ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

GST, TAXATION & ENFORCEMENT- MAKING GOLD A TRANSPARENT ASSET CLASS

Nishant Shah- Partner, ELP

24th November 2018

REALITIES OF TRADE

Realities of trade

- The relevant market can be broadly categorized into two segments-
  - **Purchases for investment**
    - Hedge against economic uncertainty and as a convenient instrument of saving, specially in economically weaker sections and in rural areas
  - **Purchases for consumption**
    - Social reasons (Streedhan, Meher etc.) or for aesthetic purposes
      - Not a preferred investment instrument as the price paid does not fully reflect the value of gold
    - Coins etc. for social occasions correlated to birth and death in various communities
- Purchases are by all segments of the society across all economic strata. Retailers also range from small village shops to national retail chains. **Therefore both purchasers and sellers are highly diverse**
- **The industry employs over 6.1 million workers, most of whom are not formally educated, over the years they have developed a skill-set which earns them a respectable livelihood**
  - Not easily employable in any other sector
  - Provides cyclical employment to agriculturist in the period where they are not involved in agriculture
  - Sector employs over 1.8 million women employees
- **The fulcrum of the industry is the job-worker who is the real manufacturer**

TAXATION & RATE STRUCTURE FOR THE GJI

Gold imports & BCD

- Import dependent as limited domestic gold refining
- Present rate of import duty (10%) incentivizes smuggling
  - Opportunity of smuggling starts beyond 5% rate of import duty
  - Has facilitated the growth of other economies such as UAE etc. wherefrom gold is hand-carried into India
- Apart from the consequences of parallel economy and loss of tax revenue, smuggled gold poses quality issues, diminishes India's brand image globally and fosters growth of unscrupulous elements
- Reduced import duty would also bolster sales made to diaspora of NRIs visiting India

Government may consider reducing import duty on gold to 5% so as to discourage and curb unethical practices. This view has been endorsed by Niti Ayog Report- Transforming India's gold market- February 2018

GST FOR THE GJI

Goods sent for exhibition-Local/ inter-state

- Where the goods are sent for display at an exhibition (including entailing inter-state movement) the same would **not constitute 'supply'** under the GST regime as the same are not supplies made for a consideration
- In context of such movements, Rule 55 of the CGST Rules states that-
  - The consigner may issue a delivery challan in lieu of an invoice at the time of removal of goods for transportation
  - Since such movement is only under a delivery challan no liability arises as there is no invoice or payment
- As regards the return movement, whereas the GST framework does not prescribe any mechanism, the goods may be moved under the same delivery challan. To that extent, the delivery challan should explicitly state that the goods covered thereunder are destined to come back post the exhibition

For an exhibition-cum sale event in a different state, the dealer may qualify as '**casual taxable person**' as the dealer would undertake transactions involving supply of goods. In such a case the dealer would be required to obtain a temporary registration in the State where the exhibition is held as well as pay an advance tax to the extent of his estimated tax liability. Further, the movement of goods from his registered location (in another State) to the State in which exhibition is being held would also attract IGST (being a supply between distinct persons)

Barter transactions

- ***Purchase of old gold jewellery by a jeweller from a consumer***
  - In terms of press release dated 13th July 2017 issued by the CBEC, it has been clarified as under-
  - *'**Even though the sale of old gold by an individual is for a consideration, it cannot be said to be in the course or furtherance of his business** (as selling old gold jewellery is not the business of the said individual), and **hence does not qualify to be a supply per se**.*

- ***Valuation for new jewellery supplied in exchange of an old jewellery***
  - A transaction of 'exchange' is specifically covered as a specie of supply under Section 3 of the CGST Act
  - Since price is not the sole consideration for the sale, as per Section 15 of the CGST Act, read with Rule 27 of the CGST Rules, taxable value shall *inter alia* be the market value of the new jewellery or the value of goods of like kind and quality
  - GST will typically be chargeable on the market value of the goods which are sold in exchange for the old product

Gold/ diamond/ gemstones provided by customer for making

- Scenarios and GST treatment-
  - <u>Supply of service and goods- where jewellery made out of customer material</u>
    - Invoice to be raised for making charges applying GST@18% *[will not qualify as job work as the customer is not a registered person]*
    - Invoice to be raised for supply of goods applying GST @3%
    - Proper documentation to be maintained for receipt and return of goods provided by customer
  - <u>Sale and purchase- where jewellery made out of jeweller material</u>
    - Goods provided by customer to be purchases and not to be treated as supply in course or furtherance of business
    - Invoice to be raised for the entire product value applying GST @3%

Goods are carried by representative of an entity to another State

- Where the customer is known, the goods may be moved on sale on approval basis to such customer, under a delivery challan. As and when the customer approves the goods, an invoice may be issued charging IGST

- In terms of CBE&C **Circular No. 10/10/2017-GST, dated 18th October 2017** , it was clarified that-

  (3)*"the goods which are taken for supply on approval basis can be moved from the place of business of the registered supplier to another place within the same State or to a place outside the State **<u>on a delivery challan</u>** along with the e-way bill wherever applicable and **<u>the invoice may be issued at the time of delivery of goods</u>**. For this purpose, **<u>the person carrying the goods for such supply can carry the invoice book with him so that he can issue the invoice once the supply is fructified</u>***

  *(4) It is further clarified that **<u>all such supplies</u>**, where the supplier carries goods from one State to another and supplies them in a different State, **<u>will be inter-state supplies and attract IGST</u>** in terms of Section 5 of the IGST Act."*

Sale on Approval

- As per Section 12 of the CGST Act, the time of supply for goods is earlier of invoicing/ receipt of consideration
- According to Section 31 (7) of the CGST Act *'where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six month from the date of removal, whichever is earlier'*
- **Accordingly, for such movements, the time of supply would arise upon supply taking place or on expiry of six months from removal. Therefore, if goods return back prior to six months, GST would not be required to be paid**
- Rule 55 of the CGST Rules states that
  - The consigner may issue a delivery challan in lieu of an invoice at the time of removal of goods for transportation, the contents of delivery challan are also mentioned in the rule
  - Since such supply is only on a delivery challan no liability arises as there is no invoice or payment

JOB WORK TRANSACTIONS

Services of intermediary/ aggregators

- Can the intermediary/ aggregator be construed as job-worker?
  - In terms of Section 2(68) of the CGST Act ***'job work means any treatment or process undertaken by a person on goods** belonging to another registered person and the expression "job worker" shall be construed accordingly'*
  - As per FAQ issued by the CBEC
    - *Q 1. What is job work? - Ans. Job work means undertaking any treatment or process by a person on goods belonging to another registered taxable person.* ***The person who is treating or processing the goods belonging to other person is called 'job worker'*** *and the person to whom the goods belongs is called 'principal'. This definition is much wider than the one given in Notification No. 214/86 – CE dated 23rd March, 1986. In the said notification, job work has been defined in such a manner so as to ensure that the activity of job work must amount to manufacture. Thus the definition of job work itself reflects the change in basic scheme of taxation relating to job work in the proposed GST regime.*

For qualifying as job worker, the intermediary/ aggregator would be required to carry some treatment or process. Where the transaction is not structured as 'job work', GST would apply at the rate of 18%. However, it may be argued that qua the principle who sends the goods to the intermediary/ aggregator, in substance, the latter would be commercially perceived as a job-worker, though such view may be litigious

Movement for various processes in a single manufacturing cycle

- The modus operandi of jewellery manufacturing requires movement to various jobbers for various processes
- As per Section 143 of the CGST Act, a principal may move inputs from one job-worker to another, under intimation to the GST officer
- However, practically, the principal may not even be aware of the several movements that may take place in course of jewellery manufacture
- As per the GST framework, the principal is required to report movements made to each job-worker, as made under Section 143 (vide Form ITC-04- explained in subsequent slides)

1. Where possible and practical, all movements should be made under the delivery challan (issued in terms of Section 143) of the principal itself

2. To clarify the ambiguity as to the procedure for subsequent movements in course of job work, the CBIC has issued circular dated 26th March 2018

Job work Guidelines prescribed vide Circular No. 38/12/2018 dated 26th March 2018

Particulars	Prescription
Movement of inputs from the principal to job worker	-The inputs, semi-finished goods or capital goods received from the principal shall be under the cover of a delivery challan issued by the principal in triplicate -The challan issued by the principal to the job worker shall contain the details specified in Rule 55 -Where the inputs etc. are sent directly from the suppliers premises or from Customs port, the same should be under cover of supplier's invoice/Bill of entry. Separately, a corresponding delivery challan shall be issued by the principal
Movement of inputs from one job worker to another	-Goods may move under the cover of a delivery challan issued either by the principal or the job worker -Alternatively, the delivery challan initially issued by the principal may be endorsed by the job worker for sending the inputs to another job worker, indicating therein the quantity and description of inputs being sent -Same process may be repeated for subsequent movements of inputs to other job workers
Return of finished goods to the principal by the job worker	-The job worker should send one copy of the delivery challan received by him from the principal, after endorsing it, while returning the goods to the principal after carrying out the job work
Finished goods are returned in piecemeal by the job worker	-In case the finished goods, after carrying out the job work, are sent in piecemeal quantities by the job worker to another job worker or to the principal, the challan issued originally by the principal cannot be endorsed and a fresh challan is required to be issued by the job worker in each case

The afore-stated obligations cast on the job-worker should be applicable only in cases where the job worker is registered. Therefore, in cases where the job-worker is unregistered, a view may be taken that the correlated compliance requirements shall entirely be the onus of the principal

Processing/ manufacturing loss

- In terms of Section 143(5) *'any waste and scrap generated during the job work may be supplied by the job worker directly from his place of business on payment of tax, if such job worker is registered, or by the principal, if the job worker is not registered'*
- However, the aforesaid provision does not cover process loss/ manufacturing loss which is not recoverable
- In terms of Foreign Trade Policy issued by the DGFT, specific wastage norms are prescribed for the jewellery sector ranging from 0.20% to 5%
- Appropriate disclosure in ITC-04 and maintenance of correlated internal records will assist the principal to justify the process loss

1. *GST demand may be raised on the principal, in respect of such irretrievable process loss incurred, (as inputs not received back within 1 year and accordingly deemed to have been supplied by the principal to the job worker on the day when the said inputs were sent out). Such demand may be premised on the factor that the principal failed to provide value and quantity wise reconciliation of delivery challans vide which inputs were sent on job work basis and thereafter received back or supplied from the premises of the job worker, as required in terms of GST-ITC-04*
2. *The authorities may also presume that the volume of irretrievable process loss being claimed by the principal in fact pertains to turnover suppression or disposal of retrievable wastages, when in fact there is compelling evidence in India and universally as regards the phenomenon of irretrievable process loss being incurred in course of manufacturing activity carried out in this sector*

ITC-04

- As per Section 143 read with Rule 45(3), the principal is required to provide details of challans in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another during a quarter in FORM GST ITC-04
- ITC-04 to contain details of details of goods/capital goods sent to job worker & received back
  - Sent to the place of business / premises of the job worker
  - Received back from job worker to whom such goods were sent for job work
  - Received back from job worker other than the job worker to whom such goods were originally sent for job work
  - Sent to job worker and subsequently supplied from the premises of job worker

While the revised format of Form ITC-04 enables the principal to provide a quantitative level details of the process loss, the modus operandi pf the trade makes it difficult to carry out compliance there by requiring relook into the requirements of filing ITC-04.

Owing to technical glitches, CBIC extends the due date for filing declaration in FORM GST ITC-04 (Details of goods/ capital goods sent to job worker and received back) during July, 2017 to September, 2018 upto 31 December, 2018

Snapshot of GST- ITC- 04 to be filed by the principal (as amended)

E L P

"FORM GST ITC-04

[See rule 45(3)]

Details of goods/capital goods sent to job worker and received back

1. GSTIN -
2. (a) Legal name -
   (b) Trade name, if any –
3. Period: Quarter - Year -

4. Details of inputs/capital goods sent for job work (includes inputs/capital goods directly sent to place of business /premises of job worker)

GSTIN / State in case of unregistered job worker	Challan No.	Challan date	Description of goods	UQC	Quantity	Taxable value	Type of goods (Inputs/capital goods)	Rate of tax (%)			
								Central tax	State/ UT tax	Integrated tax	Cess
1	2	3	4	5	6	7	8	9	10	11	12

Snapshot of GST- ITC- 4 to be filed by the principal (as amended)

5. Details of inputs/capital goods received back from job worker or sent out from business place of job work

(A) Details of inputs/ capital goods received back from job worker to whom such goods were sent for job work; and losses and wastes:

GSTIN / State of job worker if unregistered	Challan No. issued by job worker under which goods have been received back	Date of challan issued by job worker under which goods have been received back	Description of goods	UQC	Quantity	Original challan No. under which goods have been sent for job work	Original challan date under which goods have been sent for job work	Nature of job work done by job worker	Losses & wastes	
									UQC	Quantity

Snapshot of GST- ITC- 4 to be filed by the principal (as amended)

(B) Details of inputs / capital goods received back from job worker other than the job worker to whom such goods were originally sent for job work; and losses and wastes:

GSTIN / State of job worker if unregistered	Challan No. issued by job worker under which goods have been received back	Date of challan issued by job worker under which goods have been received back	Description of goods	UQC	Quantity	Original challan No. under which goods have been sent for job work	Original challan date under which goods have been sent for job work	Nature of job work done by job worker	Losses & wastes	
									UQC	Quantity
1	2*	3*	4	5	6	7*	8*	9	10	11

(C) Details of inputs/ Capital goods sent to job worker and subsequently supplied from premises of job worker; and losses and wastes:

GSTIN / State of job worker if unregistered	Invoice No. in case supplied from premises of job worker issued by the Principal	Invoice date in case supplied from premises of job worker issued by the Principal	Description of goods	UQC	Quantity	Original challan no. under which goods have been sent for job work	Original challan date under which goods have been sent for job work	Nature of job work done by job worker	Losses & wastes	
									UQC	Quantity

GST- KEY OPEN ISSUES

Exports made for promotional tours/foreign exhibitions

- In terms of the para 4.46 of FTP 2015-2020 read with HBP, the GJI is permitted to export jewellery for display at foreign exhibitions

  Relevant Extract-*"Export Promotion Tours/ Export of Branded Jewellery*

  (i) *Nominated Agencies and their associates, with approval of Department of Commerce and with approval of Gem & Jewellery Export Promotion Council (GJEPC), may export gold / silver / platinum jewellery and articles thereof for exhibitions abroad.*

  (ii) *Personal carriage of gold / silver / platinum jewellery, precious, semi-precious stones, beads and articles and export of branded jewellery is also permitted, subject to conditions as in Handbook of Procedures."*

- Such movement of goods from India to outside is not on account of supply
- Such exports may wholly or partly crystallize into export sales after a gap of certain period of time. Accordingly, significant portion of the exported jewellery is destined to be re-imported back into India
- Option for zero-rating to be exercised at the time of physical exports (LUT/Payment)

Exports made for promotional tours/foreign exhibitions

Issue 1

Difficulty in claiming export related benefits under either of the zero-rating options, owing to uncertainty as to the ultimate exports and lack of facilitation in the GSTN to account for such transactions

Issue 2

At the stage of re-import of unsold products, benefit under entry number 5 of the **Customs Notification No. 45/2017-Cus dated 30th June 2017** disputable as initial export made under LUT (though without claim of corresponding benefit), thus hit by entry 1(d) to the said Notification

The Council, along with ELP, has filed representation with the various Authorities seeking redressal of the aforesaid issues

Procurement of gold from nominated agencies- GST related issue

- Section 147 of the CGST Act empowers the Government to notify certain supplies as deemed exports, where neither goods leave India nor payment is received in convertible foreign exchange
  - Supply of gold by the nominated agencies against Advance Authorization have been specifically notified as deemed exports

- As per Section 147, only supplies of such goods can be notified as deemed exports which goods are manufactured in India
  - The deemed export benefit under Section 147 in relation to supply of gold by nominated agencies has become redundant
  - Also, nominated agencies not inclined to opt for the benefit as not having any utilizable input tax credits (gold imports being exempted)
  - The exporting jeweller is therefore required to make upfront payment of 3% IGST on procurement of gold thereby blocking working capital.

The Council, along with ELP, has filed representation seeking an outright exemption, in line with the scheme prevalent for BCD under Notification No. 57/2000-Cus., dated 8th May 2000

ENFORCEMENT UNDER GST

GST- Returns and audit

Filing of monthly return

Rectification of return in terms of Section 39(9)- for any error or omission

Audit/ Filing of annual return

Particulars	Key aspects
Scrutiny of Returns **(Section 61)**	• A preliminary screening of returned values viz. GSTR 3B with GSTR 1, GSTR 3B with GSTR 2A • Explanation to be mostly sought by jurisdictional executive authorities by issuing a notice • No further action if discrepancies explained to officer's satisfaction • Dissatisfactory explanations to trigger audit, inspection or SCN proceedings
Audit (Departmental Audit) **(Section 65)**	• Audit by GST authorities to ensure correctness of claims and tax positions • No clarity on frequency or tax payment limits for GST audits • Likely to be initiated post submission of annual return / CA Audit report • Unexplained / unaccepted audit findings to lead to SCN proceedings
Special Audit **(Section 66)**	• Audit by Chartered Accountant or Cost Accountant nominated by the Department • Generally triggered in complex cases where - the value has not been declared correctly or credit is availed beyond normal limits
Investigation	• Investigation can trigger where proper officer has 'reason to believe' that the taxpayer has: ❖ suppressed any transaction of supply of goods or services or both; or ❖ suppressed supply information relating to stock in hand; or ❖ claimed excess input tax credit; or ❖ has contravened any of the statutory provisions • Triggered for industry / interpretational issues In addition to intentional / fraudulent activities

GST- Powers in investigation

- **Summon** persons (including senior personnel, regional or global officers)
- **Inspect** places of business during investigation
- **Search and seize** critical documents (including emails), books, etc.
- **Recording of statements**
- **Arrest person** reasonably believed to have committed certain offences

Offences	Monetary limit
• Supplying goods or services without invoice 'with the intention to evade tax' • Issuing invoice without supply of goods or services • Availing ITC using invoice mentioned above • Tax 'collected but not paid' for a period of three months from due date	Tax / ITC involved exceeds two crore rupees;

- Extensive powers of arrest under erstwhile Central excise and Customs regime (with respect to evasion of tax) restricted under GST
- Monetary threshold to invoke arrest powers has been enhanced

SENSITIVITY AROUND THE GJI AND MEASURES

Global initiatives to target vulnerabilities

ELP

- The Financial Action Task Force (FATF), an inter-governmental body, was established in 1989 by the Ministers of its Member jurisdictions. The mandate of the FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation etc.
  - Applicable to 'Designated non-financial businesses and professions' which is defined to **include dealers in precious metals and stones**
  - Key FATF recommendations for member countries are-
    - ✓ Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country and take corrective action, where necessary
    - ✓ Countries should have national anti-money laundering (AML) and combating the financing of terrorism (CFT) policies
    - ✓ Countries should criminalize- (a) money laundering, and, (b) terrorist financing
    - ✓ Preventive measures- (a) Customer due diligence and record-keeping, (b) Reporting of suspicious transactions
  - **India was admitted as the 34th Country Member of FATF (in June 2010)**
- USA, one of world's largest market for gems and jewellery, has, under the US Patriots Act, notified the application of Money Laundering laws to the GJI

India's adoption of the global initiatives & other initiatives

E L P

- The Prevention of Money Laundering Act, 2002 ('PMLA') enacted-
  - Made applicable to the dealers in precious metals, precious stones
  - Mandate specific reporting requirements (including for suspicious transactions) and KYC norms
- Demonetization exercise
  - Curbing black money, corruption and fake notes
  - Curbing terrorist funding
- India has implemented a new framework of accounting standards (Ind-AS)
  - Seeks to converge with IFRS, bringing India closer to the global reporting framework
- Various statutes such as Customs Act, 1962, Foreign Exchange Management Act, 1999 etc. already follow a discipline and a compliance regime which supports certain elements of AML
- Implementation of the GST regime has one of the stated objectives of expanding the universe of assesses operating within the regulatory framework
- PAN based KYC norms under the Income Tax provisions, for purchases above INR 2 lakhs

Owing to certain notifications issued and withdrawn in 2017, there have been apprehensions as regards applicability of PMLA to the GJI

DEVELOPING GOLD AS AN ASSET CLASS

Developing Gold as an asset class

- FM Budget speech 2018-
  - *'The Government will formulate a comprehensive Gold Policy to develop gold as an asset class. The Government will also establish a system of consumer friendly and trade efficient system of regulated gold exchanges in the country. Gold Monetisation Scheme (GMS) will be revamped to enable people to open a hassle-free Gold Deposit Account'*

- Niti Ayog Report- Transforming India's gold market- February 2018- Recommendations
  - Make in India Gold
    - Creation of jewellery parks
    - Boost exports through value addition and opening up of B2C
    - Make gold mining viable and attractive to investors
    - Create India Good delivery standard
    - Industry friendly hallmarking regime

Developing Gold as an asset class

- Niti Ayog Report- Transforming India's gold market- February 2018- Recommendations contd.
  - Financialisation of gold
    - Ensure greater participation around monetization schemes
    - Increase point of contact for collection of gold deposits by involving jewellers
    - Introduce new gold savings scheme
  - Tax reforms (reduce BCD, remove CTT & review GST provisions to support MSME)
  - Regulatory Infrastructure (setting up of Gold Board, Bullion Exchange Gold Domestic Council)
  - Skill development and employment generation

The enormous potential on one hand and the associated sensitivities on the other, prompt the Government to cautiously formulate policy for this sector, to meet the twin objectives of growth and enforcement