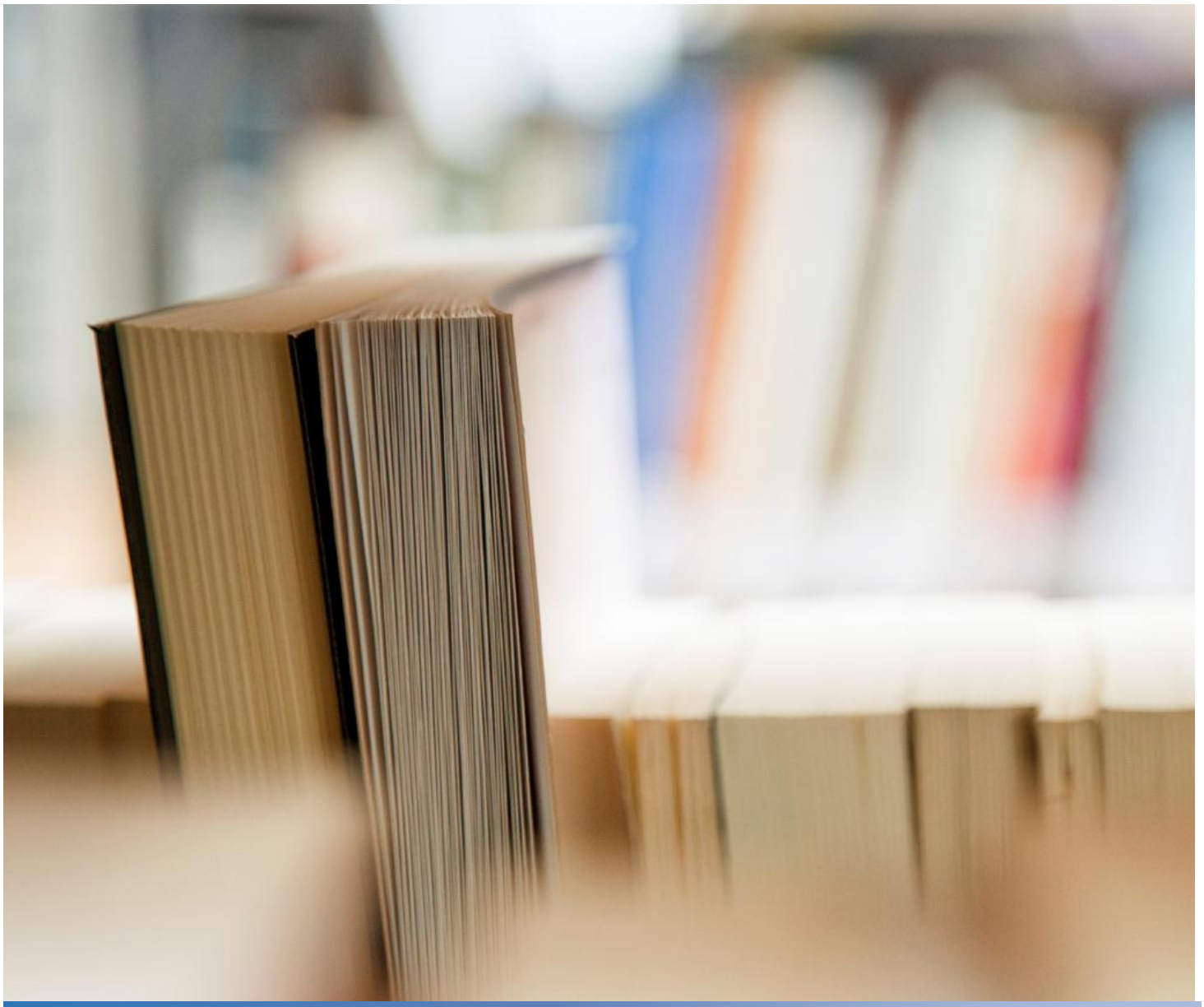

Legal Framework - Services to/by Government

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LEGAL FRAMEWORK - SERVICES TO/BY GOVERNMENT

Relevant Definitions

As per Section 2(53) of the CGST Act 2017, "Government" means the Central Government. The term 'Central Government' has not been defined under the law. So, the definition of Central Government has been given in Section 3(8) of the General Clauses Act as below:

"Central Government" shall-

(a) in relation to anything done before the commencement of the Constitution, means the Governor-General or the Governor General in Council, as the case may be; and shall include-

(i) in relation to functions entrusted under sub-section (1) of section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and

(b) in relation to anything done or to be done after the commencement of the Constitution, means the President; and shall include-

(i) in relation to functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;

(ii) in relation to the administration of a Part C State before the commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-Governor or the Government of a neighbouring State or other authority

acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be;

(iii) in relation to the administration of a Union Territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution;"

Section 2(53) of the various SGST Acts refers to their respective State Governments. The definition of the State Government has not been given under the State GST Acts So, the definition of the State Government as per the General Clauses Act has been given below:

"State Government"-

(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorized at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government;

(b) as respects anything done 9[after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article

Local authority as defined under Section 2(69) of the CGST Act means:

"local authority" means—

(a) a Panchayat as defined in clause (d) of article 243 of the Constitution;

(b) a Municipality as defined in clause (e) of article 243P of the Constitution;

(c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;

(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006;

(e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;

(f) a Development Board constituted under article 371 of the Constitution; or

(g) a Regional Council constituted under article 371A of the Constitution;

As per the definitions given under Notification no. 11/2017-Central tax (rate) and Notification no. 12/2017-Central tax (rate) dated 28th June 2017:

"Governmental Authority" means an authority or a board or any other body, - (i) set up by an Act of Parliament or a State Legislature; or (ii) established by any Government, with 90per cent. or more participation by way of equity or control, to carry out any function entrusted to a Municipality under article 243 W of the Constitution or to a Panchayat under article 243 G of the Constitution.

"Government Entity" means an authority or a board or any other body including a society, trust, corporation, (i) set up by an Act of Parliament or State Legislature; or (ii) established by any Government, with 90per cent. or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority."

Activities treated neither as supply of goods nor supply of services

Section 7(2) of the CGST Act 2017 overrides the definition of supply given under Section 7(1) of the CGST Act 2017. The inference derived here is that the activities or transactions covered under Section 7(2) will not be considered within the definition of supply at all. Section 7(2)(b) of the CGST Act 2017 states that the activities or transactions undertaken by the Central Government or State Government or local authority in which they are engaged as public authorities as may be notified by the Government on the recommendations of the Council will neither be treated as supply

of goods nor supply of services. Thereby, any activities or transactions which are notified by the Government under this clause will not be treated as supply altogether. As of now, under Section 7(2) of the CGST Act, 2017, the Central Government has notified only one nature of activity in which Central Government or State Government or local authority are engaged as public authorities shall be treated neither as supply of goods nor supply of services. The activities specified herein are the services by way of any activity in relation to a function entrusted to a Panchayat under Article 243G of the Constitution of India.

Article 243G of the Constitution of India entrusts powers, authority and responsibilities to the Panchayats. The Constitution of India endows the Panchayats to such powers and authority to enable them to function as institution of self government. Also, it allows the law to contain provisions for the devolution of powers and responsibilities upon Panchayats subject to certain conditions with respect to:

(a) the preparation of plans for economic development and social justice

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule

The activities specified within the Eleventh Schedule are Agriculture, including agricultural extension; Land improvement, implementation of land reforms, land consolidation and soil conservation; Minor irrigation, water management and watershed development; Animal husbandry, dairying and poultry; Fisheries; Social forestry and farm forestry; Minor forest produce; Small scale industries, including food processing industries; Khadi, village and cottage industries; Rural housing; Drinking water; Fuel and fodder; Roads, culverts, bridges, ferries, waterways and other means of communication; Rural electrification, including distribution of electricity; Non-conventional energy sources; Poverty alleviation programme; Education, including primary and secondary schools; Technical training and vocational education; Adult and non-formal education; Libraries; Cultural activities; Markets and fairs; Health and sanitation, including hospitals, primary health centres

and dispensaries; Family welfare; Women and child development; Social welfare, including welfare of the handicapped and mentally retarded; Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes; Public distribution system; Maintenance of community assets

Reverse charge Mechanism

Notification no. 13/2017-Central Tax (rate) dated 28th June 2017 was issued under the CGST Act which contained the categories of goods or services or both on which reverse charge is applicable. Corresponding notifications in respect of inter state supply of goods or services have also been issued under Notification no. 10/2017-Integrated Tax (rate) dated 28th June 2017. These two notifications have been amended prospectively from time to time through a number of subsequent notifications.

Entry no. 5 of the Notification no. 13/2017-Central tax (rate) dated 28th June 2017 and entry no. 6 of the Notification no. 10/2017-Integrated Tax (rate) dated 28th June 2017 talks about the supplies by the Central Government, State Government, Union territory or local authority. It has been enumerated that all services except a few as depicted below are liable under reverse charge mechanism if they are provided by Central Government, State Government, Union territory or local authority to the business entity located in the taxable territory:

(1) renting of immovable property, and

(2) services specified below-

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than Central Government, State Government or Union territory or local authority;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers.

In effect, it means that the supplier i.e. the Central Government, State Government, Union Territory or local authority will continue to pay taxes in respect of the services

given above if the said services are taxable. Any other services if received by a business entity located in the taxable territory will be liable under reverse charge mechanism and the tax is liable to be paid by such entity. Any person other than the business entity receiving such services will not be liable to pay taxes under reverse charge.

Further, vide Notification no. 3/2018-Central Tax (rate) dated 25th January 2018 amended the said notification no. 13/2017-Central Tax (rate) dated 28th June 2017 to insert a new entry no. 5A effective from 25th January 2018. Corresponding entry no. 6A has been inserted vide Notification no. 3/2018-Integrated Tax (rate) dated 25th January 2018 in the Notification no. Notification no. 10/2017-Integrated Tax (rate) dated 28th June 2017. As per the said entry, 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 are liable under reverse charge mechanism. It may be noted here that any registered person and not just a business entity receiving services from the Government will be liable to pay tax under reverse charge mechanism. However, only a person registered under the CGST Act 2017 will be liable under reverse charge. An unregistered person need not register himself for payment of taxes under the given entry if he is otherwise not liable for registration.

Tax Deducted at Source

Section 51 speaks about the provisions of Tax deducted at source. However, this section has not been made applicable as of yet. Section 51(1) overrides the entire Act. This means that anything contrary in the entire Act as compared to the provisions given under the said section will not be valid and only the provisions of the said section will hold good. As per the said section, the following categories of persons (deductors) will need to deduct tax at the rate of one percent under the CGST law from the payment made or credited to the supplier (deductees) of the taxable goods or services or both where the total value such supply under a contract exceeds rupees two lakh and fifty thousand rupees:

(a) a department or establishment of the Central Government or State Government; or (b) local authority; or

(c) Governmental agencies; or

(d) such persons or category of persons as may be notified by the Government on the recommendations of the Council

As per clause (d) above, certain category of persons can be notified by the Government on the recommendations of the Council who will also be required to deduct tax at source under Section 51. Within the powers of the said section, Notification no. 33/Central tax dated 15th September 2017 was issued. As per the said section, the following categories of persons have been specified effective from 18th September 2017 who are required to deduct tax at source under Section 51:

(a) an authority or a board or any other body, -

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by any Government,

with fifty-one percent or more participation by way of equity or control, to carry out any function;

(b) society established by the Central Government or the State Government or a Local Authority under the Societies Registration Act, 1860 (21 of 1860);

(c) public sector undertakings:

Also, the deduction of tax at source will only be applicable if the payment is in respect of taxable goods or services or both. Any payment against receipt of exempt goods or services or both will not attract any tax deducted at source.

Further, the contract value is pertinent to determine the applicability of tax deducted at source. For ascertaining the applicability of the said section, the actual payment value is not relevant. If the contract value is greater than rupees two lakh and fifty thousand, the provisions of tax deducted at source will be attracted even though the actual payment being made is lower.

However, the value on which tax is to be deducted at source will be the actual payment made or credited to the supplier. Thereby the time of deduction of payment

may be when the amount is credited even though there is no payment being actually made. The contract value is only for applicability of the provisions of tax at source. However, the actual payment or credit value is used as the base on which tax is to be deducted. This value which is taken as the base should be exclusive of the Central tax, State tax, Union territory tax and cess indicated in the invoice.

Further, it has been specified that if the location of the supplier and the place of supply is in a state or Union territory which is different from the state or as the case may be, Union territory of registration of the recipient, then no deduction of tax at source is required to be made. Effectively, this means that only for intra state supply of goods or service, tax deduction at source is required. For inter state supply of goods or services, no deduction of tax at source is required to be made.

Nature of contracts

On perusal of the contracts entered with the Government, it can be noticed mostly that the value of such contracts is all inclusive. This means that irrespective of the tax rate and amount, the value of the contract does not change. However, the evaluation of the contract from the perspective of the contractor should be made by calculating the value received by the contractor after the payment of tax amount. So, the profitability and the margin should be carefully analysed by the contractor after excluding the tax to be paid to the Government. In other words, it means that the burden of taxation even though shown as charged to the Government will be required to be paid by the contractor from his own pocket. Any change in the tax rate in future does not impact the total value of the contract which is inclusive of tax. So, any change in tax incidence affects the contractor directly and not the contractee. However, it is suggested here that the contractual terms be carefully analysed and interpreted to find out the tax implications. While, the above mentioned may be true for most of the contracts, it may not be for every contract. Other types of contracts wherein the contractual value is exclusive of tax may also exist. So, proper evaluation by the contractor should be made after a diligent perusal of the contractual terms.

In situations where the contract was entered before the advent of GST, the interpretation of the contractual terms becomes very pertinent. Where the contract terms only mention about the earlier tax regime i.e. service tax, VAT etc., it should be analysed whether a supplementary contract for factoring the aspect of GST should be entered. This will help in avoiding any future disputes of the person who needs to bear the burden of taxation. Of course, if the contract already captures the effect of any tax regime changes, then the need for such supplementary contract may not arise. Thereby, these aspects should be kept in mind before reaching to any conclusion on the impact of GST under the contract.

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