SALES TAX BAR ASSOCIATION (REGD.)

NEW DELHI

INTERNATIONAL CONFERENCE on Direct & Indirect Taxes

Phuket & Krabi

2nd to 7th November, 2022

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MESSAGE

I am delighted to know that Sales Tax Bar Association (Regd.) is organising an International Conference-Cum-Tour to Phuket & Krabi from 2nd to 7th November, 2022.

I am sure that the entire tax fraternity will benefit from this mammoth effort by understanding and inculcating the deliberations in the conference, especially in the fast changing paradigm of taxation laws.

I congratulate the Sales Tax Bar Association for organizing this Conference and also extend my very best wishes for its success.

(DR. S.B. DEEPAK KUMAR)
COMMISSIONER, T&T

E-Invoicing under GST

Suresh Aggarwal, Advocate

E-invoicing' or 'electronic invoicing' is a system where in the tax payer will **UPLOAD** his **INVOICE DETAILS** and register his supply transaction **ON** the Government Invoice Registration Portal (**IRP**) and **GET** the Invoice Reference Number (**IRN**) generated **BY** the **IRP SYSTEM**. The tax payer will first prepare and generate his invoice using his ERP/accounting system or manual system and then upload these invoice details to IRP and get the unique reference number, known as IRN.

E-invoicing DOES NOT mean preparation or generation of tax payer's invoice on government portal. It is only intimating the government portal that invoice has been issued to the buyer, by registering the details of invoice on the government portal.

Benefits of E-Invoicing

1. Standardization
    - One time reporting of B2B invoice data on the portal, it reduces reporting in multiple formats (one for GSTR-1 and the other for e-way bill).
2. Automation
    - Auto-generation of Sales and Purchase Registers
    - e-Way bill can also be generated using e-Invoice data
3. Seamless Reconciliation
    - Reconciliation and data verification between suppliers and recipient will be seamless
    - Better control over input tax credit computation and claim
4. Lesser Compliance
    - Substantial reduction in input credit verification issues as same data will get reported to tax department as well to buyer in his inward supply (purchase) register in 2B.
5. Elimination of fake invoices
    - Reduction of tax evasion, System level matching of input credit and output tax

6. Information Availability
    - Near real-time availability of information to all the relevant participants in the supply chain
7. Environment friendly
    - The need of the paper form of the multiple copies of way bill is eliminated. Hence, the tons of paper are saved per day.

Notifications regarding E-invoices

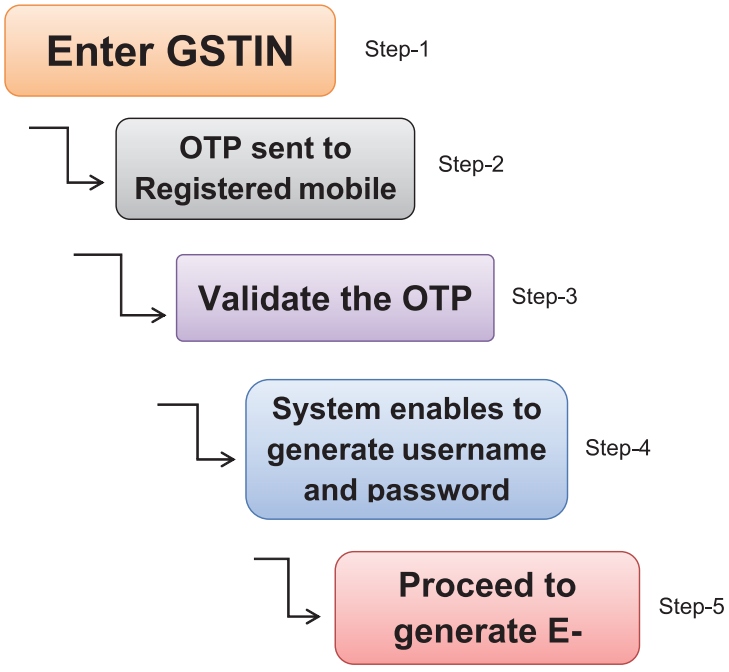
No.	Notification No.	Effective Date	Threshold Limit {Aggregate Turnover} [PAN Based]
1	NN-13 /2020 (Central Tax) Dated 21.03.2020	01/10/2020	500 crores
2	NN-88 /2020 (Central Tax) Dated 10.11.2020	01/01/2021	100 crores
3	NN-05 /2021 (Central Tax) Dated 08.03.2021	01/04/2021	50 crores
4	NN-01 /2022 (Central Tax) Dated 24.02.2022	01/04/2022	20 crores

The minimum threshold was Rs. 500 crore at the time of announcements in October 2020,then it was reduced to Rs. 50 Crore for financial year 2020-21. Through the official Notification No. 01/2022 dated 24th February 2022, the CBIC prescribed the minimum threshold to be Rs. 20 Crore from 01 April 2022.Therefore, in the current financial year, it will be mandatory for all the businesses that have an aggregate turnover of twentycrore rupees or more to generate the e-invoice.

AGGREGATE TURNOVER suggests all branches are covered even if a branch is having a meager turnover of few lakhs only.Suppose under the same PAN if an entity is having a separate branch at U.P. having turnover only Rs. 10 lakhs, then this branch is also covered under E-invoicing as per the law.

All the registered users under GST who wish to generate IRN need to register on E-invoice system using his GSTIN.Users who are already registered on the e-way bill portal need not to again register on the e-invoice system. User can use EWB login credentials to login at e-invoice system. However, if any branch is not yet registered on E-Way Bill portal then that particular branch needs to get registered on e-invoice portal for generating the E-Invoice.

Steps to register on E-invoice portal



Workflow of e-invoice generation

The flow of the e-invoice generation, registration and receipt of confirmation can be logically divided into two major parts.

1. The first part being the interaction between the business (supplier in case of invoice) and the Invoice Registration Portal (IRP).
2. The second part is the interaction between the IRP and the GST/E-Way Bill Systems and the Buyer.

Part A: Flow from Supplier (commonly known as seller) to IRP

Step 1:

a. Generation of invoice by the supplier in his own accounting and billing software.

b. Invoice must have mandatory parameters and optional parameters can be according to the business needs of the supplier.

c. Supplier's software should be capable to generate JSON of final invoice that is ready to be uploaded to the IRP.

d. The IRP will only take JSON of the e-invoice

Step 2 & 3:

a. Upload and push the JSON of the e-invoice to the IRP by the seller. The JSON may be uploaded directly on the IRP or through GSPs or through third party provided Apps.

Step 4:

a. The IRP will generate the hash based on seller's GSTIN, Document Type, Document Number and Financial Year.

b. IRP will check the hash from the Central Registry of GST System to ensure that the same document (invoice etc.) from the same supplier pertaining to same Fin Year is not being uploaded again.

c. On receipt of confirmation from Central Registry, IRP will add its signature on the Invoice Data as well as a QR code to the JSON

d. The hash computed by IRP will become the IRN (Invoice Reference Number) of the e-invoice.

e. This shall be unique to each invoice and hence be the unique identity for each invoice for the entire financial year in the entire GST System for a taxpayer.

In case the same document has been uploaded earlier, the IRP will send an error code back to the seller, when he tries to upload a duplicate e-invoice

Step 5:

a. Involve returning the digitally signed JSON with IRN back to the seller along with a QR code.

Step 6:

a. Involve sharing the uploaded data of accepted document (invoice etc.) with GST and e-way bill system..

Documents to be reported on E-Invoice Portal:

1) Business to Business Invoice (B2B)
2) Business to Government Invoices (B2G)
3) Export Invoices
4) Credit Notes
5) Debit Notes

Documents not to be reported on E-Invoice Portal:

6) Business to Consumer (B2C)
7) Bill of Supply
8) Self-Invoices under RCM

9) Bill of Entry by Custom against Import

10) Receipt Voucher against Advance

11) Payment Voucher for unregistered supplier

Invoice Reference Number

Invoice Reference Number (IRN) is a unique **64 characters** which is based on the computation of hash of GSTIN of supplier of document (invoice or credit note etc.), Year and Document type and Document number like invoice number. This shall be unique to each invoice and hence be the unique identity for each invoice for the entire financial year in the entire GST System for a taxpayer.

E-Invoice Schema

'Schema' simply means a structured template or format. 'e-invoice' schema is the standard format for electronic invoice. It is notified as '**Form GST INV-1**'. E-invoice schema is a single standard applicable to all businesses in the country. Many optional fields are available in the schema to cater to the requirements of specific businesses and practices followed by industry and trade in India.The limit of reporting of items is kept at 1000 presently.

Handling of " Bill to- Ship to" e-invoices

The tax payer raises the bill to one and sends the consignment to somebody else as per the business requirements. There is a provision in the e- invoice system to handle this situation, called as 'Bill to - Ship to'.

In the e-invoice form, there are **two portions under 'TO' section.**

1. In the **left hand side** - 'Billing To' GSTIN and trade name of the buyer is entered and
2. In the **right hand side** - 'Shipping to' address. The other details are entered as per the invoice

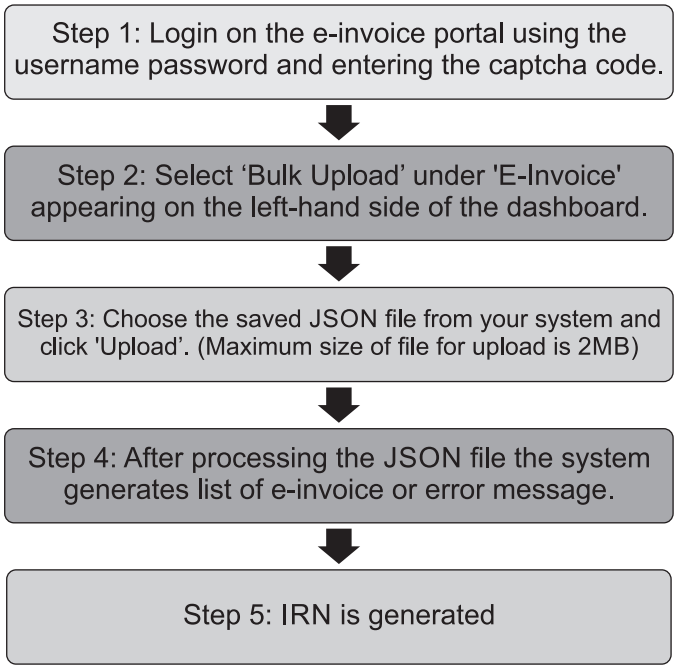
Handling of " Bill from"- " Dispatch from" e-invoices

The supplier prepares the bill from his business premises to consignee, but the consignment is moved from some others' premises to the consignee as per the business requirements. This is known as '**Bill From - Dispatch From**'. e- Invoice system has provision for this.

In the e-invoice form, there are **two portions under 'FROM' section.**

1. In the **left hand side** - 'Bill From' supplier's GSTIN and trade name are entered and
2. In the **right hand side** - 'Dispatch From', address of the dispatching place is entered. The other details are entered as per the invoice

Steps to generate Bulk e-invoices



Bulk generation facility

User can upload multiple invoices and generate multiple e-invoices at one go. This facility can be used by the taxpayers, who can prepare bulk requests for IRN in a JSON file from their automated system, and upload it on the e-invoice system and generate IRN in one go. This avoids duplicate data entry into e-invoice system and avoids data entry mistakes also.

Digitally Signed QR Code

The digitally signed QR code of the invoice is one which has been digitally or electronically signed and prepared the QR Code by the IRP after receiving the invoice upload from the supplier. The E-invoice will generate a QR code, containing some important parameters of invoice and digital signature of it so that it can be verified on the central portal as well as by an Offline App.

The web user will get a printable form with all details including QR code. The QR code will consist of the following e-invoice parameters:

1) GSTIN of Supplier
2) GSTIN of Recipient
3) Invoice number as given by Supplier
4) Date of generation of invoice
5) Invoice value (taxable value and gross tax)
6) Number of line items.

7) HSN Code of main item (the line item having highest taxable value)
8) Unique Invoice Reference Number (hash)

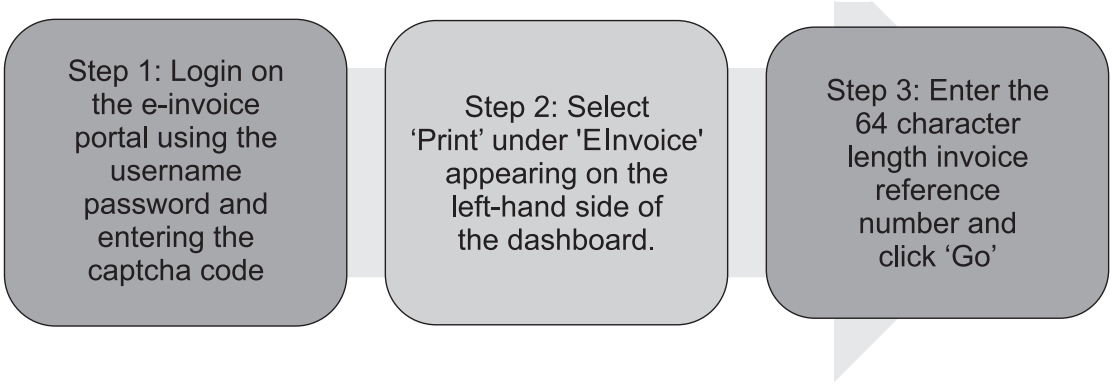
Seller's LOGO on e-invoice

There will **NOT** be a place holder provided in the e-invoice schema for the company logo. This is for the software company to provide in the billing/accounting software so that it can be printed on his invoice using his printer. However, the Logo will not be sent to IRP. In other words, it will **not be part of JSON file to be uploaded on the IRP**.

Cancellation of IRN

The IRN once generated cannot be modified or deleted. However, if IRN is generated with wrong information, it can be cancelled and generated afresh. The cancellation will have to be triggered through the IRP, if done within 24 hours. After 24hours, the same will need to be done on the GST System.

Print an e-invoice



Verify Signed Invoice

Once a request for verification is submitted, the system validates the uploaded JSON and pops up appropriate message if there is any error. Otherwise the system will display the Complete E-invoice with a green check mark and message showing 'This is Digitally Signed Invoice'.

Generate E-Way Bill

This option is used to generate the e-Way Bill for already generated e-invoice. To generate e-Way Bill, user needs to select the sub option 'Generate e-Way Bill' option under 'e-Way Bill' option in menu.

The user has to select and enter the Acknowledgement No. or IRN or Date of e-invoice as per the availability and clicks go. System will display the Part A EWB details and prompts user to enter

the details of transportation under 'e-waybill Details'. Here the user will first enter the transporter name, transporter ID and approximate distance (km) to be covered by the shipment.

The e-waybill system will Auto - calculate and display the estimated motorable distance between the supplier and recipient addresses as per the PIN codes entered in e-invoice entry form. User is also allowed to enter the actual distance as per the movement of goods. However, it will be limited to 10% more than the auto calculated distance displayed. In case, the PIN Code of both source and destination are same, the user is allowed to enter distance up to a maximum of 100 KMs only. The user has to select the mode of transportation - road, rail, air or ship and vehicle type. Next he has to update the vehicle no. and transporter document no. and date.

Once a request for EWB is submitted, the system validates the entered values and pops up appropriate message if there is any error. Otherwise the system generates the EWB with unique 12 digit number.

Authors' View:

With the evolution of New Invoicing Feature, taxpayers are facing some challenges such as:

- **Complications while Integrating ERP Systems.**

  E-invoicing is almost possible when customers are using ERP's, ASP's or GSP's. e- Invoicing should work similarly in all systems.

- **Cancellation and Amendment Policies of e-invoicing**

  The e-invoicing system doesn't allow making partial cancellations of invoices and hence, only cancellation of the integrated e-invoice is possible. Also, one can only cancel the e-invoice within 24 hours on the IRP. One can only edit or amend the e-invoice (Including the invoice number) after a brief explanation of the reason for edit and need to make proper clarifications for audit-related requirements.

  So, the process of cancellation and amendment needs lots of effort and time to complete all the formalities.

- **System Security Issue**

  There are some system stability issues/errors such as invalid GSTIN, HSN/SAC code on IRP. Hence it is suggested that the government must resolve these issues for the proper functioning of the e-invoice system.

- **Complications in Reconciliation of E-invoice data**

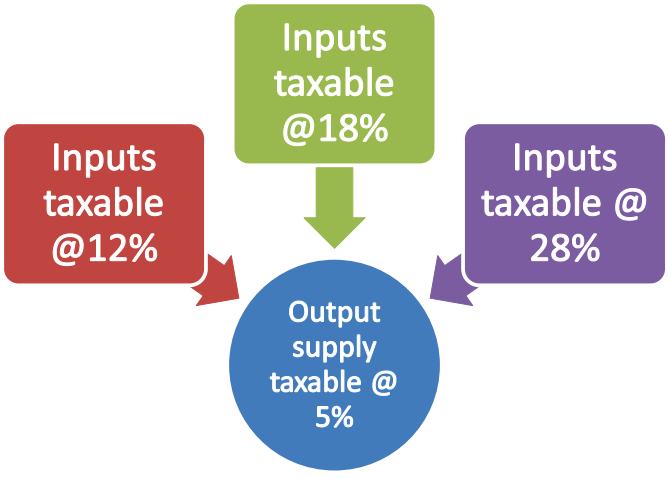
  Sometimes, one need to update GSTR-1 after uploading the invoices on IRP and afterward both the levels of data (GSTR-1 and e-invoice) will remain save on GST server. The taxpayer needs help of some tool or utility to reconcile the same. Therefore, it is suggested that it should be reconciled automatically by the GST server.

Refund under Inverted Duty Structure

CA Rohit Vaswani

GST, being value added tax system, imposes tax at every stage of value addition and at every stage there may immerge distinct or new commodity which may be subject to tax at different rates of GST. One of the primary reasons behind introduction of GST was to eliminate the cascading or "tax on tax" effect prevalent in earlier indirect tax regime. As we have variety of rate of taxes under GST, mainly 0%, 5%, 12%, 18% and 28%, implemented in India law makers envisaged a situation where inwards supplies are taxed at higher rate in comparison with rate of tax on output supplies. Classic example of the above situation is rate of tax on synthetic or artificial filament yarns being taxed @12% whereas fabric made out these yarns is being taxed @ 5%. In the country like India where variety of tax rates are implemented, it is very difficult to achieve the real benefit of implementation of GST by removing cascading effect. In fact, in many cases supplies which are exempt from GST becomes more costly to consumers rather than supplies taxable at lower rate of tax.

Inverted Duty Structure is a situation where the supplier pays higher rate of tax on its input supplies, and pays comparatively lower rate of tax on its output supply. Consequently, a large amount of credit of tax paid on input supplies is accumulated. This would result in cascading effect of taxes if loaded to product cost with consequent increase in the cost to consumer which is against the basic principle of GST being a consumption tax.



Section 54 (3) of the CGST act, 2017 envisage a situation where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council. For ease of understanding section 54 (3) of the CGST act, 2017 is reproduced below:

54 (3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than—

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

Although plain reading of sub-section (3) of section 54 allows refund of unutilised input tax credit and seems to have very wider applicability, but there are three proviso's to this sub-section and specially first proviso narrow down the section applicability only to the extent of two scenarios as mentioned in that proviso. Case (ii) mentioned in first proviso relates to refund in a case which is popularly known as inverted duty structure.

There are three types of inward supplies defined under the GST law being 'input', 'input services' and 'capital goods', but the law makers have chosen only 'inputs' for comparison of rate of tax with output supplies. In place of 'inputs' if 'inward supplies' word could have been used then the situation would have been different all together.

Rule 89(5) deals with the refund in such situations and in the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions –

(a) ***Net ITC*** *shall mean* ***input tax credit availed on inputs*** *during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and*

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)

Explanation to Rule 89(5) of the CGST Rules, 2017 restricts the benefit of such refund only to the extent of the 'goods' procured by the supplier and that too excluding capital goods. This means that the refund of input tax paid on 'services' cannot be availed.

Hon'ble Gujarat High Court had the occasion for judicial scrutiny of the above provisions in the case of VKC Footsteps India Pvt. Ltd. vs. UOI -2020 (7) TMI 726 and held that the above Explanation is ultra vires to the provisions of the Act as the CGST Act categorically provides that refund of 'unutilized Input tax credit' and Rules cannot go to disallow a benefit which is granted by the parent legislation.

Contrary to the above decision of the Hon'ble Gujarat High Court, the Hon'ble Madras High Court passed an order in favour of revenue in the case of TVL. Transtonnelstroy Afcons Joint Venture vs. UOI- 2020 (9) TMI 931. Hon'ble Madras High Court arrived at the following conclusion:

(1) Section 54(3)(ii) does not infringe Article 14.

(2) Refund is a statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies by excluding unutilised input tax credit that accumulated on account of input services is a valid classification and a valid exercise of legislative power.

(3) Therefore, there is no necessity to adopt the interpretive device of reading down so as to save the constitutionality of Section 54(3)(ii).

(4) Section 54(3)(ii) curtails a refund claim to the unutilised credit that accumulates only on account of the rate of tax on input goods being higher than the rate of tax on output supplies. In other words, it qualifies and curtails not only the class of registered persons who are entitled to refund but also the imposes a source-based restriction on refund entitlement and, consequently, the quantum thereof.

(5) As a corollary, Rule 89(5) of the CGST Rules, as amended, is in conformity with Section 54(3)(ii).

Consequently, it is not necessary to interpret Rule 89(5) and, in particular, the definition of Net ITC therein so as to include the words input services.

Hon'ble Supreme Court in the case of Union Of India & Ors. Versus VKC Footsteps India Pvt Ltd- 2021 (9) TMI 626 - SC, upheld the judgement of Madras High Court in the case of TVL. Transtonnelstroy Afcons Joint Venture vs. UOI (supra) and held that having considered this batch of appeals, and for the reasons which have been adduced in this judgment, we affirm the view of the Madras High Court and disapprove of the view of the Gujarat High Court.

So far as issue related to calculation of Net ITC for the purpose of quantification of refund amount as per rule 89(5) is concerned, that controversy seems to has been settled to an extent by the Hon'ble SC and the Net ITC shall include ITC related to 'Inputs' being goods other than capital goods and excluding 'input services' only.

However, Hon,ble SC in the case of Versus VKC Footsteps India Pvt Ltd (supra) has also pointed out about the anomalies of the formula in calculation of refund under the inverted duty structure in para 104 to 111 of the said judgement. Para 111 of the said judgement is being reproduced below for reference and discussion:

> 111 The above judicial precedents indicate that in the field of taxation, this Court has only intervened to read down or interpret a formula if the formula leads to absurd results or is unworkable. In the present case however, the formula is not ambiguous in nature or unworkable, nor is it opposed to the intent of the legislature in granting limited refund on accumulation of unutilised ITC. It is merely the case that the practical effect of the formula might result in certain inequities. The reading down of the formula as proposed by Mr Natarjan and Mr Sridharan by prescribing an order of utilisation would take this Court down the path of recrafting the formula and walk into the shoes of the executive or the legislature, which is impermissible. Accordingly, we shall refrain from replacing the wisdom of the legislature or its delegate with our own in such a case. However, given the anomalies pointed out by the assessees, we strongly urge the GST Council to reconsider the formula and take a policy decision regarding the same.

As per the above observation of the Hon'ble Supreme Court, the formula as prescribed under rule 89(5) of the CGST rules, 2017 was further amended after the decision in 47th GST Council meeting vide Notification No. 14/2022–Central Tax dated 05-07-2022, after the amendment the formula reads as under:

> Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - {tax payable on such inverted rated supply of goods and services x (Net ITC÷ ITC availed on inputs and input services)}.

After this amendment reduction of output tax payable on inverted duty goods from proportionate Net ITC to arrive at the amount of refund, is also to be proportionate in the ration of Net ITC and ITC including credit on input services also. It was amended to give marginal relief on account of credit availed on input services by the registered person which is not available for refund under inverted duty structure.

Another controversy has arisen due to Circular No.135/05/2020 – GST dated 31st March 2020 where the CBIC has clarified that the benefit of refund under inverted duty structure is not available where the input and the output supplies are the same. Relevant para 3.2 of the above circular is reproduced below:

> 3.2 It may be noted that refund of accumulated ITC in terms clause (ii) of sub-section (3) of section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that, the input and output being the same in such cases, though attracting different tax rates at different points in time, do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act. It is hereby clarified that refund of accumulated ITC under clause (ii) of sub-section (3) of section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same.

There are many instances of reduction of rate of tax under GST or where concessional rate of tax has been prescribed for supplies to certain specified recipient for example Concessional GST rate on scientific and technical equipments supplied to public funded research institutions has been prescribed by Notification No. 45/2017 - Dated: 14-11-2017 - CGST (Rate). These types of rates variation accumulate credit with the traders and there is no alternate mechanism provided for the same.

The same issue came for consideration before the Hon'ble Gauhati High Court in the case of BMG Informatics Pvt. Ltd., Vs The Union Of India - 2021 (9) TMI 472 dated 2nd September 2021. The Hon'ble Gauhati High Court held as below:

> 28. Consequently, in view of the clear unambiguous provisions of Section 54(3) (ii) providing that a refund of the unutilized input tax credit would be available in the event the rate of tax on the input supplies is higher than the rate of tax on output supplies, we are of the view that the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020 providing that even though different tax rate may be attracted at different point of time, but the refund of the accumulated unutilized tax credit will not be available under Section 54(3)(ii) of the CGST Act of 2017 in cases where the input and output supplies are same, would have to be ignored.
>
> 33. However, we have taken note of that the circular No.135/05/2020-GST dated 31.03.2020 was issued in exercise of the powers under Section 168(1) of the CGST Act of 2017. As already noted, Section 168(1) of the CGST Act of 2017 pertains to a situation where the Central Board of Indirect Tax and Customs considers it necessary and expedient to do so for the purpose of uniformity in implementing the CGST Act of 2017. In other words, the provisions of Section 168(1) can be invoked to bring in uniformity in the implementation of the CGST Act of 2017. In the instant case, when the provisions of Section 54(3)(ii) of the CGST Act of 2017 are unambiguous and explicitly clear in nature, there is no requirement of bringing in any uniformity in the implementation of the Act and the provisions of Section 54(3)(ii) would have to be applied in the manner it is provided in the Act itself.

The above condition was relaxed by Circular No. 173/05/2022-GST dated 6th July, 2022 and the relevant para of Circular No.135/05/2020 – GST dated 31st March 2020 was amended to give relief to the cases where duty inversion was due to the concessional rate notifications. Relevant para 4 of the Circular No. 173/05/2022-GST dated 6th July, 2022 is being reproduced below for reference and discussion:

> 4. Therefore, it is clarified that in such cases, refund of accumulated input tax credit on account of inverted structure as per clause (ii) of sub-section (3) of section 54 of the CGST Act, 2017 would be allowed in cases where accumulation of input tax credit is on account of rate of tax on outward supply being less than the rate of tax on inputs (same goods) at the same point of time, as per some concessional notification issued by the Government providing for lower rate of tax for some specified supplies subject to fulfilment of other conditions.

Further the concessional rate notification No. 45/2017- Central Tax (Rate) dated 14th November, 2017 was also withdrawn with effect from 18th July 2022 which was giving Concessional GST rate of 2.5% on scientific and technical equipments supplied to public funded research institutions.

The concept of refund under inverted duty structure is contentious, complicated and difficult to implement. This was also accepted by the Hon'ble Finance Minister in her budget speech 2021 and the relevant para 176 of the budget speech 2021 is reproduced below:

176. The GST Council has painstakingly thrashed out thorny issues. As Chairperson of the Council, ***I want to assure the House that we shall take every possible measure to smoothen the GST further, and remove anomalies such as the inverted duty structure.***

In the 45th GST Council meeting held on 17th September 2021 following decision has been taken as per the press release dated 17.09.2021, which is worth considering to understand the complexity of the issue related to the inverted duty structure:

> "Council decides to set up 2 GoMs to examine issue of correction of inverted duty structure for major sectors and for using technology to further improve compliance, including monitoring."

From the above discussion it's clear that controversies relating to inverted duty structure are not going to end soon and any efforts done to mitigate the issues related to inverted duty structure may further increase the confusion and complexities, unless single GST rate is worked out for most of the goods and services barring very minimal exceptions and now after having experience of revenue collections for more than 5 years that seems to be not very difficult.

GST on Legal Services

By Adv. Vineet Bhatia & CA Nancy Aggarwal

Before addressing the applicability of GST on Law firms, it is foremost to know the brief connotation of GST. Goods and service tax (GST) is a ***comprehensive, multi-stage, value- added indirect tax*** imposed on the supply of taxable goods and services. The purpose of the introduction of goods and service tax into the Indian economy was to ***supersede multiple levies*** and to act as a ***substitute for indirect taxes with a unified tax***. After the goods and service tax got implemented and came into operations, it has abolished the cascading effect on tax.

Classification of Goods and Services under GST Act is an inevitable process and firstly a taxpayer has to identify that whether the supply is of goods or services. For this purposes, the taxpayer has to refer to Schedule II of CGST Act. Undoubtedly, 'Legal services' fall within the ambit of "services" as defined under section 2(102) of CGST Act.

Meaning of Legal Services:

Under the GST regime, "Legal service" means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority. ***(As per Explanation to Notification No. – 13/2017-Central Tax (Rate) dated 28.06.2017).***

Taxability of Legal Services:

Legal services are covered under the scope of "supply" as defined in section 7 of CGST ACT, 2017. To constitute a supply the important ingredients are:

(i) There must be supply of goods or services.
(ii) Such supply must be generally made for a consideration.
(iii) Such supply must be in the course or furtherance of business.

The term business has been defined in section 2(17) of CGST Act, 2017 and includes a **profession,** vocation, any trade, commerce, adventure, etc.

Thus, it can be easily culled out that 'Legal services' fall within the ambit of 'supply'. The 'Legal services' can be provided by any of these class of persons i.e. Individual Advocates, Firm of Advocates and Senior Advocates.

Now the question is who is required to pay the tax on such legal services i.e. whether supplier of Legal Services or Recipient of Legal Services. Whether the said supply is covered under the Re-

verse Charge Mechanism (RCM)? Section 9(3) of CGST Act empowers the government to notify certain category of supply of goods or services or both, the tax on which is to be paid on reverse charge basis by the recipient of such goods or services and all the provisions of this Act applies to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services. In exercise of powers conferred by Section 9(3) of CGST Act, the Central government has issued Notification No. 13/2017 – Central Tax (Rate) dated 28th June, 2017. Entry no. 2 of the said notification stipulates that if **services are provided by an individual advocate including a senior advocate or firm of advocates by way of legal services, directly or indirectly to any business entity located in the taxable territory, tax is to be paid under Reverse charge mechanism (RCM) by the recipient of services.**

Thus, all legal services provided by individual advocates, senior advocates as well as firm of advocates (i.e. Law firms) to a business entity located in the taxable territory would be chargeable to tax on Reverse charge basis. It is advised that the following footnote must be incorporated by all individual advocates, senior advocates as well as firm of advocates (i.e. Law firms) when they are issuing invoices for legal services to a business entity.

> ***"Kindly note that as per Notification No. 13/2017-Central Tax (Rate) dated 28- 06-2017 in the case of Services provided by an individual advocate*** **including a senior advocate** ***or a firm of advocates by way of legal services, Tax is to be paid by the service recipient under Reverse charges mechanism, if services are provided to any business entity located in the taxable territory."***

Exemptions available to Advocates:

The Central Government also has the powers to exempt certain services from GST and for this purpose it has issued **Notification 12/2017 – Central Tax (Rate) dated 28th June, 2017. Entry No. 45** of the said notification exempt services provided by: –

(*a*) an arbitral tribunal to -

- (*i*) any person other than a business entity;
- (*ii*) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017; or
- (*iii*) the Central Government, State Government, Union territory, local authority, Governmental Authority or Government Entity;

(b) a partnership firm of advocates or an individual as an advocate other than a senior advocate, by way of legal services to-

- (*i*) an advocate or partnership firm of advocates providing legal services;
- (*ii*) any person other than a business entity;
- (*iii*) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017; or

(iv) the Central Government, State Government, Union territory, local authority,Governmental Authority or Government Entity;

(c) a senior advocate by way of legal services to-

(*i*) any person other than a business entity;

(*ii*) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017; or

(*iii*) the Central Government, State Government, Union territory, local authority,Governmental Authority or Government Entity.

This means that Legal Services provided by advocates as well as firm of advocates (i.e. Law firms) to non-business entities or small business entities (turnover less than 20 lakhs) and to firm of advocates would be exempt from tax. The question that arises for consideration is that whether services provided by 'senior advocates' to firm of advocates (i.e. Law Firms)are taxable or not? This issue requires a clarification from the government. In the opinion of the author, by the logical conclusion, the services provided by 'senior advocates' to firm of advocates (i.e. Law Firms) would also be exempt from tax although a plain reading of Entry no. 45 of **Notification 12/2017 – Central Tax (Rate) dated 28th June,2017** does not suggestsso.

Requirement of GST Registration

Section 23 of CGST Act, 2017 stipulates that the following persons shall not be liable for 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.

However, 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. The Central Government by way of **Notification No. 5/2017-Central Tax dated 19th June, 2017** specifies the persons who are only engaged in making supplies of taxable goods or services or both, the total tax on which is liable to be paid on reverse charge basis by the recipient of such goods or services or both under sub-section (3) of section 9 of the CGST Actas the category of persons exempted from obtaining registration under the aforesaid Act.

Since services rendered by individual advocates, senior advocates or firm of advocates (i.e. Law firms) are either exempt from tax or are liable to tax under Reverse Charge, therefore,in the opinion of the author such advocates, senior advocates or firm of advocates (i.e. Law firms) would not be required to take GST registration. However, if advocates, senior advocates or firm of advocates (i.e. Law firms) has any other taxable income than it is required to take registration under GST.

The **Hon'ble Delhi High Court** in the case of "**J.K. Mittal & Co. Vs. Union of India & Ors. (W.P.(C) 5709/2017 & CM No. 23814/2017**)," affirmed that there is no clarity on whether all legal services provided by legal practitioners and firms would be governed by the reverse charge notification? In fact, if all legal services are to be governed by the reverse charge mechanism, there is no compulsion for legal practitioners and law firms to compulsorily get registered under the CGST, IGST and/or DGST Act. The Court further clarified and added the following points with regard to LLPs in a separate order on the same matter holding the following:

(i) No coercive action can be taken against advocates, law firms of advocates including Limited Liability Partnerships (LLPs) of advocates providing legal services for non-compliance with any legal requirement under the CGST, DGST or IGST Act.

(ii) Any advocate, law firm of advocates or LLPs of advocates who are providers of legal services, who have registered under the CGST, DGST or IGST Act from 1st July 2017 will not be denied the benefit of the order.

(iii) All legal services provided by advocates, law firms of advocates, or LLPs of advocates will continue to be governed by the reverse charge mechanism, unless, of course, any such legal service provider wants to take advantage of input tax credit.

(iv) Through a subsequent order dated 14 September 2017 the High Court gave directions to the Central Government to issue corrigendum to 13/2017-Central Tax (Rate) to clarify that reverse charge mechanism is not restricted only to 'representational services' rendered by advocates/law firms including LLPs.

GST Rate and SAC code for Legal Services

The applicable GST rate on Legal Services is **18%** (i.e. CGST 9% + SGST 9%) and it is taxable under the **SAC code 9982 as per Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017.**

Legal Services provided in Non – Taxable Territory:

The next question that arises for consideration is whether legal services provided by individual advocates, senior advocates or firm of advocates (i.e. Law firms) to an individual or a business entity located in non-taxable territory would be exigible to tax or not.

In the opinion of the author, legal services provided by advocates, senior advocates or firm of advocates (i.e. Law firms) to any person other than business entity would be exempt fromtax even if the said person is located in non-taxable territory. However, the services rendered by advocates, senior advocates or firm of advocates (i.e. Law firms) to a business entity located in non-taxable territory would be exigible to tax and that to on forwardcharge basis.

As per Section 13(2) of the IGST Act, generally the 'place of supply' of such service shall be the location of recipient of service. The next question that arises for consideration is whether the legal services by advocates, senior advocates or firm of advocates (i.e. Law firms) to a business entity

located in non-taxable territory would qualify as export of services or not. To determine this issue, it is imperative to look into the **Section 2(6) of the IGST Act** which stipulates that the following conditions must get fulfilled in order to qualify as export of services-

Section 2(6):

"export of services" *means the supply of any service when,—*

(i) *the supplier of service is located in India;*

(ii) *the recipient of service is located outside India;*

(iii) *the place of supply of service is outside India;*

(iv) *the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and*

(v) *the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;*

Thus, legal services provided to a business entity located in non-taxable territory would qualify as Export of Services provided all abovementioned conditions are fulfilled. Export of Services are considered as inter-state transactions; therefore Section 24 of CGST Act will be applicable and in such case registration would be mandatory.

Input Tax Credit:

Any amount payable under Section 9(3) of CGST Act and Section 5(3) of IGST Act, under reverse charge shall be paid through electronic cash ledger only by the recipient of service. Reverse charge liability cannot be discharged by using input tax credit. Any amounts paid as taxes for the legal services by a business entity would be available as input tax credit to such entity provided other conditions as mentioned in Section 16 of the CGST Act are satisfied.

Conclusion:

From the above discussion, it can be safely concluded that **individual advocates including senior advocates as well as firm of advocates (i.e. Law Firms)** are generally not liable to paytax under the Central Goods and Services Act, 2017. Their services are either exempt from tax or are liable to tax under Reverse Charge Mechanism (RCM) if such services are rendered to a business entity located in the taxable territory. However, if such services are rendered to a business entity located in non-taxable territory then the individual advocates including senior advocates as well as firm of advocates (i.e. Law Firms) would become liable to pay tax under forward charge or claim the benefit of export of services if other conditionsrelating to export of services are fulfilled. However, in such an eventuality the serviceprovider i.e. individual advocates including senior advocates as well as firm of advocates (i.e.Law Firms) would be required to take the GST registration and export his services under bond or LUT.

Concept Note on Family Settlement - Case Study

A K Srivastava, Chartered Accountant

Background and Facts

1. ABC family comprises of 3 brothers and their children. The group has been carrying out various business and have companies which carry out manufacturing activities or provide manpower services or leasing of properties / plants to other companies of the group.

2. The shareholdings in various companies, of the group, are held by the members of the family in their individual capacity.

3. The businesses are looked after jointly by various members of the family. Some of the business has performed well whereas some have not performed that well.

4. With increase in number of family members (addition of next generation), some differences on various aspects of running of business are generally visible. These differences could flare up with passage of time and may lead to disharmony and disputes amongst family members.

5. To avoid any dispute amongst family members and respect of family in the society, the members of the group were advised an amicable settlement amongst themselves. Another objective of family settlement is to ensure that there are no impediments in sustainable growth in each company of the Group.

6. The manner of settlement, which may involve transfer of shares/ assets, held in one name to another, and the possible liability under tax laws, may arise.

A possible solution is family settlement. The salient features are discussed hereinafter.

Family Arrangement

A Family Arrangement is an arrangement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed right or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

It is a transaction between the members of the family for the future benefit of family members. This arrangement is done by the descending ancestors who try to settle the differences, disputes and conflicts and maintain peace and harmony in the family and to bring goodwill in the family by distribution of all the assets and properties amongst family members. This also ensures sustainable growth of each company under the management of a particular family member.

The object of family arrangement is to preserve the goodwill and property of the family by recognising that it is not good to indulge in fights and disputes. Every family has some or the other kind of disputes. Majority of these disputes relate to family properties. They also arise in respect of jointly acquired / held assets.

Transfer of assets amongst family members

Any profit or gain, arising on transfer of a capital gain is chargeable to tax under the head "Capital Gain", generally in the year of transfer. Section 45 of the Income-tax Act, 1961(Act) charges to tax such gains. Exceptions are provided in section 47 of the Act. The term "transfer "is defined in section 2(47) of the Act.

It has been held by the courts that property that comes under the purview of family arrangement cannot be considered as transfer for capital gain purposes. The realignment of interest by way of family arrangement amongst the family members not being treated as transfer no liability to capital gains arises in such cases.

The issue of tax arising in case of family arrangement has been subject to litigation and there are numerous judgments on the issue. The principle laid down is that the realignment of assets in a family arrangement does not amount to transfer. This principle cannot be read universally and has to be read in conjunction with the facts of that case. Reference may be made to the judgment of Punjab & Haryana High Court in the case of Commissioner of Income Tax Vs. Ashwani Chopra, wherein vide judgment dated 10.01.2013 in ITA No. 353 – 356 of 2011, the Hon'ble court upheld the order of the ITAT which found that the rearrangement of the shareholdings in the company to avoid possible litigation among family members is a prudent arrangement which is necessary to control the company effectively by the major shareholders to produce better prospects and active supervision or otherwise there would be continuous friction and there would be no peace among the members of the family. Such a family arrangement intended either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour cannot be concluded as any other dealings between strangers, as such a family arrangement is for the interest of the family and for the harmonious way of living. Therefore such a realignment of interest by way of effecting a family arrangement among the family members would not amount to transfer.

In the above background, the queries are replied herein after. It has to be kept in mind that

this being a concept note, the exact liability, if any, on the transaction can be answered only after analysing the facts of the case.

Partial or Complete Settlement

The question of complete family settlement or partial family settlement arises only in case of partition of a Hindu Undivided Family (HUF). Complete details of assets/ liabilities, which are sought for settlement needs to be ascertained as a first step.

Valuation of assets and liabilities

As the arrangement is not treated as transfer, strictly speaking, the valuation of assets is irrelevant. Its relevance is only from the settlement point of view amongst the family members to avoid any dispute and being fair and equitable to all. The acceptability of NAV method of valuation would depend upon the nature of business / asset. The Balance Sheet should possibly be of a date close to the date of arrangement.

Slump Sale

Slump Sale, if is carried out between two companies, may not be treated as a part of family arrangement, as the assets belong to particular company, which may not be considered as family for the purpose of family arrangement.

Transfer of shareholdings in various companies amongst family members

The transfer of shares amongst family members as part of family arrangement would not be treated as transfer.

Tax Liability

The possible tax issues are highlighted hereunder:

1. No tax liability would arise in case of a genuine family arrangement.
2. The provisions of section 79 may get attracted, if the conditions specified therein are not satisfied. The arrangement has to be carefully drafted. May be certain shares may have to be transferred after the period when the carried forward loss has been set off against profit.
3. The Income Tax Department is known for creating litigation, if it feels that there is loss of revenue. The possibility of litigation would always be there. Bona-fide of the family arrangement has always to be established.

Statement of Donation in form no 10 BD

CA Ved Mittal

Millions of people often give to charity to support causes they believe in that there to be some tax benefits under section 80G of the Income-tax Act on this donations. However, it can only be availed by those opting for the old tax regime. there was a changed in Budget 2021 that the charitable trusts or institutions receiving donations should file a statement of donation to the Income tax The government has notified Form 10BD for declaring donations received during the year. This notification has been brought up to ensure the transparency of the donations received and to bring into net all the bogus and fraudulent claims of donations Hence, the burden of compliance has now gradually shifted to charitable organizations.

It started from re-validation of registration to avail benefits under section 12A and 80G, followed by charitable organizations with section 80G approval having to file a statement of donations in Form 10BD. Form 10BD for every financial year needs to be filed before 31 May of the immediately following financial year. This is effective from assessment year 2022-23, (for financial year 2021-22) and the due date to file Form 10BD is 31 May.

Now, after the amendment, the donor can avail the deduction under section 80G only if the trust or institution (donee) reports the correct information to the Income tax via Form 10BD about the donation. It then issues a certificate (Form 10BE) to the donor. The deduction will be pre-filled while filing the income tax return.

What details has required to fill the form no 10 BD

Form 10BD requires the details to be furnished which can be collected and documented at the time of receipt of donation. A list of such required details is as follows

- Name of the Donor
- PAN / Aadhar Number
- Address of the donor
- Type of Donation received (Corpus / Voluntary)
- Mode of receipt of the donation (cash, Cheque , or in kind)
- Amount of donation

How to file form no 10 BD from income tax portal

By login income tax portal 'Form 10BD' (Persons not dependent on any Source of Income). Fill in the basic information, details of donors and donations, and complete the verification. After all the details are filled, complete the process by e-verification and the form is successfully submitted. Once Form 10BD is filed, Form 10BE can be generated under 'Filed Forms'. These certificates should be downloaded and issued to all the donors listed in Form 10BD.

Form 10BE is necessary for the donors now to avail section 80G deduction. Hence, if the charitable institution (donee) has failed to generate this in time or has incorrect or no information about its donors, the donor will not be able to avail the benefit.

Consequences of non-compliance

Any charitable trust/institution receiving donations will need to file Form 10BD for compliance and to give the benefit of section 80G to their donors. If they fail to do so, a penalty of 200 per day shall be imposed as per the income tax Act.

What is the procedure to file Form 10BD

- Log in to your account on Income Tax Portal
- Under the tab 'e-file' select 'File Income Tax Form'
- select Form 10BD under the tab 'Persons not dependent on any Source of Income
- Once the option of 'File Now' is selected,
- Three parts of the Form shall be displayed:

    a. Basic Information – This section is a pre-filled details which needs to be checked and confirmed by the entity. Incase of any changes, the same shall have to be done in 'My Profile'. Once these details are confirmed, this tab shall be marked as 'completed'

    b. Details of Donors & donation – This section shall allow the entity to download an excel template in which the entity shall provide all the details of the donors and donations received during the year. Once this template is complete, it shall have to be converted into 'csv format' and the same shall be uploaded in the same section. Once the file is uploaded and is saved, this section shall be marked as 'completed'

    c. Verification – Fill in the details of the Authorized Signatory of the entity and save.

- After ensuring that all the correct details are furnished, proceed to e-verify. E-verification of this form can be done by OTP on Aadhar of the Authorized Signatory, Digital Signature

Certificate or EVC. Once the e-verification is done and validated, the form gets successfully submitted

➢ Download the acknowledgement of the Form 10BD .

Some practical question answer

Q . Can we revised the form no 10 BD ?

Ans. You can only modified the data in form no 10 BD as correct the PAN details, amount of donation, Address, name of Donor in the exiting data.

Q . Can we Added some more entries in the existing from no 10 BD ?

Ans . No you can only modified the data but can not added more data in form no 10 BD

Q . Can we filed more then one form no 10 BD ?

Ans. Yes you can filed more then one form no 10 BD, if such filed before the due date i.e 31 May then no penalty was imposed other wised after that the amount of penalty of Rs. 200/= per day to be imposed on after the filing of due dated for every form no 10 BD.

Q . What is form no 10BE

Ans. Once Form 10BD is successfully filed, Form 10BE is generated under filed forms. These certificates can be downloaded in PDF format and the same has to be furnished to all the donors who are listed in Form 10BD. These certificates provide the details of Donation made by the donors to the entity which can be claimed as deduction by them u/s 80G while filing their income tax return.

Widening Of Equity Culture In India

Puneet Rai, Advocate

Since March 2020, i.e after the first outbreak of Covid 19 in India, number of Demat Accounts in India have increased from 4 crores to 10 crores. As the number of Traders and Investors are increasing in India, everyone is supposed to know the taxability of Shares and Securities.

Trading of Shares-Capital Gain or Business Income

There has always been confusion around the treatment of income from Trading of shares. Whether Profit or loss from trading of Shares is to be considered as Capital Gains or Business Income as the tax structure under both heads of income are different. Thus, the treatment of profit or loss on the sale of shares has been a matter of dispute. While making a decision regarding the head under which it shall be taxable we need to decipher whether the asset sold is a trading asset or capital asset.

Trading Asset is dealt u/s 28 of the Income Tax Act, i.e under the head of Business Income .

Capital Asset is defined u/s 2(14) and dealt as per Section 45 of the Act ie under the head of Capital Gains.

Tests to determine whether a person is a Trader or Investor:

Tests for distinction between shares held as stock in trade and shares held as investment were issued by CBDT vide Instruction No. 1827 dated 31/08/1989 and then vide Circular No. 4/2007 dated 15.06.2007.

The CBDT's office memorandum dated 13/12/2005 list the following aspects to be considered by the Assessing Officers in determining whether a person is a trader or an investor in stocks: –

- Whether the purchase and sale of securities was allied to his usual trade or business/ was incidental to it or was an occasional independent activity;
- Whether, the purchase is made solely with the intention of resale at a profit or for long term appreciation and/or for earning dividends and interest;
- Whether scale of activity is substantial;

- Whether transaction were entered into continuously and regularly during the assessment year;
- Whether purchases are made out of own funds or borrowings;
- The stated objects in the Memorandum and Articles of Association in the case of corporate assessee;
- Typical holding period for securities bought and sold;
- Ratio of sales to purchase and holding;
- The time devoted to the activity and the extent to which it is the means of livelihood;
- The characterization of securities in the books of account and balance sheet as stock-in-trade or investment;
- Whether the securities purchased or sold are listed or unlisted;
- Whether investment is in sister/related concerns or independent companies;
- Whether transaction is by promoters of the company;
- Total number of stocks dealt in;
- Whether money has been paid or received or whether these are only book entries.

The latest Board Circular on this aspect was issued vide Circular No.6/2016 in order to reduce litigation. As per Circular it was clarified that :

- Where the assessee itself opts to treat listed shares and securities as stock in trade, the income would be treated as its business income.
- In respect of listed shares and securities held for a period of more than 12 months, if the assessee desires to treat the income as capital gains, the same shall not be disputed by the AO.
- However, if the assessee opts to treat shares as an investment in a particular year, assessee shall not be allowed to adopt different/contrary stands in subsequent years.
- This circular shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction is itself questionable such as bogus claim of LTCG/STCL, etc.

Another Clarification issued by CBDT states that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets.

Hon'ble Delhi High Court in case of Commissioner of Income Tax vs. Amit Jain (2015) 374 ITR 550 (Del) laid down certain criteria to determine whether the shares to be treated as Investment or Stock in trade.

These criteria are :

- The intention of the assessee at the time of purchase of the shares;
- Did the assessee borrow money to purchase the shares;
- If Volume and frequency of purchase and sales are frequent;
- Was the purchase and sale made for realising profit, or for retention and appreciation in its value;
- Whether the items in question were valued at cost;

Thus, there could not be any straight jacket formula to distinguish the same and further there cannot be any single decisive factor to determine the same but an overall view has to be taken keeping in mind peculiar facts and circumstances of the case.

Thus shares held as stock in trade shall be chargeable under the head business and shares held as investment shall be chargeable under the capital gains.

Tax on Shares and Securities.

Before we discuss about the Taxability of Shares & Securities, it is relevant to know the meaning of Securities. Income Tax Act has borrowed the definition of Securities from SCRA Act,1956 which reads as under:-

"securities" Include—

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;]

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;]

(id) units or any other such instrument issued to the investors under any mutual fund scheme;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities

Situations where Capital Gain is chargeable:

Section 45(1) is charging provision of Capital Gains reads as under:-

"Any profits or gains arising from the transfer of a capital asset effected in a previous year shall be chargeable to income tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place."

Thus, Essential conditions for a transaction to be taxed under the head of Capital Gains are:

- There must be a capital asset as defined u/s 2(14) of the Act
- The capital asset must be owned by the assessee.
- Such transfer should take place during the previous year.
- The profits or gains should arise as a result of such transfer.
- Such profit or gain should not be exempted from tax under sections 54, 54B, 54D, 54EC, 54EE, 54F, 54G, 54GA or 54GB.

As per Section 2(42A) & 2(29AA) of the Act, Capital Asset is categorised into Short Term or Long Term Capital Asset.

Type of Asset	Transfer take place on or after April 1, 2017
Equity or Preference Shares in a company (Listed)	12 Months +
Securities (like debenture, bonds, govt. securities, derivatives, etc.) listed	12 Months +
Units of UTI (Listed or Unlisted)	12 Months +
Zero Coupon Bond (Listed or Unlisted)	12 Months +
Units of Equity Oriented Fund (listed or unlisted)	12 Months +
Equity or Preference Shares in a company (Unlisted)	24 Months +
Immovable Property (being land or building or both)	24 Months +
Units of Debt Oriented Mutual Funds (listed or unlisted)	36 Months +

Note: If the capital asset is held for less than the above mentioned period then it will be short term capital asset.

Summary of Provisions under which LTCG.STCG are taxable:

Nature of Gains	Section
Long Term Capital Gain (if STT is not applicable)	Taxable u/s 112
Long Term Capital Gain (if STT is applicable)	Taxable u/s 112A, if all condition are satisfied otherwise taxable u/s 112
Short Term Capital Gains (if STT is not applicable)	Taxable at normal rate
Short Term Capital Gains (if STT is applicable)	Taxable u/s 111A @ 15%

Note: Cost of Acquisitions and the period of holding of any securities shall be determined on the basis of the (FIFO) : Section 45(2A).

Long Term Capital Gain is taxable u/s 112A (w.e.f) AY 2019-20 only if the following condition are satisfied.

- Long Term Capital Assets being equity shares in a company or a unit of an equity oriented fund or a unit of business trust.
- Securities Transaction Tax has been paid on such transfer,
- STT has also been paid on acquisition of equity shares, however Board has clarified the requirement of STT payment at the time of acquisition is applicable only when shares are acquired after October 1, 2004.

If all the conditions are satisfied, tax on long term capital gains exceeding Rs 1,00,000 shall be taxed @ 10%. That means if long term capital gain does not exceed Rs 1,00,000 in a previous year then it is not chargeable to tax.

Note:

- Indexation benefit is not available when tax is payable u/s 112A
- Deduction u/s 80C to 80U shall not be allowed.
- Rebate u/s 87A is not available from the tax payable on such long term capital gain.

As per Section 112, Tax on Long Term capital Gains where Section 112A is not applicable:

Capital Gain on Unlisted Securities	
Category	**Rate of Tax**
Resident-Individual/HUF	20% of LTCG with Indexation
Domestic Company	20% of LTCG with Indexation
Non-Resident or Foreign Company	10% of LTCG without Indexation and without applying first proviso to Sec. 48
Any other resident	20% of LTCG with Indexation

Capital Gain on Listed Securities where condition of section 112A are not satisfied:

Tax on LTCG shall be minimum of the following:

a. 20% with Indexation

b. 10% without Indexation

Note: LTCG on Debt Mutual Fund., option "b" is not available.

Note: LTCG on Bonds & Debenture, option "a" is not available.

Benefit of Indexation not be available in case of following long term capital assets

- Transfer of a long term capital asset, being a bond or debenture other than-
  – Capital index bond issued by the government.
  – Sovereign Gold Bond issued by the RBI under sovereign gold bond scheme
- Transfer of shares or debenture acquired by a non resident in foreign currency in a Indian company
- The Capital gain arising from the transfer of a long term capital asset being
  – an equity shares in a company
  – a unit of on equity oriented fund or
  – a unit of business trust
- On which STT has been paid (Section 112A)
- Transfer of securities by Foreign Institutional Investor (Section 115AD)
- Transfer of unlisted securities by non-resident (Clause (c) of proviso to sec. 112(1)

Transactions taxable under the head Business Income

As per Section 43(5) of the Act Intraday Trading in Shares is a Speculation Transaction:-

- The motive of intraday is to earn profit on daily basis and the intention of the investor is not of investment thus the gain/profit arising on intraday is treated as Speculation business income and not capital gain.
- As per section 43(5) of the Income Tax Act, 1961, intraday trading in shares shall be considered as speculative business transactions and the income there from would be either speculation gains or speculation losses. Income from speculation gains is taxed at the normal rate. In intra-day trading in shares, there is no actual delivery as the shares enter and exit from the trading account on the same date and it does not enter the DEMAT account at all.

Taxability of Derivatives (Share Futures & Options)

Derivatives means that they do not have any value of their own but their value is derived from an underlying asset. Income from Futures & Options is always treated as business income. This treatment is irrespective of the frequency or volume of transactions.

- All transaction of trading in share derivatives are non-speculative transactions. Para 5 of "Guidance Note on Tax Audit under section 44AB of the Income Tax Act, 1961" issued by ICAI, provides determination of turnover in respect of these Transactions.

Determination of turnover in case of F&O shall be as under:

- The total of positive and negative or favourable and unfavourable differences shall be taken as turnover.
- Premium received on sale of options is to be included in turnover. However , where the premium received is included for determining net profit for transactions, the same should not be separately included (As per Revised Guidance Note on Tax Audit u/s 44AB issued by ICAI in 2022)
- In respect of any reverse trades entered, the difference thereon shall also form part of the turnover.
- Here, it makes no difference, whether the difference is positive or negative. All the differences, whether positive or negative are aggregated and the turnover is calculated.

Thus, the taxability of Shares and Securities depends on many factors and every Taxpayer must determine the correct treatment of the transaction and pay the appropriate tax to avoid litigation.

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Alternate Dispute Resolution and its Relevance

Savita Goel Kasana, Advocate

Alternate dispute resolution processes have gained enormous popularity throughout the world. Mediation is one of the alternate dispute resolution processes. Mediation has become an effective mode for dispute resolution now a days.

The concept of mediation is not new to our country. It is prevalent since ancient times in one form or the other but those process es lacked systematic and structured approach towards dispute resolution. In present times, Mediation has become an effective mechanism for dispute resolution in comparison to the other modes of dispute resolution. In India, section 89 Civil Procedure Code, 1908 provides the following modes of Alternate dispute resolution:

1) Arbitration

2) Conciliation

3) Judicial Settlement

including Settlement through Lok Adalats; and 4) Mediation The Supreme Court of India in Salem Advocate Bar Association TN vs Union Of India (2003) 1 SCC 49 has held the Constitution al validity of Section 89 CPC. In terms of section 89 Civil Procedure Code, 1908, the courts can refer the parties to any of the modes of alternate dispute resolution processes i. e. arbitration, conciliation, mediation, lok adalat for the resolution of their disputes. Mediation is more effective than other modes of dispute resolution. Mediation is Speedy, Private, confidential, cost- effective and Prompt. It helps in Preserving and restoring the relationships. In Mediation it is win-win situation for both the parties. It is a voluntary process outcome of the dispute is controlled by the parties. Parties themselves decide the solution of their dispute. In mediation the solution is not forced on the parties by anyone. Arbitration is an adjudicatory process. Where there are procedural rules and rules of evidence have to be followed by the disputants. In Arbitration third person take decision for disputants. It is a formal process. Mediation is mainly of two types:- 1) Court-Annexed Mediation - These days almost all the courts have their own mediation centers. In court annexed mediation, courts refer a pending matter for mediation to the trained mediator for mediation. Where a trained mediator assists the parties in arriving at an amicable Settlement. 2) Private Mediation

- Trained mediators mostly handle Pre- litigation matters. Independent trained mediators may that be advocates, retd. Judges, professionals any one can do private mediation. Mediation has helped in successfully resolving various disputes like Matrimonial disputes, property disputes, Matters under Section 138 N.I. Act, etc.

In the year 2015, the Commercial Courts Act, 2015 was introduced by the government to reduce the pendency of commercial dispute s. According to section 12A of Commercial Courts Act, 2015 any suit, which does not contemplate any urgent interim relief, cannot be instituted unless the plaintiff exhausts the remedy of Pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules. Also that the suits which are filed violating this mandate are liable to be rejected at the threshold under Order Vll Rule Xl of Civil Procedure Code. Mediation is helping the disputants in early and effective disposal of their disputes. It is a boon for the legal system. Mediation should be encouraged for the resolution of disputes. This would strengthen the Judicial System.

Assessee – Dealers Await DVAT Amnesty

Sanjay Sharma, Advocate

Hare Krishna to All Esteemed Colleagues and Friends,

Goods and Services Tax (GST) is the most transformational tax reform in recent times that celebrated its 5th anniversary on 1st July, 2022. Prior to the advent of GST, we had a regime of DVAT which was also a Value Added Tax. Earlier thereto there was a system of multi point Sales tax in different States across the country. National Capital Territory of Delhi enacted Delhi Value Added Tax Act, 2004 (DVAT Act) which after rolling out of GST law on 1st July, 2017 got subsumed in it together with 17 other indirect taxes.

DVAT Act, 2004 had come into force w.e.f. 1.4.2005 by repealing the Delhi Sales Tax Act, 1975. Now, DVAT Act, 2004 also stands replaced by the Delhi Goods & Services Tax Act, 2017 and the Central Goods & Services Tax Act, 2017 w.e.f. 1.7,2017.

The Period for completion of assessment u/s 32 and for imposition of penalty u/s 33 of the DVAT Act was four years. In cases of concealment, the period could be extended to 6 years. The period of limitation fixed under the DVAT Act, 2004 for completion of assessment applies to the Central Sales Tax Act, 1956 also.

The assessments for the 1st Quarter of 2017 were completed recently by 31st March 2022. The number of dealers registered with the Department under the DVAT Act and the CST Act was above three lakhs.

DVAT Act also envisaged filing of objections against the notices of default assessment of tax & notices of assessment of penalty by a person who felt aggrieved from such notices of assessment and penalty.

At present it is learnt that after completion of assessments there are lakhs of objections which are pending for decision by the Objection Hearing Authorities for various assessment years. The Department is running short of staff which is causing delay in deciding the cases.

There are many appeals pending before the Appellate Tribunal, VAT. Around 2000 appeals are also likely to be filed before the Appellate Tribunal.

After the enforcement of GST, the attention of the Department and its officers should be to-

wards compliance of GST provisions by the assessees. There is no denying the fact that the GST law is mainly based on earlier Service Tax and Excise Law provisions and less on the lines of VAT provisions. Therefore, the officers have to understand the new provisions and concepts like 'Supply; 'Time of Supply'; 'Place of Supply'; 'Value of Supply'; 'Provisional assessment'; 'Summary assessment'; 'Demand of tax short paid or excess input tax claimed or refund wrongly claimed and allowed in the absence of as well as on account of fraud, misrepresentation", etc.

As per the provisions of the DVAT Act, once an objection is filed, there is automatic stay of the demand, unless the objection hearing authority, for reasons to be recorded, and after hearing the objector, imposes some condition of pre-deposit for hearing the objections.

As a result of such a provision thousands of crores of rupees are held up by way of outstanding demands.

In view of the above background, the Delhi Govt./DVAT Department should come out with some Amnesty Scheme, like the other States such as Kerala, Maharashtra, Gujarat and the Central Government. Hereunder are some suggestions to introduce DVAT Amnesty Scheme -

Amnesty Scheme under the present circumstances will be beneficial not only for the assessees but even for the Department as: –

i) it will help in immediate realization of the revenue as in Amnesty Schemes the person wishing to avail the benefit of Scheme is required to deposit the dues forthwith or within the time fixed under the Scheme. Relief under the scheme will be towards interest and penalty. No Relief towards the tax account would be given although under the Sabka Vishwas (Legacy) Disputes Resolution Scheme, remission towards tax in arrears was also given;

ii) it will help in liquidating the pendency of objections before the Objection Hearing Authorities and the appeals pending before the Appellate Tribunal, VAT;

iii) it should be extended to pending assessments also which will save a lot of time of the officers in the Department and will, thus, reduce the cost of administration also;

iv) it will save the time and effort of the officers who can devote that time to understand and implement the GST;

v) it will help in recovering the admitted amount of tax which may not even be in the knowledge of the Department;

vi) it will also help in recovering the arrears of tax for which no proceedings whether by way of objections or appeal are pending;

The Scheme should cover the cases under the Delhi Sales Tax Act, 1975, Delhi Sales Tax on Works Contract Act, Delhi Sales Tax on Transfer of Right to use Goods Act and Central Sales Tax Act, 1956.

It is for these benefits that Kerala, Maharasthra & Gujarat had come out with their Amnesty Schemes which were even extended from time to time and Centre had come out with Sabka Vishwas Legacy Dispute Resolution Scheme.

An Amnesty Scheme, in order to be successful, should be simple and offer an all time full settlement. Under the Scheme offered by Maharashtra State, apart from the fact that it was a bit complex, an assessee had been allowed to avail the benefit of the Scheme on some issues while continuing to contest the other issues in an appeal Such a Scheme defeats the very purpose of the Scheme which is to offer one time settlement to liquidate the pending disputes. However, Amnesty Scheme offered by the State of Kerala was simple and fulfilled the tests of a good Amnesty Scheme. A large number of dealers could declare their liability and avail the benefit of the Scheme to buy peace.

An Amnesty Scheme on the lines of Kerala Scheme may be introduced in Delhi to cover:

1. both registered as well as unregistered dealers;

2. the arrears/outstanding dues for a year;

3. arrears of tax, interest and penalty pertaining to the period of Delhi Sales Tax regime whether admitted or disputed giving complete waiver of interest and penalty to the assessee on the condition that the assessee deposits 70% of the tax amount in arrears within the prescribed time;

4. arrears of tax, interest & penalty under the DVAT Act which are not in dispute giving complete waiver of interest and penalty on the condition that the assessee deposits the tax in arrears within the prescribed time;

5. outstanding dues on account of tax, interest and penalty under the DVAT Act which are the subject matter of dispute before the objection hearing authority or the Appellate Tribunal, VAT giving complete waiver of interest and penalty subject to the condition that the assessee deposits full amount of tax in dispute as well as the tax which may be admitted to be due;

6. outstanding dues on account of tax, interest and /or penalty under the CST Act on account of non-submission of statutory forms on the condition that the assessee deposits the tax amount giving full waiver of interest and penalty;

7. outstanding dues on account of tax, interest and penalty under the CST Act on account of non-submission of forms where the assessment has been made and the assessee has

filed objections giving complete waiver of interest and penalty on the condition that the assessee deposits the tax amount in respect of the inter-State sales for which the statutory forms have not been received and the assessee furnishes the forms already received with the declaration to be filed under the Scheme.

8. cases of inter-State sales under the CST Act where assessment has not been completed and the assessee voluntarily deposits the tax amount with respect to the statutory forms which are yet to be received and furnishes the forms in his possession alongwith the declaration to be filed under this Scheme;

9. outstanding dues on account of tax, interest and penalty under the DST Act/DVAT Act, Delhi Sales Tax On Works Contract Act, Delhi Sales Tax on Transfer of Right to Use Goods Act or CST Act resulting from assessment based on enforcement survey giving full waiver of interest and penalty, on the condition that the assessee deposits the tax amount as assessed within the period fixed under the Scheme;

10. cases of enforcement survey where the assessment has not been completed giving complete waiver from interest and penalty which is likely to be levied and imposed on the condition that the assessee himself voluntarily estimates his tax liability and deposits the same within the time fixed and on completion of assessment at his option either deposits the balance amount of tax as may be found to be due by the assessing officer getting complete waiver of interest and penalty levied or takes recourse to the statutory remedies against the balance amount of tax, interest and penalty that may be assessed or levied by the assessing authority;

11. Cases where only penalty has been imposed by giving remission of 75% of the penalty amount on the condition that the dealer deposits the remaining 25% of the penalty within the time fixed;

Under the present scenario, Amnesty Scheme will be a Win-Win situation for both the assessees as well as the Department.