



ADVAITA LEGAL
ATTORNEYS AND
ADVOCATES

Legal Interpretational Issues under the GST

Sujit Ghosh

***Advocate, Delhi High Court & Supreme
Court of India***

Partner & National Head, Advaita Legal

August 2, 2017



Anti-profiteering measure envisaged under Section 171

❖ **Section 171 of the CGST Act:**

*“(1) Any **reduction in rate of tax on any supply of goods or services** or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*

*(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a **commensurate reduction** in the price of the goods or services or both supplied by him.*

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.”

❖ **‘Commensurate reduction’ – means what?**

❖ **The Central Government has issued the Central Goods and Services Tax Rules, 2017, wherein, Chapter XV deals with Anti-Profiteering rules – the same are discussed on the subsequent slides**

Constitution of the Authority and Committees

1

National Anti-Profitteering Authority (Rule 122)

Composition :

Chairman

(Holds or has held post equivalent to the rank of secretary to Govt. of India)

Four (4) Technical Members

(Commissioners/ Ex-Commissioners of State or Central Tax)

2

Standing Committee on Anti-profitteering (Rule 123)

Composition :

Officers of the State and Central Government

3

State Level Screening Committee (Rule 123)

To be constituted in each State by the State Governments

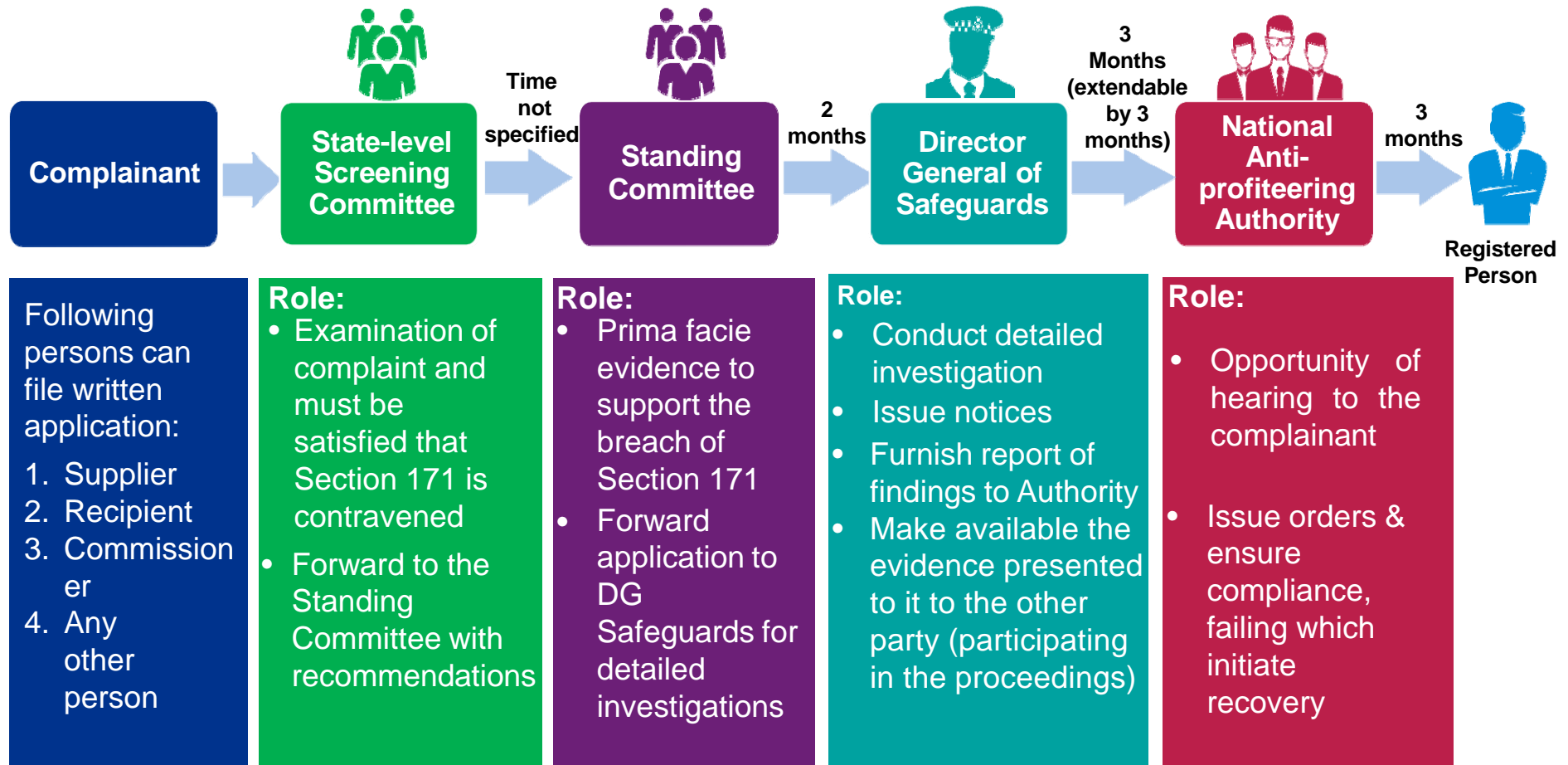
Composition :

- 1 officer of State Government
- 1 officer of Central Government

4 Reference to the Director General of Safeguards (DG Safeguards) for the purpose of undertaking investigation (Section 129)

Examination of the application filed by the complainant

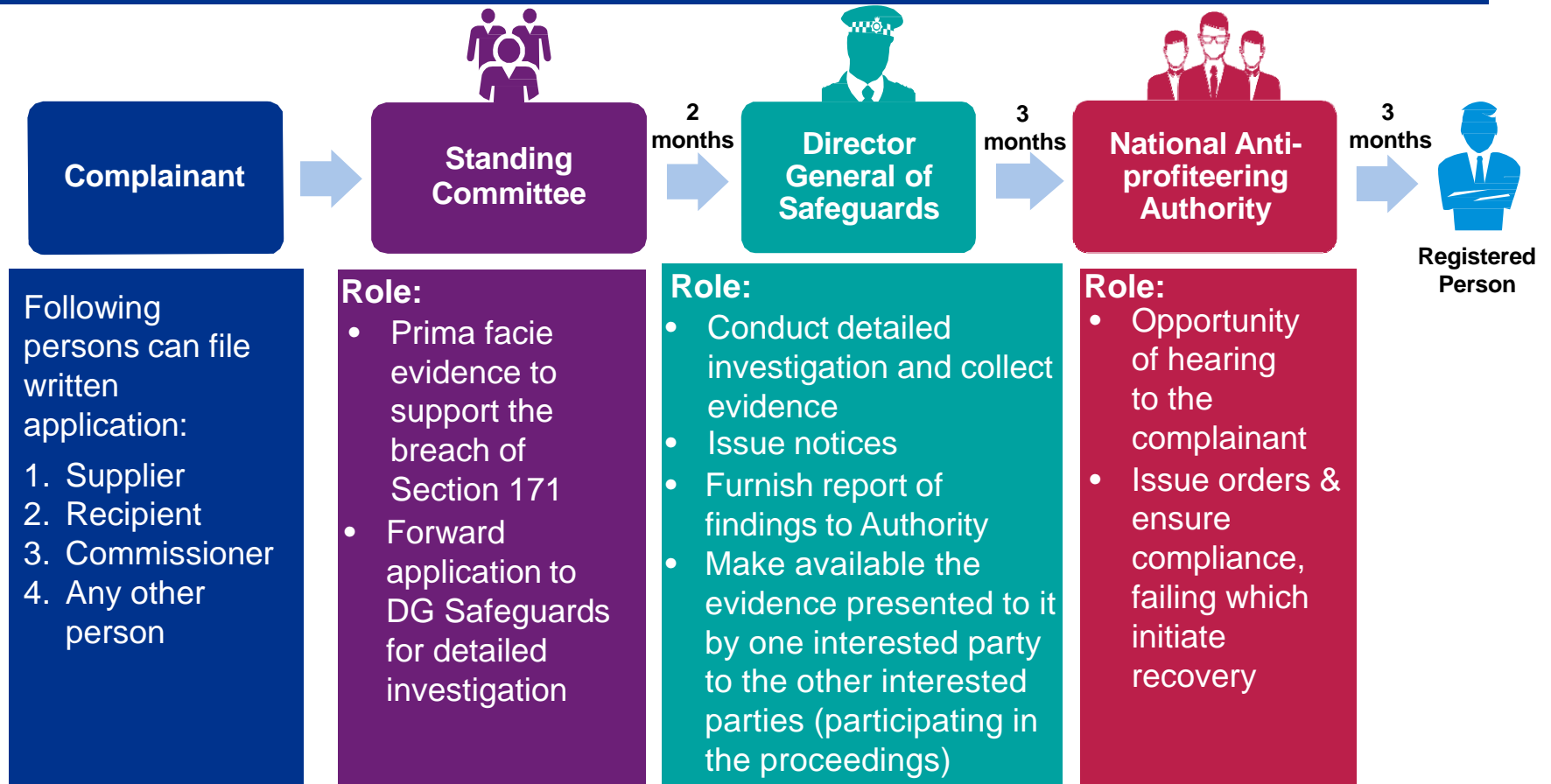
Issues - Local nature



Term Local nature not defined?

Examination of the application filed by the complainant

Issues - Other than local nature



A senior government official stated in an interview that the authority will take up cases of mass importance and will not look into small cases – no monetary threshold has been fixed in this regard

Nature of the order

- ❖ **Section 2(4) of the CGST Act defines the term ‘adjudicating authority’ – means **any authority**, appointed or authorized to pass any order or decision under the CGST Act**
- ❖ **Section 107 of the CGST Act provides – Any person aggrieved by any order passed under this Act by an **adjudicating authority** may appeal to such Appellate Authority**
 - An appeal against the order of the Appellate Authority will lie either before a National/Regional Bench or before a State/Area Bench
 - Subsequent appeal from State/Area Bench shall lie before the High Court and an appeal against an order of National/Regional Bench shall lie before the Supreme Court
- ❖ **Section 171 of the CGST Act – provides for **constitution of an authority** to examine whether ITC availed by any person or the reduction in the tax rate have actually resulted in reduction in the price of the goods/services supplied by him**
- ❖ **Thus, by definition the authority constituted under Section 171 can qualify as an adjudicating authority under Section 2(4) of the CGST Act**
 - **Consequently, an appeal against the order of the said authority may lie before the Appellate Authority (under Sec. 107) – which can be further appealed**

Overreach and excess delegation

Provision under CGST Act	CGST Rules, 2017	Observation
171(1) – Reduce the price commensurate with reduction in rate of tax or the benefit of ITC	127(iii)(a) – Authority to order reduction in prices	Both the provision and the corresponding rule are in consonance
171(3) – The authority shall exercise such powers and functions as may be prescribed	127(iii)(b) – Return the amount along with interest @ 18%	Levy of interest being an essential legal function cannot be delegated
	127(iii)(b) – Recover the amount and deposit it in Consumer Welfare Fund	Recovery of the amount – not specified under the CGST Act – excessive delegation
	127(iii)(c) – Impose penalty as specified in the Act	Provision in the CGST Act does not provide for imposition of penalty – excessive delegation
	127(iii)(d) – Cancellation of registration under the Act	Section 171 of the CGST Act does not contemplate the cancellation of registration
No guidelines provided for determining the methodology and procedure for ascertaining whether the reduction in rate of tax or the benefit of ITC has been passed to the recipient	126 – Provides that the authority may determine the methodology and the procedure for ascertaining whether the benefit has been passed to the recipient	Rule has travelled beyond the scope provided under the statute – excessive delegation
Jurisdiction – essential legislative function cannot be created by delegated legislation		

Mapping the impact of the provision - Illustration

Particulars	Current Regime	GST Regime
	Amount in INR	Amount in INR
Cost of Purchases	100.0	100.0
Add: Excise Duty @ 12.5%	12.5	-
Add: GST @18%	-	18.0
Sale Price	112.5	118.0
Subsequent Sale by the Vendor		
Gross Purchase Price	112.5	118.0
Purchase Price net-off credit	112.5	100
Add: VAT @ 12.5%	14.06	
Add: GST @ 18% on purchase price net-off credit		18
Sale price	126.56	118

- Price of goods may decrease in the GST regime considering the fungibility of tax credits
- In terms of the Anti Profiteering Clause, such benefit is expected to be passed on by the seller to the buyer

Questions unanswered



ADVAITA LEGAL
ATTORNEYS AND
ADVOCATES

Neither the CGST Act nor the CGST Rules provide the guidelines for determining the methodology and procedure, for ascertaining the fact of profiteering by the supplier, and the same has been left to the discretion of the authority



'Any other person' eligible to make complaint of profiteering



No time limit prescribed for forwarding application received by State-level Screening committee to Standing Committee



How to apportion common credit to each product or service and ensure that the benefit has been passed on to customer



Taxability of the Non-resident Taxable Person (“NRTP”)

❖ Section 24 of the CGST Act:

“Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,—

....

(v) non-resident taxable persons making taxable supply

....;”

- Thus, compulsory registration is required to be obtained by a non-resident taxable person

❖ Section 2(77) of the CGST Act – defines the term ‘non-resident taxable person’

*“non-resident taxable person” means any person who **occasionally** undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India;”*

- The definition and the CGST Act do not ascribe a meaning to the term ‘occasionally’
– **whether it would include ‘single or one-off’ transaction or only ‘multiple’ transactions?**

Taxability of the Non-resident Taxable Person ("NRTP")

- ❖ **Section 2(77) of the CGST Act** – definition of NRTP – ‘occasionally’ (contd.)
 - **The interpretation of the term should not have an impact on supply of goods**
 - Goods imported into India by purchaser – **leviable to BCD and IGST**
 - **Issues may arise in relation to supply of services**
 - **In case ‘occasionally’ includes single or one-time transactions** – NRTP would be required to take registration under the CGST Act – **additional compliance burden on NRTP**
 - **In cases where NRTP obtains registration and pays GST** – **reverse charge mechanism would not apply** – since it does not qualify as a supply from a person located in the non-taxable territory to a person located in the taxable territory
 - **Consequently, such an interpretation would make the reverse charge mechanism redundant**

Cross utilization of Central GST credit

- ❖ **Whether the credit of CGST paid in a State can be utilized against the payment of CGST levied by another State?**
 - **Section 49(5) of the CGST Act – deals with payment of tax**

*“(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of–
(b) the **central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;**”*
 - **Term ‘Central Tax’ has been defined under the CGST Act**

“CGST Act –
(21) “central tax” means the central goods and services tax levied under section 9;”
 - **Basis the above, it can stated that credit of Central GST can be utilized for payment of Central GST (irrespective of the State where it is paid) or IGST**

Cross utilization of Central GST credit

- ❖ However, CBEC clarified in its Twitter FAQs as under –

“41. Can one State CGST be used to pay another state CGST?”

Reply: The CGST and SGST Credit for a State can be utilized for payment of their respective CGST/SGST liabilities **within that State for the same GSTIN only.**”

- ❖ Thus, as per the clarification, CGST paid in one State cannot be utilized for the payment of CGST levied in another State
 - It can be argued that the clarification is in contravention to the legal provision stipulated under the CGST Act

Validity of the clarifications provided on social media

- ❖ The Government has been very active on social media and on other communication channels – **providing clarifications in relation to the practical issues being faced by the business community**
 - **One such clarification was regarding the extension of the due date of filing of the first return**
 - **Section 37 of the CGST Act** deals with filing of various returns and also specifies the time limit for filing the same – **no notification or circular has been issued in this regard, instead a press note has been issued by CBEC**

- ❖ **Whether such clarifications have any binding value in the eyes of law?**
 - **Section 168 of the CGST Act** – provides that CBEC can issue circulars/instructions for maintaining uniformity in the implementation of the Act, which have to be followed by the departmental officers
 - **No circular/instruction has been issued under the said provision**

 - **Thus, all tweets, FAQs and Press releases/Press notes (providing extension of time limit or providing other clarification) have no legal sanctity and are not binding**

Issues in relation to transition provisions

❖ Whether a ‘works contract service provider’ can carry forward the credit of inputs lying in stock into the GST regime?

➤ Section 140(3) of CGST Act – deals with carry forward of the inputs lying in stock

*“A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or **who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012** or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be **entitled to take**, in his electronic credit ledger, **credit of eligible duties in respect of inputs held in stock** and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely...”*

- Abatement notification does not envisage within it works contract service – separate valuation is provided under the Valuation Rules for works contract services
- Resultantly the category of ‘works contract service provider’ contemplated under Section 140(3) – **does not exist**
- **Harmonious interpretation should be accorded to the provision – benefit should be extended to both the category of persons by reading the word ‘and’ as ‘or’**

Issues under Section 7 of the IGST Act

- ❖ **Section 7 of the IGST Act** – specifies the supplies which qualify as ‘supplies in the course of inter-State trade or commerce’
 - **Sub-section 5 of the said provision** provides that the following shall also be treated as inter-state supply –
 - Export of goods or services
 - Supply of goods/services to or by a SEZ developer/SEZ Unit
 - **Supply of goods/services in the taxable territory, not being an intra-state supply and not covered elsewhere in Section 7**

- ❖ **It is unclear as to what kind of supplies are sought to be covered in the third category**
 - **Either a supply would be an intra-state or an inter-state**

Whether Form C can be issued under the GST regime?

- ❖ **Whether a purchaser can issue Form C on making a purchase of product in the course inter-state trade or commerce?**
 - **Section 6(1) of the Central Sales Tax Act, 1956 (“CST Act”)** – deals with sale of **goods** in the course of inter-state trade or commerce
 - **Section 2(d) of the CST Act defines the term ‘goods’** –
“In this Act, **unless the context otherwise requires**, -
(d) Goods means-
(i) petroleum crude;
(ii) high speed diesel;
(iii) motor spirit (commonly known as petrol);
(iv) natural gas;
(v) aviation turbine fuel; and
(vi) alcoholic liquor for human consumption;”
 - Section 8 of the CST Act provides the rate of tax on inter-state sale of goods as described under Section 8(3)(b) – Also, mandates the submission of Form C
 - **Section 8(3)(b) provides** that Sec. 8(1) is applicable to the **class of goods which are used in the manufacture of goods for further sale**
 - **Whether the term ‘goods’ occurring in the latter part of Sec. 8(3)(b) would be restricted to the definition of ‘goods’ provided under Section 2(d)?**

Whether Form C can be issued under the GST regime?

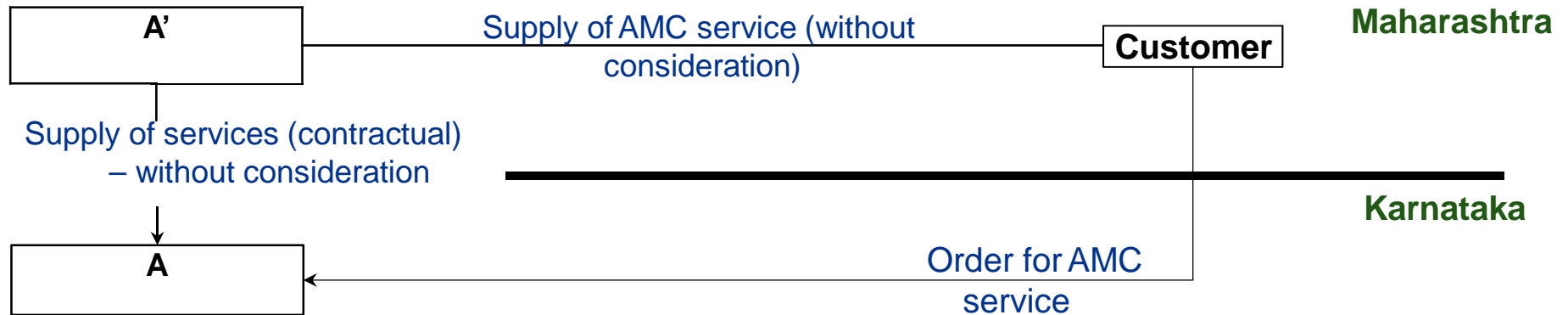
- ❖ In case definition of 'goods' under Sec. 2(d) is applied to Sec. 8(3)(b) – **it would lead to an absurd interpretation**
 - **Concessional rate of tax is applicable on purchase of goods, which are used in the manufacture of those very goods**
- ❖ **Contextual interpretation to be adopted** – Section 2 starts with the words '*unless the context otherwise require*'
 - Thus, the definition of the term 'goods' provided under Section 2 would not be applicable in cases where the context requires otherwise
 - Thus, the context of Sec. 8(3)(b) requires that the term 'goods' to be interpreted widely to include goods utilized in the manufacture of **any goods** meant for further sale
 - Reference may also be made to the circulars issued by the commercial tax departments of **Uttar Pradesh** (dated July 18, 2017) and **Uttarakhand** (No. 1803 dated July 13, 2017)

Registration under the GST



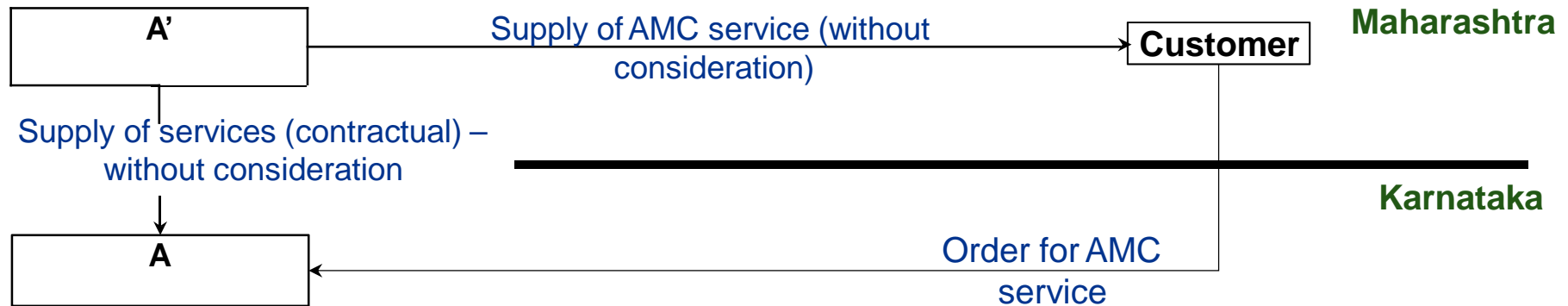
- ❖ **Section 22 provides – every person to register in the State from where the supply is made**
 - Interpretation possible that such place could be the place of effective management (POEM) i.e. the place responsible for the planning, execution or the place which books the order and issues further subcontracts to vendors etc.
 - **If this interpretation adopted, then whether registration of site office is required, where the works contract is carried out?**
 - **Resort can also be made to the contract clauses, entered into between A and its prospective buyer(s), to infer as to whether any service is supplied by the site office**
 - **In case registration is required – it would lead to a significant increase in the compliances**

Recipient's location - factual or contractual?



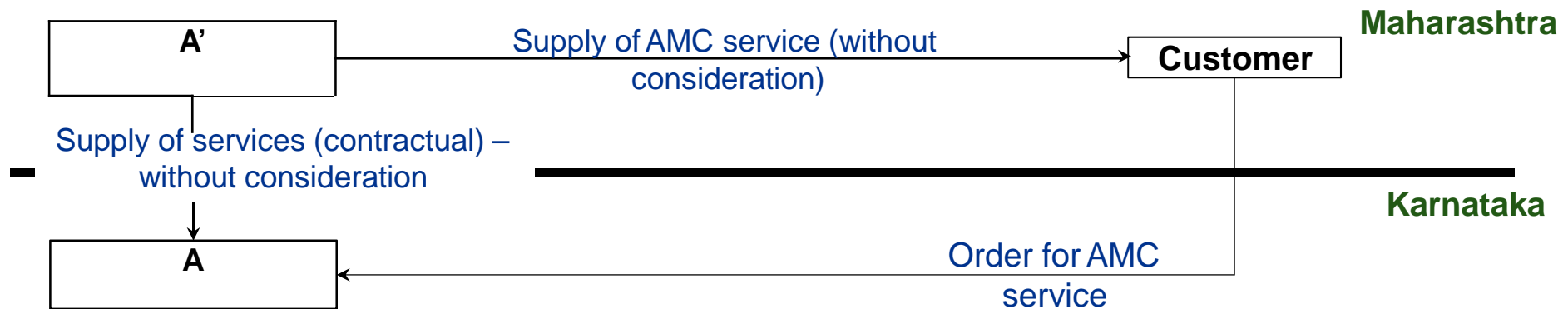
- ❖ With respect to supply between A and A' – **place of supply would be governed by Section 12(2) [residuary category] of the IGST Act** (since PoS for AMC service has not been specifically provided)
 - **Section 12(2) of IGST Act** – supply made to a registered person – **PoS would be the 'location of such person'**
 - **Section 2(93) of the CGST Act defines 'recipient'** –
 - “(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;
 -(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,
 - and **any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply** and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;”
 - **Consequently, 'such person' under Section 12(2) would be the 'recipient' under Section 2(93)**

Recipient's location - factual or contractual?



- **Section 2(93) of the CGST Act also provides –**
 - “(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;
 -(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,
 -”
- **Resultantly, as per the above definition ‘recipient’ would be the person to whom the service is rendered**
- **The phrase ‘to whom the service is rendered’ whether refers to contractual provision of service or factual provision of service?**
 - **Who would qualify as the ‘recipient’ – A or the Customer?**
 - **Whether A’ is liable to pay CGST & SGST or IGST?**

Cross utilization of SGST - whether permissible?



- ❖ **Assuming the Customer as the 'recipient'** (under Sec. 2(93) of the CGST Act), as the services are factually being received by the Customer located in Maharashtra
- ❖ **A' will pay CGST and SGST (in Maharashtra) on its supply of service to A**
- ❖ **CGST and SGST paid by A' will be an input tax for A**
- ❖ **Whether CGST and SGST paid by A' in Maharashtra would be available as ITC to A in Karnataka for the purpose of discharging IGST/CGST and SGST liability in Karnataka?**

Need for comprehensive contract review

- ❖ **Contracts transitioning - 'Change in law' clause(s) –**
 - **Tax extra contract or inclusive of tax contract**
 - Does it enable tracking the impact of 'change in law' across the supply chain?
 - Applicability of Section 64 A of the Sale of Goods Act

- ❖ **Capturing specific indemnities and obligations** apropos tax compliances to ensure that there is no leakage of tax credit/benefits
 - Contracting companies may have to make specific clauses obligating both the parties (or the supplier of goods/service) to comply with procedural requirements (of filing valid returns etc.) so as to enable the other party to avail input tax credit

Need for comprehensive contract review

- ❖ **Bid evaluation criteria** in the tender documents may need to be relooked at – given the possibility of enhanced availability of credits in GST
- ❖ **Incoterms (FOR, Ex-works etc.) to lose relevance under the GST Laws-** Leviability of CGST and SGST /IGST would be predicated on the location of supplier and place of supply and not on the incoterms
- ❖ **Single contract vs multiple contracts** – will splitting of contracts between goods and services still remain relevant?



ADVAITA LEGAL
ATTORNEYS AND
ADVOCATES

THANK YOU

Delhi

703-706

International Trade

Tower, E Block

Nehru Place

New Delhi 110019

Tel +91 11 3323 2700

Fax +91 11 30671304

Key Contacts

sujitghosh@advaitalegal.com

sudiptab@advaitalegal.com

Mumbai

Lodha Excelus, 1st Floor,

Apollo Mills Compound,

N.M. Joshi Marg,

Mahalakshmi,

Mumbai 400 011

Tel +9122 39896000

Fax +91 22 39836000

Disclaimer: Pursuant to the Bar Council of India rules, we are not permitted to solicit work and advertise. You, the reader acknowledges that there has been no advertisement, personal communication, solicitation, invitation or inducement of any sort whatsoever from us or any of our members to solicit any work through this newsletter. The information provided in this newsletter is solely available at your request and is for informational purposes only, it should not be interpreted as soliciting or advisement. We are not liable for any consequence of any action taken by the reader relying on material/information provided in the newsletter. In cases where the reader has any legal issues, he/she must in all cases seek independent legal advice. Any information obtained or materials used from this newsletter is completely at the reader's volition and any transmission, receipt or use of the contents of this newsletter would not create any lawyer-client relationship.

© 2017 Advaita Legal. All rights reserved.

Speaker profile



SUJIT GHOSH

**Partner & National
Head**

703-706, International
Trade Towers, Nehru
Place, New Delhi
T: +91 11 3323 2701
(Direct)
M: +91 98110 19857
E:
sujitghosh@advaitaleg
al.com

- Sujit is a Partner & National Head at Advaita Legal and has over 22 years of experience after graduating from the prestigious National Law School of India University, Bangalore
- Sujit has specialized in all Indirect Taxes specifically Customs duty, Excise duty, Service tax, VAT and has catered to clients in various sectors
- He is also an Arguing Counsel and appears regularly on tax and regulatory matters. **He has been listed by the International Tax Review, 2014, 2015, 2016 as one of the leading tax litigators of India and as "Tax Lawyer of the Year, 2016" by INBA and Legal Era. Sujit has also been listed as a "Ranked Lawyer" by Chambers and Partners.**
- He was one of the founding Partners of BMR. Prior to BMR, Sujit was with Arthur Andersen and thereafter Ernst & Young.