh in 2017 to more than 1.4 crore in 2022 indicates the expansion in formal businesses



WHY DID INDIA IMPLEMENT GST?

- Tax reform
- Elimination of 'cascading effect'
- Equitable taxation
- Simpler system
- One market

DO GST PROVISIONS FACILITATE THE REFORM OBJECTIVE?

Parameters	Yes/ No	Comments
Tax Reform	Yes	Industry, Government and consumers have gained
Elimination of 'cascading effect'	Yes*	Recent changes which seems to restrict or make availment of ITC a difficult task would result in the re-introduction of 'cascading effect' of tax
Equitable Taxation	Yes	Entire supply chain is taxed
Simpler system	No	Intended to be one, but has turned out to be complicated
One market	Yes	GST rates are same across the country. 'T' from Tamil Nadu can supply to 'G' in Gujarat without the risk of loss of tax credit to 'G'
Advance Rulings	No	More complications on account of predominantly revenue tilted rulings

GST – THE REFORM ASPECT – GAINS FOR THE INDUSTRY

- Path breaking tax reform
- Harmonization of taxes
- Elimination of cascading effect
- Widening of scope of ITC
- Uniform rate across the country
- Elimination of unwanted business structures
- Better supply chain management
- Goods can be supplied from any part of the country
- Vendor verification by buyers
- Transparency

GST – GAINS FOR THE CONSUMER

- Massive reduction in indirect taxes on goods
- GST Awareness
- Product / Service pricing
- Consumer oriented services at a lower rate
- Anti-profiteering provisions
- **No inflation on account of GST**
- One indirect tax levy

GST – GAINS FOR THE GOVERNMENT

- New assesseees
- Widening of tax base
- Data mining
- Revenue collected from multiple assesseees
- E-way bill and trail
- Consumer awareness
- Many States have shown increase in revenue
- Compensation based on 14% revenue growth rate

INDUSTRY PERSPECTIVE – INPUT TAX CREDIT

- **Seamless credit or seemingly less credit**
 - Vendor compliance
 - Payment of taxes by vendor
 - Filing of relevant returns by vendor
 - Payment within 180 days
 - MSME Act and 45 days
 - Non-availability of ITC – Section 17(5)
 - Reconciliation issues
 - Audit queries on ITC

INPUT & INPUT SERVICES

- **Input** means **any goods other than capital goods** *used or intended to be used by a supplier in the course or furtherance of business.*
- **Input service** means **any service** *used or intended to be used by a supplier in the course or furtherance of business.*
- Used or intended to be used
- *In the course or furtherance of*
- *Business*

- **Nexus to business**
- **Scope much wider than cenvat credit and VAT credit**
- What is 'furtherance of business'?
- Possible litigation similar to business expenditure in income tax law.
- The Supreme Court in ***CIT Vs. Walchand (1967) 65 ITR 381***, observed that *in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue.*
- The Supreme Court in the case of ***CIT Vs. Dhanraj Giri (1973) 91 ITR 544***, observed that it is not open to the Department to decide what type of expenditure the assessee should incur and in what circumstances

NON-AVAILABILITY OF ITC

- Motor vehicles with seating capacity of not more than 13 persons including driver.
- Vessels and aircraft
- General Insurance / servicing / repair / maintenance – Vehicles, etc.
- Food and Beverages, Outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, etc.
- WCT Services when *supplied for construction* of an immovable property (other than plant and machinery) except where it is *an input service for further supply of WCT service*.
- Goods or services or both *received* by a taxable person for *construction* of an immovable property (other than plant and machinery) on his *own account* including when such goods or services or both *are used in the course or furtherance of business*.
- Club Membership / Health and Fitness Centre
- Tax paid under Section 74, etc.
- Goods lost, stolen, destroyed, written-off or disposed off by way of gift or free samples.
- Goods or services used for personal consumption.

SECTION 16(2)

- Input Tax Credit contingent upon
 - Possession of tax invoice / debit note or such other prescribed document
 - **Receipt of goods or services or both.**
 - **Tax charged in respect of supply and has been actually paid to the credit of the Government either in cash or through utilization of admissible input tax credit**
 - Furnishing of return
 - Filing of GSTR-1 by the supplier – FA 2021 w.e.f. 01.01.2022.
 - ITC not restricted in GSTR-2B – FA 2022
 - Amendment by FA 2021 to Section 16 of CGST Act inserting clause (aa) **w.e.f. 01.01.2022**

SECTION 16(2)(aa) & SECTION 36(4)

- Form GSTR-1 to be filed for furnishing of details of outward supply in terms of Rule 59.
- Furnishing of GSTR-1 by the supplier becomes a condition for entitlement of Input Tax Credit.
 - Due diligence on suppliers
 - Continuous verification and follow-up by recipients required to ensure that GSTR-1 is filed by the supplier
 - *ITC becomes complicated.*

PAYMENT OF TAX BY SUPPLIER

- Conditions in Section 16(2) requiring the buyer to verify whether the supplier has paid the tax to the Government account has been challenged before the Delhi High Court in the case of ***Bharti Telemedia Ltd. Vs. Union of India***.
- The Madras High court in the case of ***Sri Vinayaga Agencies Vs. The Assistant Commissioner (CT), Chennai and another (2013) 60 VST 283*** held that the department is not empowered under Section 19(16) of the TNVAT act, to revoke the input tax credit availed on the plea that the selling dealer has not paid the tax when the petitioner-dealer has paid tax to the selling dealer and claimed Input tax credit by way of self-assessment.

PAYMENT OF TAX BY SUPPLIER

- ***Arise India Ltd. Vs. Commissioner of Trade Taxes [TS-314-HC-2017(Del)-VAT]***
 - Section 9(2)(g) of the DVAT Act does not make any distinction between bonafide purchasing dealer and others.
 - The provisions should be read down whereby dealer or class of dealer shall not include a purchasing dealer who has bonafide entered into purchase transaction with validly registered selling dealer who had issued tax invoices .

PAYMENT OF TAX BY SUPPLIER

- The Bombay High Court on the other hand in the case of ***Mahalaxmi Cotton Ginning Pressing and Oil Industries Vs. State of Maharashtra (2012) 51 VST 1*** had upheld similar provisions of the MVAT Act.
- *lex non cogit ad impossibilia*

COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Number of Companies have received notices comparing 3B and 2A
- Notices call for reversal with interest and in some case even penalty
- Mere letters without a section 73 Show Cause Notice
- Summons from DGGSTI on these aspects
- ***Can filing of GSTR 1 be a condition for availment of ITC by the recipient?***
 - *For the period prior to 01.01.2022*
 - *For the period after 01.01.2022*

COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Except for GSTR-1 and GSTR-3B, the filing of GSTR-1A, GSTR-2, GSTR-2A and GSTR-3 were are all kept in abeyance;
- Matching mechanism as contemplated in GST did not take off
- Payment of GST by the taxpayers is by way of GSTR-3B and not by way of GSTR -1
- GSTR -2A is an auto-populated form and at present, it is only a facilitation measure given to recipient of supply to check whether the corresponding supplier is depositing the taxes collected from him with Government

COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Non-reflection of invoices in GSTR-2A does not impact the ability of recipient tax payer to avail ITC on self-assessment basis, as the taxpayer has adhered to all the conditions listed down in Section 16 of the CGST Act, 2017
- Section 42 deals with 'Matching, Reversal and Reclaim of Input Tax Credit' and Section 43 deals with 'Matching, Reversal and Reclaim of Reduction in Output Tax Liability' and both these provisions have not been operationalized
- Filing of Form GSTR-2 and Form GSTR-3 remain suspended and therefore, neither Section 42(10) nor Section 43(10) would be applicable
- No liability to pay interest under Section 50(3) CGST Act, 2017

INPUT TAX CREDIT

- ***Union of India Vs. Bharti Airtel Ltd. (2021) 54 GSTL 257 (SC)***
 - The registered person is obliged to do self-assessment of ITC, reckon its eligibility to ITC and of output tax liability including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of account required to be statutorily preserved and updated from time to time
 - This he could do so even without the common electric portal as was being done in the past till recently pre-GST regime
 - The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment
 - The primary source is in the form of agreements, invoices/ challans, receipts of the goods and services and books of accounts which are maintained by the assessee either manually or electronically

BOARD CIRCULAR No. 183 dated

27.12.2022

- Supplier has not filed GSTR -1 but filed GSTR – 3B and amount not reflected in GSTR – 2A
- Supplier has filed GSTR -1 and 3B but has not reported a particular supply and hence, supply is not reflected in GSTR - 2A
- Supplies made to registered person and invoice issued referring to GSTIN of the recipient but supplier has wrongly reported the supply as B2C and not reflected in GSTR -2A
- Supplier has filed GSTR -1 as well as GSTR -3B but has declared the wrong GSTIN of the recipient in GSTR -1

BOARD CIRCULAR No. 183 dated

27.12.2022

- In all the four scenarios, the difference in ITC can be claimed by the registered person in GSTR -3B by following the specified procedure
 - Officer shall first seek details of ITC not reflected in GSTR -2A
 - Officer shall check whether invoice has been received; goods or services have been received and recipient has made payment to the vendor;
 - Officer shall check whether any reversal is required under Section 17 and whether credit was availed within the time limit
 - **Only for verification of the condition for payment of tax by the supplier, the officer shall ask the registered person to produce certificate for the concerned person from a CA or CMA certifying that supplies have been actually made and the supplier has paid the tax in GSTR – 3B. *This is applicable where the difference in ITC for a supplier exceeds Rs. 5 lakhs for the said financial year***
 - *Upto Rs. 5 lakhs, certificate to be obtained from the supplier himself that supplies have been actually made and tax has been paid*

BOARD CIRCULAR No. 183 dated

27.12.2022

- This circular is applicable only for 2017-18 and 2018-19
- For FY 2017-18, relaxation shall not apply to claim of ITC made in GSTR – 3B after the due date for furnishing return for the month of September 2018 till the due date for furnishing return for March 2019 if the supplier has not furnished details of supply in GSTR -1 till the due date for furnishing GSTR -1 for the month of March 2019
- Circular is applicable for 2017-18 and 2018-19 only to ongoing proceedings in scrutiny / audit / investigation and not to completed proceedings
- Circular will apply where any adjudication or appeal is still pending
- Karnataka High Court in the case of ***Wipro Industries Ltd.*** has extended the application of Circular to even **2019-20**

ITC – OTHER ISSUES

- Cancellation of supplier registration
- Cancellation with retrospective effect
- Goods supplied and received
- In the context of VAT the Madras High Court in the case of ***Infinity Wholesale Ltd. Vs. ACCT (2015) 82 VST 457*** has held that retrospective cancellation of suppliers registration cannot affect buyers credit
- ***In M/s. JKM Graphics Solutions Private Limited & Others Vs. Commercial Tax Officer (2017) 99 VST 343*** it has been held that ITC availed by the Petitioner could not have been proposed to be reversed or reversed on the ground that the selling dealer has not filed returns or paid taxes

A NEW VERSION OF GST WITHOUT BENEFIT OF ITC

SERVICE	RATE OF TAX
Restaurant Service	5% without ITC
Construction of residential apartments	5% without ITC
Hospital rooms where the rent is more than Rs.5000/-	5% without ITC
Transportation of passengers by rail in First Class or AC	5% without ITC on goods
Transport of passengers by air conditioned contract carriage other than motor cab	5% without ITC
Transport of passengers by air in economy class	5% without ITC on goods
Transport of passengers by motor vehicle where cost of fuel is included	5% without ITC
Transportation of goods in a vessel / rail	5% without ITC on goods

INDUSTRY PERSPECTIVE – SALE OF USED CARS

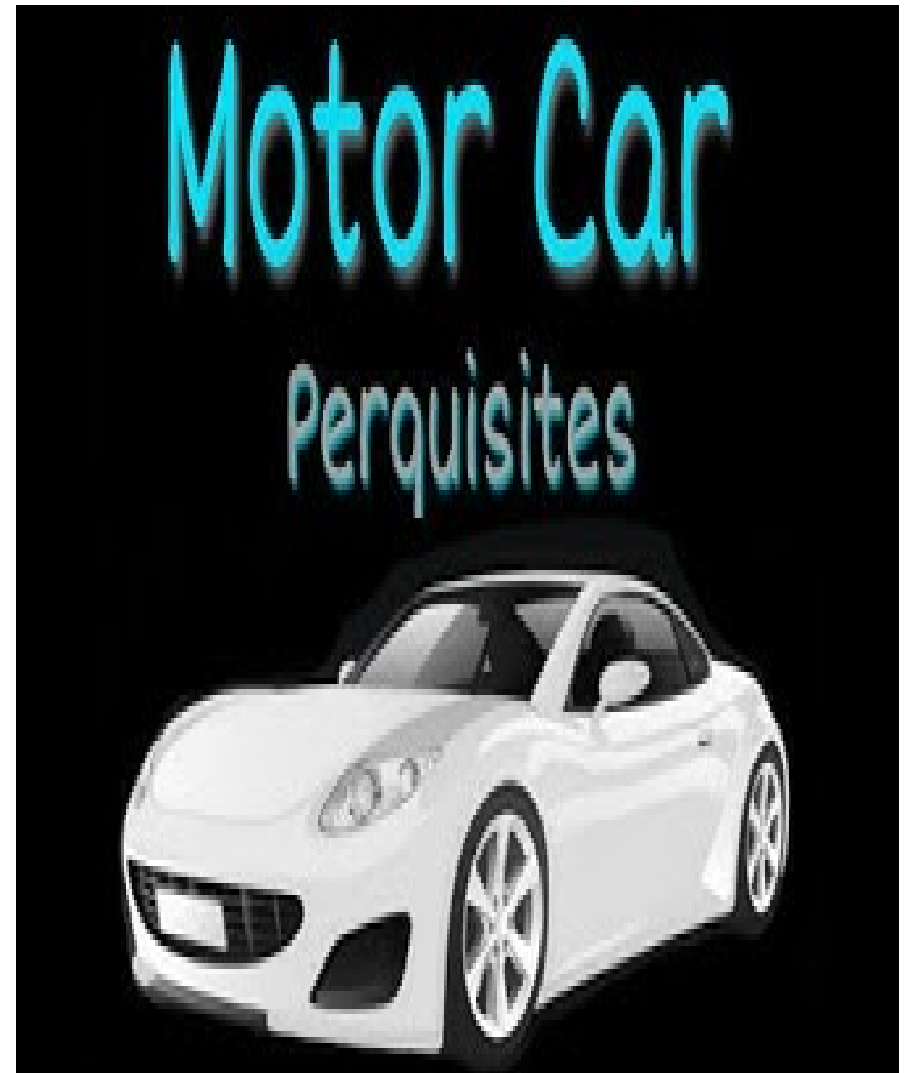
- Company purchases cars and claims depreciation
- Cars sold after certain period of time
- No ITC on cars in terms of Section 17(5)
- Sale of used car
 - Can it be said that the sale of used car is not a supply in the course or furtherance of business?
 - Bombay High Court in the case of ***Morarji Bros Pvt. Ltd. Vs. State of Maharashtra*** , held that sale of used car by dealers who was a dealer in chemicals are not sales in connection with or incidental to the business of manufacture and sale of goods

INDUSTRY PERSPECTIVE – SALE OF USED CARS

- **Notification No. 8/2018 – CTR**
 - in case of a registered person who has claimed depreciation under section 32 of the Income-Tax Act, 1961 on the said goods, the value that represents the margin of the supplier shall be the difference between the consideration received for supply of such goods and the depreciated value of such goods on the date of supply, and where the margin of such supply is negative, it shall be ignored; and
 - in any other case, the value that represents the margin of supplier shall be, the difference between the selling price and the purchase price and where such margin is negative, it shall be ignored

INDUSTRY PERSPECTIVE – SALE OF CAR TO EMPLOYEE

- Motor car owned by company
 - Depreciation claimed by company
 - Employee allowed to use the car
 - Vehicle sold to employee at residual value after a certain period
 - In terms of Notification No. 8/2018 – CTR, dated 25.01.2018 if the difference between the sale consideration and WDV as per the Income Tax provisions is positive, then GST is paid on such margin and if the margin of supply is negative, then no GST is paid
 - Valuation?



INDUSTRY PERSPECTIVE - CANTEEN

- **Subsidised food to employees at canteen**
 - Recovery of small amount from employee
 - Can it be said that it is a supply in the course of business?
 - Can it be said that the provision of food is a perquisite and part of employee contract?
 - The Maharashtra AAR in the case of ***Re Tata Motors*** in the context of a nominal amount recovered from employees for providing transport facilities ruled that transaction between the applicant and the employees is not a supply due to employer-employee relationship. Since no service is provided by an employer to the employee GST is not applicable on the nominal amounts recovered from the employee



*Frankly, I've seen better menus on
my computer Accounts Package*

INDUSTRY PERSPECTIVE - CANTEEN

- Contractor charges 5% GST
- Small amount recovered from employee
- CBIC Circular
- Contractual obligation
 - Where an assessee can clearly demonstrate either through the employment agreement or company policy or standing orders that subsidized food is part and parcel of the employer's obligation and is in the nature of perquisites to the employees, then the transaction should only be seen as a third schedule transaction and need not be looked at as a separate supply by the employer
- ITC availability
 - Statutory mandate for provision of canteen?

INDUSTRY PERSPECTIVE – NOTICE PAY

- Notice pay
 - Supply?
 - Consideration?
 - Schedule – II?
- Board Circular dated 03.08.2022
 - Amounts recovered by employer by way of forfeiture of salary or bond amount is not a consideration for the service of agreeing to tolerate and act or a situation



I want to withdraw my resignation.
The company which hired me is
hiring my boss too.

E-WAY BILL

- E-Way Bill is an important and critical document that has to be filled up carefully and generated within the time prescribed and the transporter must be aware of the time frame
 - Validity period can be extended for reasons such as break-down, natural calamity, law and order, accident etc. before 8 hours or after 8 hours of expiry
 - Alternative solution is to cancel earlier invoice and prepare fresh e-way bill from the place where the goods are lying to the destination
- Part – A of the E-way bill cannot be generated if
 - The supplier has not furnished GST CMP-08 for two consecutive quarters
 - Supplier has not furnished GSTR -3B for a 2 consecutive tax periods
 - Supplier has not furnished GSTR -1 for 2 consecutive months or quarters
 - Supplier's registration has been suspended

E-WAY BILL

- Online application can be made for unblocking E-way bill generation facility
- E-way bill system is integrated with Vaahan System of Transport Department
 - Vehicle number will be verified with Vaahan data
- E-way bill system is integrated with Fastag
 - Real time tracking
- Part B has to have vehicle number for road and transport document number
 - Vehicle number should be entered without space in between
 - Last number has to be 4 digits. Middle number has to be two digits
 - AP 1 725 should be entered as AP010725
 - TN 7 M 35 should be entered as TN07M0035
 - E-way bill is valid only when both Part-A and Part –B is filled up and E-way bill number is generated by the system

E-WAY BILL

- If goods are moving without E-way bill and are stopped by the roving squad or any other authority
 - Goods can be confiscated
 - Tax + penalty
 - Release of goods
 - Challenges in other States
 - Delay in delivery
- Part A is normally filed by the consignor
- Part B is normally filed by the transporter but can be filed by others also
- Consignor is required to furnish specified details before movement of goods where the value exceeds Rs. 5000 in Part –A
- Transporter can fill up Part A if he is authorised
- E-way bill required even for movement other than supply
 - Job work
 - Sending equipment to site

E-WAY BILL

- If total invoice value is greater than sum total of taxable value and applicable taxes, system will alert the user with a pop-up for generating E-way bill
- Where total invoice value entered is more than Rs. 2 crores, additional alert and SMS would come to ensure that there is no error or typo mistake
- Bill to –ship to transactions
 - A has directed B to send goods directly to C
 - B would be sending the goods and C is the recipient
 - Two supplies are involved and two tax invoices are required
 - Either A or B can generate E -way bill for the movement of goods from B to C but only one E-way bill is required to be generated

SERVICES BY GOVERNMENT

- **Services by Central Government / State Government / Union Territory / Local Authority to a business entity**
 - GST under Reverse charge mechanism
 - Certain services excluded
- Services supplied by the Central Government, State Government, Union territory or local authority by way of renting of immovable property to a person registered under the CGST Act, 2017
 - Exemption for amounts paid for long term lease of 30 years or more of industrial plots or plots for development of infrastructure for financial business, provided by the State Government Industrial Development Corporations or Undertakings etc. subject to conditions

SERVICES BY GOVERNMENT

- Services by Government / Sovereign Functions?
- Mining royalty?
 - Is RCM even applicable given the fact that the licensee can sell the minerals which would mean that the minerals have been sold by the Government to the licensee and hence, supply of goods
 - Sovereign function?
 - Absence of service
 - Whether royalty is a tax – Supreme Court
- Contribution to District Mineral Foundation and National Mineral Exploration Trust
 - Where is the Government?
 - Where is the service?
- The Allahabad High Court in the case of ***Greater Noida Industrial Development Authority*** has observed that if a sovereign/public authority provides a service, which is not in the nature of a statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, Service Tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined

INDUSTRY PERSPECTIVE – CREDIT NOTES

- Discount in the invoice
- Post – supply discounts
 - Agreement
 - Credit note within time limits under Section 34
 - What happens if dealer does not reverse ITC?
 - Financial credit notes
 - In the case of ***Maya Appliances P. Ltd. v. ACCT (2018) 2 SCC 756*** SC held that that all the regular trade discounts are allowable as permissible deductions. It is a matter of common experience that in the present contemporary competitive market, trade discounts not only are dependent on variable factors but also might be strategically cannot disclosed at the time of original sale/purchase

INDUSTRY PERSPECTIVE - RCM

- Goods transport agency
- Services by Central Government, State Government, UT or local authority
 - Sovereign functions?
 - Regulation through licensing and permissions?
 - Fees?
- Renting of motor vehicle designed to carry passengers where fuel is included and services provided to a body corporate
 - Services must be provided by a person other than a body corporate and should not be charging GST at 12%
- Ocean freight
- Security Services by a non-body corporate to a registered person
- Director remuneration
 - Employee – no GST
 - Other directors

INDUSTRY PERSPECTIVE – CROSS CHARGE

- Whether cross charge is mandatory?
- Types of costs
 - Employee costs
 - Third party costs
 - Corporate office cost
- ISD Vs. Cross Charge

AUDIT, SURVEY, INTELLIGENCE, NOTICE

- State GST authorities
- Central GST authorities
- State intelligence
- DGGSTI
- State Audit
- Central Audit
- CAG
- Multiple authorities – Same questions and data?
- Cross empowerment – Writ Petitions
- Time frame for replies
- Physical / upload
- Concept of GST DRC -01A and DRC- 01

LITIGATION

- First appeal
 - Pre-deposit
- Second appeal
 - No tribunal
 - Time available
 - Writ option if there is recovery
- Writs
 - Jurisdiction
 - Natural justice
 - Not following procedure
 - Question of law

INTERPLAY BETWEEN INCOME TAX AND GST

CONSTITUTION OF INDIA

- No tax shall be levied or collected except by the authority of law – **Article 265**
- Taxation includes the imposition of any tax or impost whether general or local or special and 'tax' shall be construed accordingly – **Article 366(28)**
- Tax on income includes a tax in the nature of an excess profits tax – **Article 366(29)**
- Taxes on income other than agricultural income – **Entry 82, Union List, Seventh Schedule**

INCOME TAX - JOURNEY

- Indian Income Tax Act, 1922
- The Income Tax Act, 1961 was based on the recommendations of the Law Commission's 12th Report, 1958 and the Direct Tax Administration Enquiry Committee's Report, 1959
- Section 2(24) of the Income Tax Act, 1961 defines 'income' in an inclusive manner
- Concept of real income
 - Real profits or gains that is to say on the basis of ordinary commercial principles on which actual profits are computed and the manner in which no commercial man would misunderstand – ***Sunil Siddharth Bhai Vs. CIT 156 ITR 509 (SC)***.
 - What income never accrued or was never received cannot be computed as capital gains under Section 48 of the I.T. Act 1961. The onus of establishing the conditions of taxability to be fulfilled is always on the Revenue – ***KP Varghese Vs. ITO (1981) 131 ITR 497 (SC)***

CONSTITUTION OF INDIA

- 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.

GST

- Section 7(1) defines 'supply' in an inclusive manner
- All forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease, disposal, made or agreed to be made for a consideration by a person in the course or furtherance of business
 - Consideration
 - In the course or furtherance of business
- Section 7(1)(c) considers certain activities specified in Schedule I made or agreed to be made without consideration as a supply
 - Supply of goods or services or both between related persons and distinct persons

SUPPLY Vs. INCOME

- **What constitutes supply need not constitute income**
 - Stock transfer of goods between Chennai and Ahmedabad
 - Inter-unit billing within the Company
 - Advances for services would be liable to GST
 - Related party transactions – open market value or cost plus 10%
- **IT assessment**
 - Financial statements and GST returns need not match
 - GST returns and IT returns need not match
 - Audit observations in GSTR – 9C may not be conclusive
 - What is supply is not necessarily income

INCOME Vs. SUPPLY

- **What constitutes income need not constitute supply**
 - Sale of land or building
 - Employee remuneration
 - High Sea Sales
 - Transfer of title to warehoused goods
 - Compensation need not necessarily be consideration for supply
 - Services where GST is payable by another person under reverse charge mechanism.
- **Number of services exempt through notifications in GST but liable to income tax**
 - Healthcare services
 - Slump sale
 - Specific works contract services
 - Renting of residential dwelling for use as a residence
 - Transportation of goods by road (not being GTA)
 - Interest or discount arising out of extending of deposits, loans or advances

FAKE INVOICES

FAKE INVOICES – GST AND INCOME TAX

- Invoice without any supply
- Unscrupulous methods to facilitate input tax credit
- When ITC is used to pay GST or ITC is obtained as a refund, there is revenue loss
- Action taken by GST authorities
 - Statements are obtained from any of the players in the chain and based on these statements, the other entities are called upon to reverse the ITC with interest
 - In some cases, statements are made to the effect that there are no actual sales
 - Even though ITC is reversed, parties dispute on the ground that the statement was wrong and there was actual receipt of goods
 - Cross examination not done in most of the cases

STATEMENTS AND CROSS EXAMINATION

- Adverse findings based on statements taken from others
- Assessee entitled to cross examination
 - In the case of ***Shree Parvathi Metals Vs. Union of India (2018) 11 GSTL 137***, the issue was whether statement given by the foremen can be used against the appellant without affording the opportunity of cross examining, while holding disallowance of Cenvat credit. The Rajasthan High Court held that we are of the considered opinion that the cross-examination is a right of assessee.
 - The Supreme Court in the case of ***CBI Vs. V.C. Shukla (1996) AIR SC 1406*** has held that third party records alone cannot be relied upon as an admissible piece of evidence.
- Assessee can counter the statements
- Reversal before investigation is complete need not necessarily mean that the matter has been accepted or conceded
- Assessee can contest the matter as and when the investigation is completed and Show Cause Notice is issued

GST INVESTIGATION

- The investigation would involve collection of data; statements after summons; enquiry; and should culminate into a Show Cause Notice
- The noticee is entitled to object to the proposals in the SCN and adjudication has to happen
- After an order is passed, the assessee has the right of appeal to the first appellate authority
- Second appeal to GST Tribunal and subsequently to High Court or Supreme Court
 - Reversal during any of the stages need not necessarily mean that the purchases are bogus
 - Reversal to buy peace or under pressure or coercion
 - Reversal or payment to obtain bail since arrest is a separate and parallel proceeding

IT ASSESSMENT

- Purchases or expenditure may be questioned based on GST investigation
- During scrutiny, there could be proposals to disallow the expenditure
- Cash deposits / withdrawals may require explanation
- Interesting issues
 - A reports fake supplies to facilitate B to avail ITC
 - B reports fake supplies to facilitate C to avail ITC
 - Can there be disallowance of purchases in the hands of both B and C?
 - If supply is fake, can the income alone be taxed?

SECTION 271 AAD

- Inserted by Finance Act, 2020 w.e.f. 01.04.2020
- *Section 271AAD(1) - Without prejudice to any other provisions of this Act, if during any proceeding under this Act, it is found that in the books of account maintained by any person there is –*
 - *A false entry; or*
 - *An omission of any entry which is relevant for computation of total income of such person to evade tax liability,*
- *The assessing officer may direct that such person shall pay, by way of penalty, **a sum equal to the aggregate amount of such false or omitted entry.***
- *Section 271AAD(2) - Without prejudice to the provisions of sub-section (1), the Assessing Officer may direct that **any other person**, who causes the person referred to in sub-section (1) in any manner to make a false entry or omits or causes to omit any entry referred to in that sub-section, shall pay by way of penalty **a sum equal to the aggregate amount of such false or omitted entry.***

SECTION 271AAD

- Income tax enters into book keeping
- There are adequate penalty and prosecution related provisions in GST for this problem
- Why should there be an additional impact in Income Tax?
- Scope of 'any other person'
- If offence is by a Company, can there be a penalty on the employee?

SECTION 271AAD

- What is the need for another penalty when
 - Disallowance of an expenditure resulting in income can be tested under concealment.
 - Section 276C which deals with prosecution defines wilful attempt to evade tax to cover *makes or causes to be made any false entry or statement in the books of account or other documents.*

SECTION 271AAD

- False entry as per explanation includes 'use' or 'intent to use'. Therefore, intent will have to be established
- The objective must be to 'evade tax liability' and this will have to be established
- The legislative intent behind the provision is set out in the Memorandum to the Budget
- Assessing officer 'may direct'. This indicates discretion.
- Section 274 would require Show Cause Notice and Show Cause Notice will have to clearly establish the violation

CHARITABLE INSTITUTIONS

CHARITABLE INSTITUTIONS - IT

- Section 11 of the Income Tax Act, 1961 provides that income derived from the property held under trust, wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India, shall not be included in the total income
- Section 2(15) of the Income Tax Act, 1961 defines “charitable purpose” as under:
 - relief of the poor,
 - education,
 - yoga,
 - medical relief,
 - preservation of environment (including water-shed, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and
 - the advancement of any other object of general public utility.

CHARITABLE INSTITUTIONS - IT

- Recent Supreme Court decision in the case of ***New Ahmedabad Authority***.
 - Definition of charitable purpose
 - Object of general public utility
 - Proviso
 - Business, trade or commerce

INTERPRETATION OF SECTION 2(15) – SUPREME COURT

- The paradigm change achieved by Section 2(15) after the amendment is that a GPU cannot engage in any activity in the nature of trade, commerce, business or any service, in relation to such activities for any consideration including a statutory fee
- This is emphasised in the negative language in the main part of Section 2(15)
- The idea of a predominant object amongst several other objects is discarded
- **The prohibition is relieved to a limited extent by the proviso**
 - Activities in the nature of trade, commerce or business or service in relation to trade, commerce or business for consideration should be in the course of actual carrying on of the GPU object
 - Quantum of receipts from such activities should not exceed 20% of the total receipts

PREDOMINANT OBJECT

- **The test of charity being driven by 'predominant object' is no longer good law**
- If at all any activity in the nature of trade or commerce or business or service in the nature of the same, for any form of consideration is permissible, it must be intrinsically linked to or a part of the GPU category charity's object
- **Ploughing back of business income to feed charity is an irrelevant factor**
- There is no conflict between the definition of 'charitable purpose' and the machinery part of Section 11(4A)
- The obligation to maintain separate books of account under Section 11(4A) is to ensure that the quantitative limit imposed by sub-clause (ii) to Section 2(15) can be computed and ascertained

PROFIT & COST

- Pure charity in the sense that performance of an activity without any consideration, is not envisaged in the Act
- What Section 2(15) emphasises is that so long as GPU's charity object involves activities which generate profit, it can be granted exemption provided the quantitative limit of not exceeding 20% under the second proviso to Section 2(15) for such receipts from such profits is adhered to
- Where fee or charges cover cost or nominal markup, it is not an activity in the nature of business.
- When the entity charges substantial amounts over and above the cost for doing the same work, which is part of its objects, such activities are in the nature of trade, commerce or business or service in relation to them and the receipts should not exceed the limits set out in the Proviso

SUPREME COURT ON ICAI

- Institute performs statutory functions in the larger public interest of regulating the profession of CAs
- It clearly falls in the description of a charity advancing GPU
- Bodies which regulate professions and are created by statutes which are enjoined to prescribe compulsory courses to be undergone and also continuously monitor the conduct of members do not *ipso facto* carry on activities in the nature of trade, commerce or business or services in relation thereto
- However, whether the kind of consideration charged is vast or significantly higher than cost will have to be examined
- If the fees for forms, brochures or exams are significantly higher than cost then income would attract the mischief of proviso to Section 2(15) and will have to be within the limits

STATUTORY REGULATORY BODY (ICAI, etc)

- If assessing authority discerns that certain kind of activities involve charging of fees that are significantly higher than the cost incurred with a nominal markup or providing other facilities or services such as admission forms, coaching classes, registration processing fees etc. at markedly higher prices, these would constitute commercial or business receipts and the limits in the proviso to section 2(15) would apply
- Seed certification agencies set up under the Seeds Act are not engaged in activities by way of trade, commerce or business nor service since food security is important and agriculture is one of the main stays of the economy

SC ON TRADE PROMOTION BODIES, COUNCILS, ASSOCIATIONS OR ORGANISATIONS

- The decision in ***Surat Art Silk*** was in the context of unamended Section 2(15). The judgement had proceeded on the assumption that trade promotion was the predominant object and the Court held that furthering the said object would not result in denial of exemption
- The change in the definition and the negative phraseology has made a difference
- Organising meetings, disseminating information through publications, holding awareness camps and events, would broadly fall under trade promotion
- **However, if a trade promotion body provides individualised or specialised services such as conducting paid workshops, training courses, skill development courses certified by it and hires venues which are then let out to industrial, trading or business organisations, to promote and advertise their respective business, the GPU status needs to be scrutinised more closely**

SC ON TRADE PROMOTION BODIES, COUNCILS, ASSOCIATIONS OR ORGANISATIONS

- Such activities are in the nature of services, *in relation to trade, commerce or business*
- The receipts are clearly fee or other consideration for providing services in relation to trade, commerce or business
- Exemption would be subject to the limits set out in the proviso to Section 2(15)
- For each year, the question would be whether the receipts are within the limit set out in the proviso to Section 2(15)

APPLICATION OF THE JUDGEMENT

- **The conclusions in this judgement neither precludes any of the assessee advancing objects of GPU from claiming exemption nor the tax authorities from denying the exemptions in the future, if the receipts in the relevant year exceeds the limit**
- **AO should scrutinise records on a yearly basis,**
 - whether the nature of assessee's activities amount to trade commerce or business, based on its receipts and income that is whether amounts charged are on cost basis or significantly higher
 - **If it is found that they are in the nature of trade commerce or business, then it has to be examined whether the limits have been breached**

CHARITABLE INSTITUTIONS - GST

- Entry 1, Notification No. 12/2017 – CTR provides for exemption in respect of services by an entity registered under Section 12AA of the Income Tax Act by way of *charitable activities*
- “charitable activities” is defined to mean activities relating to
 - Public health by way of –
 - Care or Counselling of
 - I. Terminally ill persons or persons with severe physical or mental disability;
 - II. Persons affected with HIV or AIDS;
 - III. Persons addicted to a dependence forming substance such as narcotics drugs or alcohol; or
 - Public awareness of preventive health, family planning or prevention of HIV infection;
 - Advancement of religion, spirituality or yoga.
 - Advancement of educational programmes or skill development relating to
 - Abandoned, orphaned, or homeless children;
 - Physically or mentally abused and traumatized persons;
 - Prisoners; or
 - Persons over the age of 65 years residing in a rural area;
 - Preservation of environment including watershed, forests and wildlife.

CHARITABLE INSTITUTIONS

- While all charitable institutions registered under Section 12AA subject to compliance of the provisions of income tax would enjoy exemption, exemption from GST would depend upon the definition of 'charitable activities' in the notification
- Definition restricted in scope
- Once the definition is applicable, all activities for the objects of the institution should qualify for exemption in GST
 - Contrary views in AAR Rulings
 - Sale of goods was considered as not a business activity by the Supreme Court in ***CST Vs. Sai Publication (2002) 126 STC 288***
- Voluntary donations without any specific direction would not constitute consideration

GST

- While activities for achieving objects of Trust have been recognised in income tax over a period of time, matters would be tested once again in GST
- Whether the decisions in income tax will cast a shadow on GST?

HEALTHCARE SERVICES

HEALTHCARE SERVICES – INCOME TAX

- Income of universities, education institutions, hospitals, medical institutions, charitable institutions, public religious institutions are exempted from tax on fulfilment of certain conditions – Section 10(23C)
- Section 10(23C)(iiia) covers hospitals substantially funded by Government and Section 10(23C)(iiiae) deals with hospitals whose annual receipts are less than Rs. 1 crore
- The hospital must not be for profit and must exist solely for philanthropic purposes
- Recent amendments by Finance Bill, 2022 to align trust related provisions and Section 10(23C)

HEALTHCARE SERVICES - GST

- Entry 74, Notification No. 12/2017 – Central Tax (Rate) exempts services by way of
 - Health care services by a clinical establishment, an authorized medical practitioner or para-medics;
 - Services provided by way of transportation of a patient in an ambulance, other than those specified in the para above.
- "health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, **but does not include** hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

HEALTHCARE SERVICES - GST

- “Clinical establishment” means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases.
- The Telangana and Andhra Pradesh High Court in the context of service tax exemption in the case of ***Manthena Satyanarana Raju Charitable Trust Vs. Union of India (2017) 3 GSTL 213*** held Holistic health care institution cannot be denied exemption under Notification No. 25/2012-S.T.
- System of medicine which focused mainly on healthy living and not merely prolonged existence cannot be denied benefit of exemption notification on the basis of misconception that clinical establishment was one that would treat people after they fall ill and not one which will prevent people from falling ill.
- In the said case, the Court held that exemption was applicable to an institution which provided Naturopathy services.

HEALTHCARE SERVICES – IT Vs. GST

- Income Tax Act is very explicit that the activity must be for philanthropic purposes and not for the purposes of profit. However, there is no such indication in the Goods and Service Tax Act as such.
- As the definition of charitable activities covers certain activities relating to public health, it should be possible for a charitable trust duly registered under Section 12AA to also claim the exemption from GST under the umbrella of charitable activities (Eg. Care or counselling of terminally ill persons or persons with severe physical or mental disability)
- **Exemption in GST is wider than in income tax**
- **Queries could come from GST while comparing GST returns with IT returns**

SHARES AND SECURITIES

SHARES AND SECURITIES – INCOME TAX AND GST

- Income from sale of shares or securities could either be business income or capital gains
- Securities expressly excluded from the definition of 'goods' as well as 'services' in GST
- Proceeds from sale of securities not liable to GST but considered as exempt supply for proportionate ITC.
 - Section 50CA – Consideration less than FMW, FMW shall be determined under Rule 11UAA
 - No such provision in GST. However, 1% of the sale value of the security shall be taken as the value of exempt supply for the purpose of proportionate reversal of ITC.

TRANSFER PRICING AND GST

- GST is on transaction value. Price paid or payable where supplier and recipient are not related and price is the sole consideration.
- Exports are zero rated.
- Import of goods / services liable to GST.
- Change in valuation on account of adjustments made in transfer pricing.
 - Impact in GST valuation?
 - Inherent conflict between transfer pricing and indirect taxes would surface.
 - Import of services. Proviso to Rule 28. Acceptance of invoice value if ITC is available
 - TP study can have a bearing on valuation of exports since the metric is the same.

SEARCH

SEARCH IN INCOME TAX

- Section 132 refers to “in consequence of information in his possession”, the authorised officer has *reason to believe*.
- Explanation inserted to provide that reason to believe as recorded by the income tax authority under this sub-section shall not be disclosed to any person or any authority or the Appellate Tribunal.
- Mere information from CBI that cash found in possession of the person was undisclosed without any supporting material evidence cannot be considered as sufficient for action under Section 132 – ***UoI Vs. Ajit Jain (2003) 260 ITR 80 (SC)***
- The investigation in GST can lead to a search in IT based on the information shared.

SEARCH IN INCOME TAX

- Voluntary declaration of undisclosed income at the time of recording of statement.
- Voluntary disclosure of undisclosed income through a disclosure petition before conclusion of search.
- Income offered or surrendered during IT proceedings or voluntary additions accepted.

GST IMPACT

- **Can there be an automatic inference that the amount surrendered is liable to GST?**
 - The Punjab and Haryana High Court in the case of ***CCE Vs. Mayfair Resorts (2011) 22 STR 263*** has held that when Rs. 35 lakhs is surrendered to income tax authorities, it cannot be attributable to consideration received for mandap keeper services in the absence of any enquiry. There can be no statutory presumption to treat such amount as proceeds of services.
 - The Tribunal in the case of ***CCE, Chandigarh Vs. Bindra Tent Service 2010 (17) STR 470*** has held that demand of Service tax cannot be made based on presumptions. In this case, the Service tax was demanded under Pandal or Shamiana services based on amount **surrendered to Income-tax Department.**
 - The Delhi Bench of the Tribunal in the case of ***Chetak Marmo Pvt. Ltd. Vs. CCE (2015) 325 ELT 150***, has held that it is a well settled law that clandestine removal ought to be established by production of positive evidence. In absence of any other evidence on record, some disclosure and surrender of income before income-tax authorities especially when assessee pleading also undertaking other activities for generation of income, not to be held to be sufficient evidence to uphold finding of clandestine activities in absence of procurement of raw materials, actual manufacture of goods and non-identity of transporter and customer, etc.

TDS BASED QUERIES

- A number queries are raised in Service Tax and GST based on Form-26AS without appreciating the fact that
 - Income may not be exempt but the service could be exempt or not taxable.
 - Excess TDS
 - TDS on reimbursement out of abundant caution.
 - Deduction under Section 195. Place of supply could be outside India and not liable to GST.
 - Even though Form-26AS may reflect the TDS, GST would be payable by another person under RCM.

BUSINESS EXPENDITURE

- ITC on goods / services used or intended to be used in the course or furtherance of business.
- Business expenditure under Income Tax Act.
 - Disallowance by ITO on the ground that expenditure is personal in nature. Impact in GST.
 - Travel / telephone / vehicle related expenses / guest house
- **Section 43B**
 - GST paid and lying in electronic cash ledger and yet to be offset against liability. *Actual set off need not be insisted upon and the amount credited should be considered as tax paid.*
 - GST paid through ITC. *Payment through ITC is also payment of tax.*
 - *Unutilized modvat credit is not payment of tax – Maruti Suzuki India Vs. CIT (2020) 421 ITR 510 (SC)*

BUSINESS EXPENDITURE

- **GST paid during enquiry / investigation / proceedings without collecting from customer**
 - Either on account of buying peace or on account of pressure adhoc payment of GST is made during investigation
 - Where the assessee had not deposited service tax but made the payment on being pointed out, it is an expenditure in the course of business and allowable – ***CIT Vs. Kaypee Mechanical India Pvt. Ltd. [(2014) 45 taxmann.com 363 (Gujarat)]***
 - Input service tax credit is deductible u/s.37(1) of the Act when such input tax credit is written off in the books of account - ***FIH India Private Limited Vs DCIT (ITAT Chennai)***

BUSINESS EXPENDITURE

- **Interest & Late Fee**

- Where the amount paid is partly penal and partly compensatory, the amount to the extent that it is compensatory can be allowed as a deduction – ***Swadeshi Cotton Mills Co. Ltd. Vs. CIT (1998) 233 ITR 199 (SC)***
- Interest on sales tax arrears compensatory in nature - ***Lachmandas Mathura Vs. CIT [254 ITR 799 (SC)]***

- **Penalty**

- **CSR expenditure**

- **Capital Vs. Revenue expenditure**

- If it is capital goods, depreciation cannot be claimed on the GST portion.

AMOUNTS RECEIVED DUE TO COVID-19 – OTHER SOURCES

- Section 56(2)(x) attracted where there is a receipt without consideration in excess of Rs. 50,000/-.
- The following are not income with retrospective effect from 01.04.2020
 - Money received by an individual from any person in respect of expenditure incurred by him on medical treatment for him or family members in respect of any illness related to Covid-19 subject to notified conditions.
 - Any sum received by a member of family of a deceased person from employer (without limit) or any person (not exceeding Rs.10 lakhs), where death is due to Covid-19 and payment is received within 12 months from the date of death subject to conditions to be notified.
- Where is the consideration for levy of GST?

AMOUNTS RECEIVED DUE TO COVID-19 – PERQUISITES

- Section 17(2) provides the definition of “perquisite”.
- Amendment to Section 17(2) w.r.e.f. 01.04.2020 to state that any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of any member of his family in respect of any illness relating to COVID-19 subject to such conditions, as may be notified by the Central Government, shall not be form part of “perquisite”.
- Retrospective amendment is welcome since the non-taxability was only based on CBDT Press Release.
- Gifts not exceeding Rs. 50,000/- in value in a Financial Year by an Employer to an Employee is not supply

SPECIAL PROVISIONS IN INCOME TAX & IMPACT IN GST

INCOME TAX LAW & GST

- **Section 50C – Guideline value for stamp duty and reference to Valuation Officer**
 - No such concept in GST
 - Construction service liable to GST before issue of completion certificate – Transaction value
- **Section 50D – Where consideration received or accruing as a result of transfer of a capital asset is not ascertainable or cannot be determined for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.**
 - No such concept in GST.
 - Valuation Rules deal with open market supply for specific situations.

INCOME TAX LAW & GST

- **Section 56(2)(x) – Receipt of sum of money without consideration where the aggregate value exceeds Rs.50,000/-.**
 - Levy of GST requires supply *for consideration*
 - If there is no underlying supply, receipt without consideration cannot be subjected to GST.
- **Doctrine of mutuality – Well established principle in direct tax – *Chemsford Club; Bankipur Club.***
 - Supreme Court decision in the case of ***Calcutta Club*** in the context of VAT and Service Tax.
 - Finance Act, 2021 has inserted Section 7(1)(aa) to bring within the scope of supply activities or transaction by a person other than an individual to its members or constituents or vice versa for cash, deferred payment or other valuable consideration. Amendment is with retrospective effect from 01.07.2017.

INCOME TAX LAW & GST

- **Diversion by overriding title –**

- *Bijli Cotton Mills Pvt. Ltd. (1979) 116 ITR 60;*
- *CIT Vs. Sitaldas Tirathdas (1961) 41 ITR 367;*
- *Soma TRG Joint Venture Vs. CIT (2017) 398 ITR 425*
- *Principles can be extended by interpretation to GST*

- **Reimbursement**

- Non-applicability of TDS
- Non-applicability of GST subject to pure agency

- **Subsidy**

- Income includes assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee with certain exclusions.
- Subsidies directly linked to the price forms part of value in GST excluding subsidies provided by the Central Government and State Governments.

WAY FORWARD

- The Government should re-examine the current exercise of comparing IT returns and Service Tax / GST returns.
 - Form 26AS / Annual Information Statement (AIS) / GST
- There should be an understanding that both income tax and indirect tax operate in different fields and have limited convergence points.
- Challenges in reconciliation should be understood from an ease of doing business perspective.

WAY FORWARD

- 5 trillion dollar economy is possible only if the trust deficit is removed
- Merely because some frauds take place, rest of the businesses cannot be subjected to scrutiny and suspicion
- Withholding or blocking of refund affects the cash flow and affects business
- Concept of blocked credit should not exist in the GST regime
- Special relaxation will have to be provided on account of Covid and buyer defaults
- The Government should re-examine the current exercise of comparing IT returns and Service Tax / GST returns.
- Form 26AS / Annual Information Statement (AIS) / GST
- There should be an understanding that both income tax and indirect tax operate in different fields and have limited convergence points.
- Challenges in reconciliation should be understood from an ease of doing business perspective.

THANK YOU



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