

# National Conference on GST

Some issues in Place of Supply of Services and Time of Supply of Services

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Organized by Navi Mumbai Branch of WIRC

*N.B. Background material on POS already circulated*

**PLACE OF SUPPLY (POS)**

**&**

**TIME OF SUPPLY (TOS)**

**Both are very significant in the study  
of GST law**

# **SOME ISSUES IN THE PLACE OF SUPPLY OF SERVICES**

# *What is GST*

- GST is one indirect tax for the whole nation – make India one unified common market
  - A destination-based tax on consumption of goods and **services**
  - Single tax on supply of goods and services, right from the manufacturer to the consumer.
  - Essentially a tax only on value addition at each stage with set – off benefits– seamless credit – consumer not burdened with cascading of taxes.
  - POS of services required to determine where services are supplied.

# Areas Covered



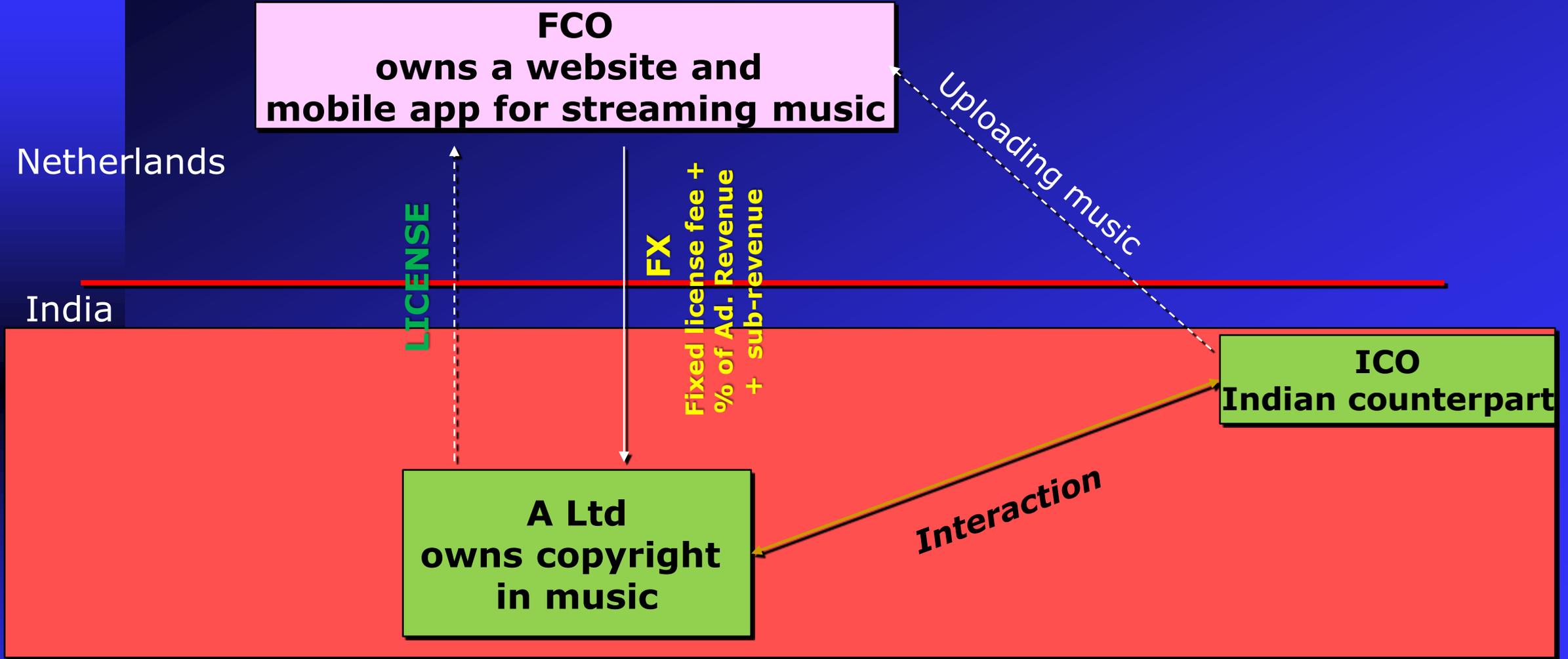
## Place of Supply of Services

- Domestic (*artificial creation of GST; s.12 of IGST Act; one of the factors to determine IGST or CGST + SGST; also relevant for input tax credit mechanism*)
- Cross border (*International Phenomenon; s.13 of IGST Act; determines import / export of services*)

# **CASE STUDY – 1**

## **OVERSEAS COMPANIES STREAMING MUSIC TO INDIAN AUDIENCE**

# FACTS



FootFalls



service



payment



## ISSUE



1. Footfalls of licenced music is in India.
2. All interactions is with ICO who is also situated in India
  - ❖ Agreement stage
  - ❖ Working mechanism Log management

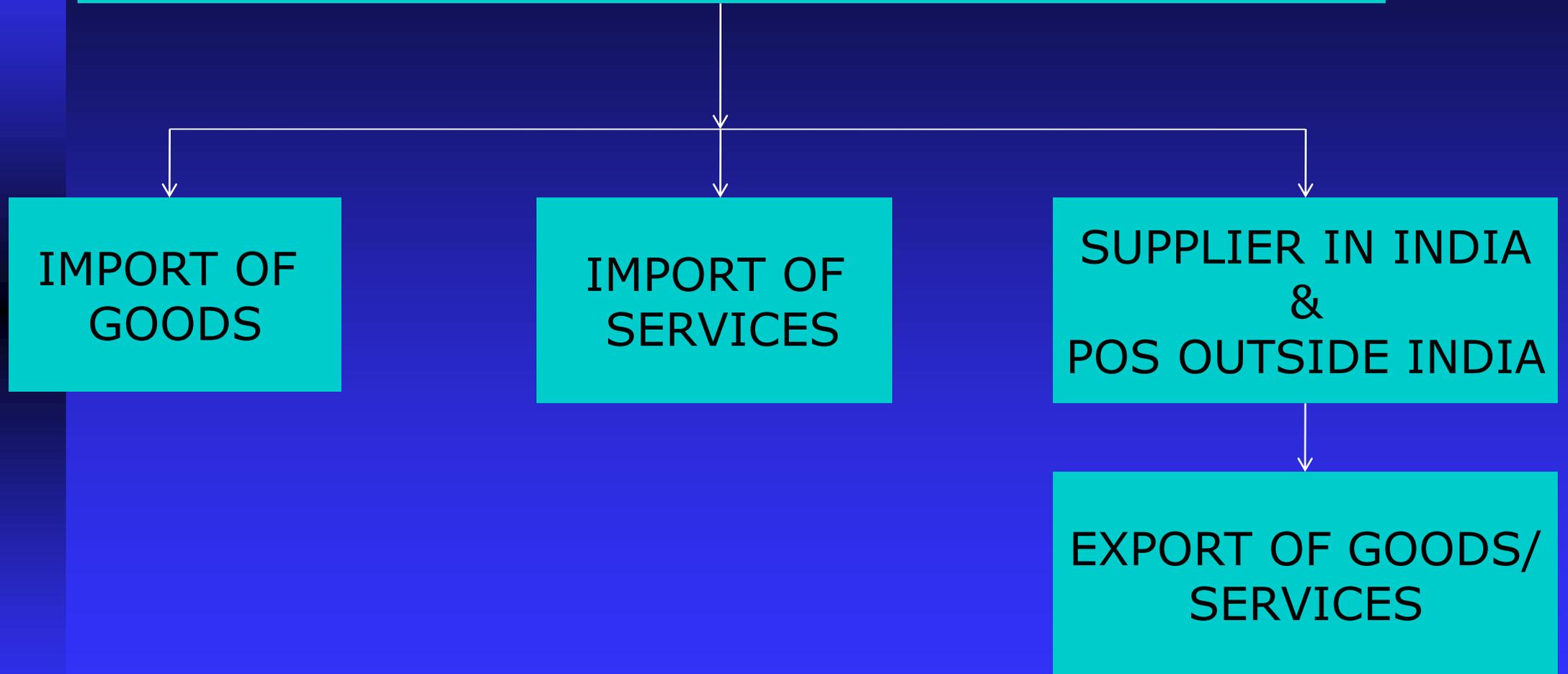
Whether supply made by A Ltd. is zero-rated or liable to GST?



## Levy of GST

- CGST / SGST to be levied on all *intrastate* **supply of goods and / or services** at rate notified
- IGST to be levied on all *inter-state* **supply of goods and / or services** at rate notified
- Tax to be paid by **taxable person**

# CROSS BORDER INTER STATE SUPPLY



# The INTEGRATED GOODS AND SERVICES TAX ACT, 2017

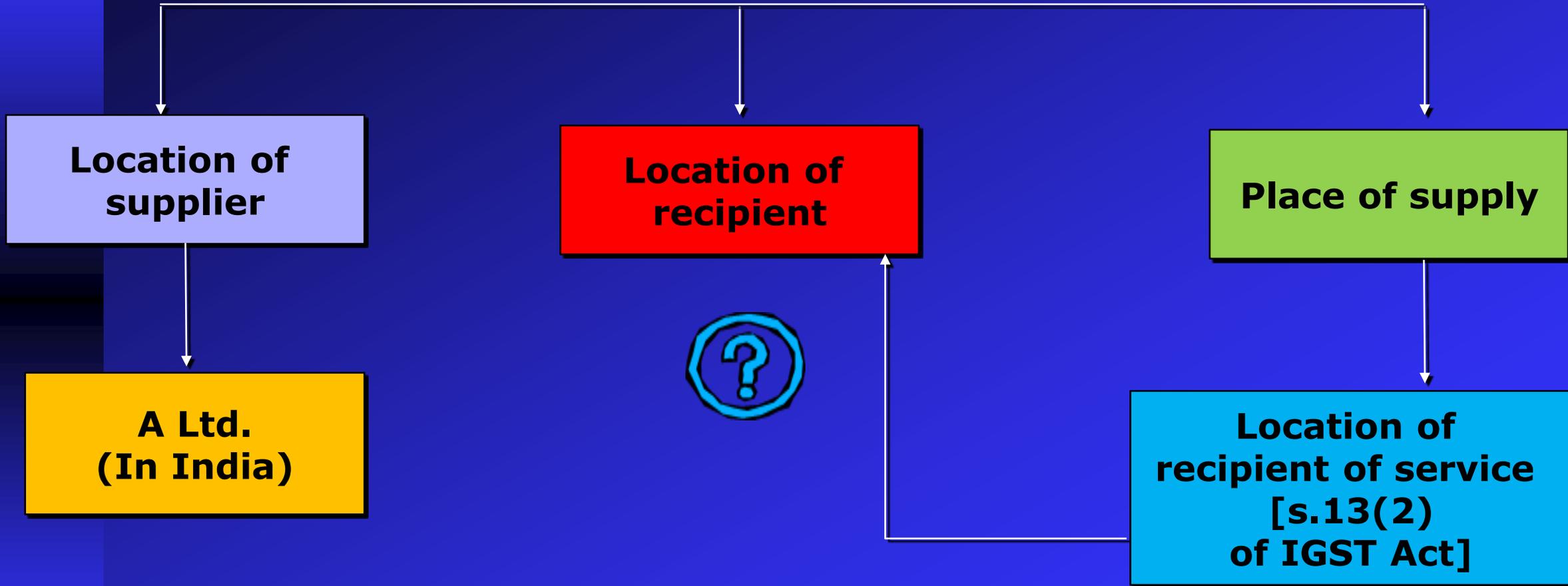
Section 2:

- (6) "export of service" means the supply of any service when
- (a) the supplier of service is located in India,
  - (b) the recipient of service is located outside India,
  - (c) *the place of supply of service is outside India,*
  - (d) the payment for such service has been received by the supplier of service in convertible foreign exchange, and
  - (e) the supplier of service and recipient of service are not merely establishments of a distinct person in accordance with explanation 1 of section 8;

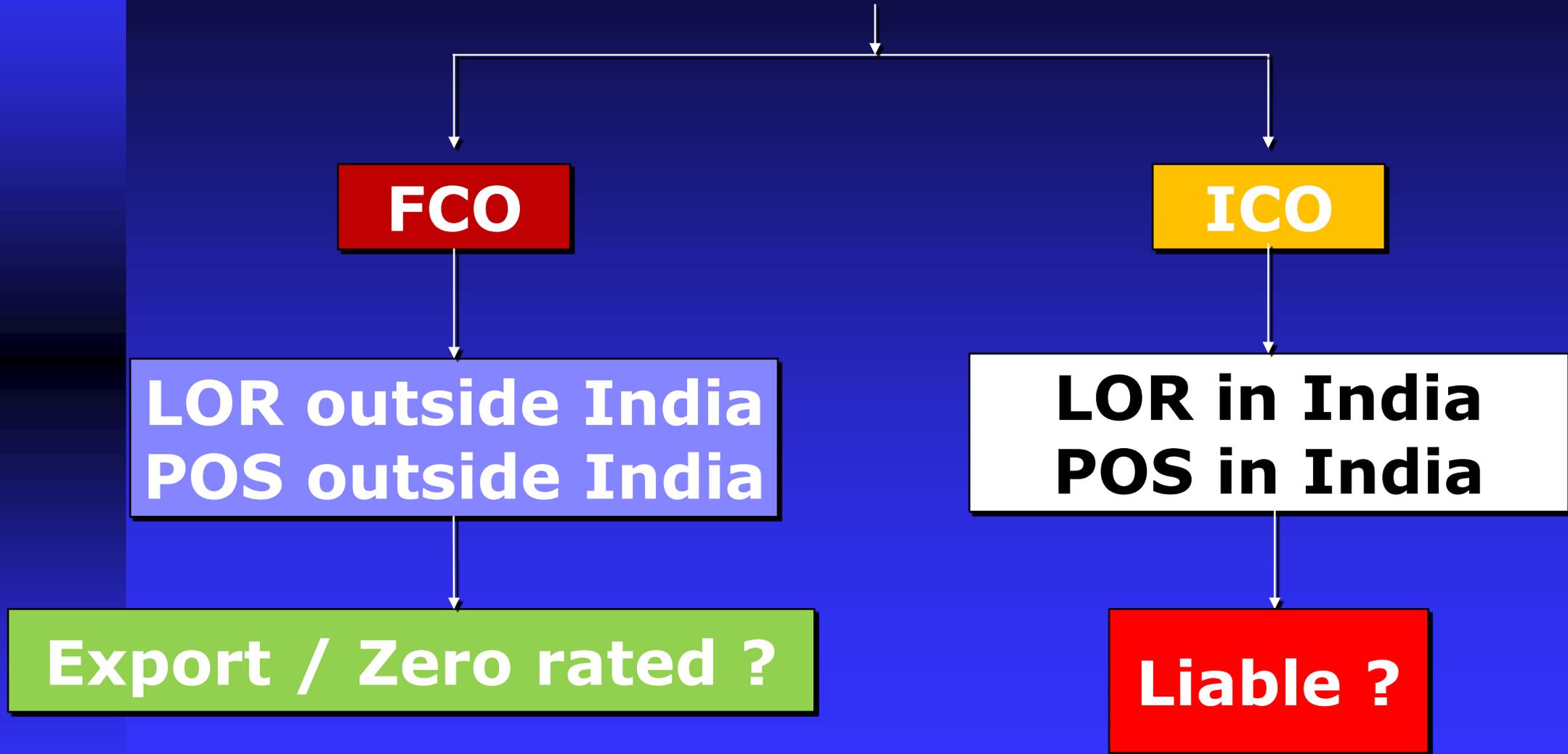
# Whether A Ltd.'s services will be considered as exports – s.2(6) of IGST Act.

Sl. no.	Conditions for supply to be considered as exports	Whether Satisfied
1.	the supplier of service is located in India	Yes
2.	the recipient of service is located outside India	?
3.	the place of supply of service is outside India	?
4.	the payment for such service has been received by the supplier of service in convertible foreign exchange; and	Yes
5.	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	Not Applicable

# Cross border transactions : Three important factors



# Who is the recipient of supply?



# Location of Service Receiver [S.2(14) of IGST Act 2017]

*Clause(i):* Supply received at Registered POB – Registered POB

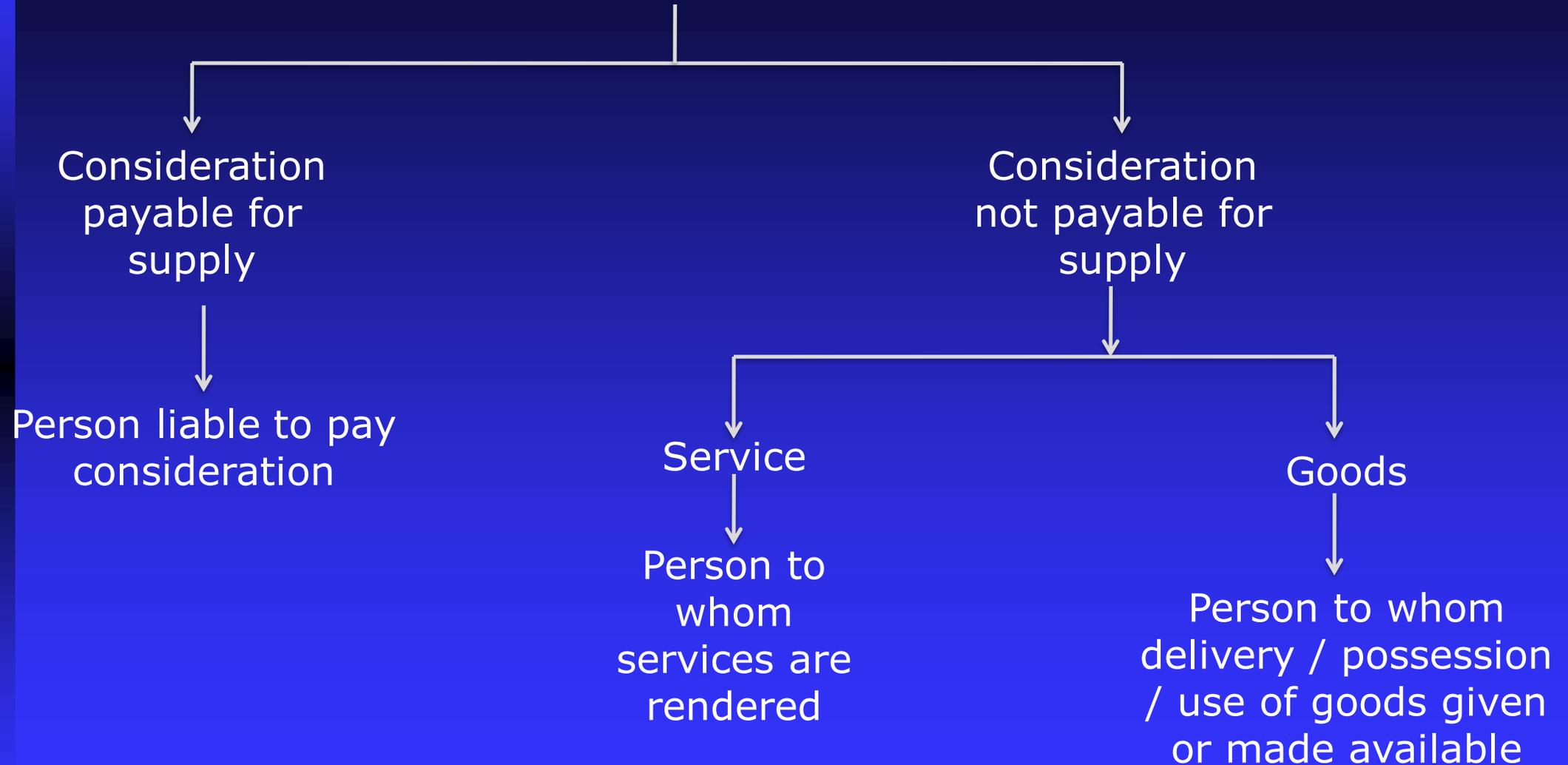
*Clause(ii):* Supply received at FE (other than Reg. POB) – Location of Fixed Establishment

*Clause(iii):* If supply received at > 1 POB/FE – POB/FE directly concerned in receiving supply

*Clause(iv):* If no POB/FE – usual place of residence

# Recipient of supply of goods / Services

s. 2(93) of CGST Act 2017



*Recipient includes agent*

# CONCLUSION

- ✓ Since FCO has establishment in Netherlands and A Ltd. has contracted with FCO qua its establishment in Netherlands and is obligated to render its licensing services to FCO; Only FCO has licence to stream the music.
- ✓ The benefit of A Ltd.'s services accrue mainly to FCO located outside India
- ✓ Only FCO legally obligated to make payment of consideration for supply by A Ltd.;
- ✓ ICO only a communication conduit between A Ltd. & FCO - not a beneficiary of A Ltd.'s service *qua* agreement with A Ltd.;

Good case to say that the location of service recipient is outside India & hence POS also outside India.

## **Case Study – 2**

# **PLACE OF SUPPLY IN RENTAL CONTRACTS**

# RENTAL CONTRACTS – INTER-STATE OR INTRA-STATE SUPPLIES?

## FACTS

**ABC Ltd. (Mumbai – HO)**



- Properties are Residential Dwellings given on rent
- No staff or office on either places to manage properties
- Contracts signed with Mumbai – HO

## ISSUE

- Whether ABC's supplies are intra state or inter-state supplies? Any other GST implications?
- Would it make a difference if properties are commercial premises

- S.9 of CGST (Charging section) levies GST on intra-state supply of goods and services.
- S.7 of IGST (Charging section) levies GST on inter-state supply of goods and services.
- For determining whether Intra-state / Inter-state?



## Place of Supply

Place of supply in respect of services directly in relation to immovable property including grant of rights to use immovable property is the location of immovable property [s. 12(3)]. In this case West Bengal and Kerala.

# Location of supplier- From where is the supply being made ?

## Location of Supplier of Service [S.2(15) of IGST Act 2017]

*Clause(i):* Supply from Registered POB – Registered POB

*Clause(ii):* Supply from FE (other than Reg. POB) – Location of Fixed Establishment

*Clause(iii):* If supply from > 1 POB/FE – POB/FE directly concerned in providing supply

*Clause(iv):* If no POB/FE - usual place of residence

# Whether ABC is having a fixed establishment in West Bengal/Kerala ?

## Fixed establishment [S.2(50) of CGST Act 2017]

Place (other than POB) having sufficient degree of permanence and structure in terms of human and technical resources to supply services or to receive and use services for own needs.

### 3 P's –

- *Place*
- *People*
- *Permanence*

- No staff or office to manage the properties at Calcutta/Kerala – Hence no human resources (people) or establishment (place). Hence No FE at West Bengal / Kerala. [In fact licensee may have an FE in terms of a leased premises].
- HMRC UK VAT Notice 741A (Published 24.2.2010 and updated upto 29.9.2022

### **“3.5 Examples of what is a fixed establishment**

.....

- a company with a business establishment overseas that owns a property in the UK which it leases to tenants — the property does not in itself create a fixed establishment, but, if the company has UK offices and staff or appoints a UK agent or representative (such as a subsidiary company acting on their instructions) to carry on its business, this creates a fixed establishment in the UK.

.....”

- Further, contract with Mumbai – HO which negotiates – terms & conditions etc. Hence Mumbai HO ***most directly concerned with providing supply***
- Usual place of residence – Mumbai. [Place of incorporation – s.113(b) of CGST Act]
- Government Tweet Clarification
  - "Q. whether I have to take registration in respect of each immovable property in case renting of immovable service?*
  - A. You may register only in one state and for other states you can raise invoice charging IGST."*
- Location of Supplier – Mumbai.
- Supply is inter-state supply – IGST chargeable.

## Taxability of Renting of Residential Dwelling

Sl. no.	Transaction	Taxability	RCM/FCM
1.	C to C	Exempt (See Note 1 below)	-
2.	C to B	Liable	RCM (See Note 2 below)
3.	B to B	Liable	RCM (See Note 2 below)
4.	B to C	Exempt (See Note 1 below)	-

### Note:

1. Entry 12 of Notification No – 12/2017- CT (R) dated 28.6.2017

2. Entry 5AA of Notification No – 13/2017- CT (R) dated 28.6.2017

## Taxability of Renting of Commercial Premises

Sl. no.	Transaction	Taxability	RCM/FCM
1.	C to C	Liable	FCM (See Note 1 below)
2.	C to B	Liable	RCM (See Note 2 below)
3.	B to B	Liable	FCM
4.	B to C	Liable	FCM

### Note:

1. If threshold turnover crosses 20 lakhs in an FY

2. Entry 5AB of Notification No – 13/2017- CT (R) dated 28.6.2017

## **Case Study – 3**

# **R&D SERVICES TO OVERSEAS FMCG COMPANIES**

**FMCG  
Soap Manufacturer**

Outside  
India

India

**ABC**

R&D agency –research, Product development, product sampling, market survey & submitting reports

## Contract between FMCG & ABC

- FMCG – desires to improve features and quality of its soap.
- ABC is a R&D agency
- FMCG sends some of its soaps to ABC and requests ABC to provide a report on the effects of 'Tulsi' and 'Neem' when added to the contents of the soap. Post addition these soaps are sent for sample and market survey.
- After feedback from the users ABC provides a report as to the effects of adding 'Tulsi' and 'Neem' to the soap.
- The soaps received from FMCG are never returned but get consumed in the process of analysis and market survey.
- Relevant ingredients such as 'Tulsi', 'Neem' and other materials to be purchased by ABC.
- ABC receives – (i) Fees for analysis; (ii) Cost of materials for research are reimbursed with a mark-up. All amounts received in convertible foreign exchange.

## SCN issued by Department

- ABC's services are in the nature of testing and analysis of goods of FMCG.
- The place of supply of services is to be determined by section 13(3)(a) which provides that place of supply of services in respect of goods made physically available by 'recipient' to 'supplier' in order to provide the service is the place where the services are performed.
- Since all the services are performed by ABC in India the place of supply of its services is India. Hence the supply of ABC is not 'exports' and accordingly it would have to pay GST.
- The place of supply of ABC's services is not the location of recipient of service i.e. outside India (FMCG) u/s. 13(2) as was contended by FMCG during investigation and in its pre-SCN reply.

# **Determining the Place of Supply**

## **Three Factors Relevant**

- Essential nature of supply provided by supplier to the recipient
- Identifying the possible candidates or pigeon-holes in section 13(2) to 13(13) and determining their scope
- Correlating the essential nature of supply with the possible candidates (pigeon-holes) and determining place of supply.

## Nature of Supply

- FMCG essentially wants data / study report regarding the effects of adding “Tulsi” and “Neem” to the contents of the soap. Whether it would enhance the quality?
- It banks on the expertise of ABC to conduct the study and provide the analysis and data.
- Thus, it requires data for decision making in future product development.

## Scope of Section 13(3)(a)

- Service must be “in respect of goods” made **physically** available by recipient so that the supplier is able to provide the necessary service in respect of **such goods**.
- The central theme is that recipient wants services in respect of the specific goods that are physically made available to the supplier so that the supplier can work upon them and return them to the recipient.
- The above can also gathered from section 13(3)(b) which provides that services supplied to an individual, either as a recipient or on behalf of the recipient, which requires the physical presence of the individual with the supplier to provide the service (e.g. Beauty treatment of a Model of an Advertising Agency). The recipient wants the service on the specific individuals belonging to him.
- Where the recipient purely requires data relating to his goods section 13(3)(a) may not be attracted since the essence of the supply is research or advisory in nature.

## Whether R&D Service of ABC falls u/s. 13(3)(a)

- ABC provides R&D service in relation to FMCG's soap where the essence of supply is to provide data after research regarding effects of adding "Tulsi" and "Neem" on the soap manufactured by FMCG. The service is advisory in nature.
- It is also not in respect of "*such goods*" physically made available by FMCG. The soap is never returned to FMCG but is consumed in the research process. What is delivered is the study report for decision making.
- Hence section 13(3)(a) is not applicable.
- No other sections of s.13(3) is applicable and the default section 13(2) which provides that location of recipient would be the place of supply would apply in the present case.
- Hence ABC's supply would be exports and zero rated.

# Education Guide on Rule 4(a) which is *pari materia* with section 13(3)(a)

## 5.4 Rule 4- Performance based Services

5.4.1 What are the services that are provided “in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service”?- sub-rule (1):

Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt

## Education Guide on Rule 4(a) which is *pari materia* with section 13(3)(a) contd.....

or possessed. **Examples** of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), **technical testing/inspection/certification/ analysis of goods**, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. **Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys.**

- While EG clarifies **testing and analysis** to fall under rule 4(a) / 13(3)(a)
- But it also clarifies market research services (i.e. study of consumers' preferences about say quality or other characteristics of a product) provided to a manufacturing firm would not fall under rule 4(a) / 13(3)(a) even if recipient provides the sample products to the market research firm.
- The above explains the scope of section 13(3)(a) – while testing for the “specific goods” provided by recipient e.g. mango testing for a foreign buyer could fall u/s. 13(3)(a) a commissioned “research” on foreign firm’s product would not. In order to fall u/s. 13(3)(a) the services must be “specific goods” centric and not “research centric”.

### “9.7 Work carried out on goods

Work carried out on goods is essentially any physical service carried out on another person’s goods.

Examples include:

- processing, manufacturing or assembling
- repairs, cleaning or restoration
- alterations, calibrations, insulating, lacquering, painting, polishing, resetting (of jewellery), sharpening, varnishing, waterproofing
- nominations to stallions, covering (that is, attempting to secure the pregnancy of mares)

***Amongst the types of service not included as valuation services or work on goods are:***

- work which is not mainly physical work performed on the goods themselves, for example inspection for a purpose other than valuation
- ***testing and analysis of goods – the physical work simply provides data for the required analysis***

**Good case not services do not fall u/s 13(3)(a) but u/s. 13(2) and therefore “exports”**

## **TIME OF SUPPLY OF SERVICES**

**[is the point at which the liability to pay tax arises on supply of services – s. 13(1) & (2)]**

# **Case Study – 4**

## **Intellectual property Rights [Copyrights]**

# FACTS

- **2020:** 'A' – an owner of Copyrights in music albums files a case/suit on 'B' for infringement for 300 crores for the period 2015-2020
- **2020-2024 (30<sup>th</sup> June):** 'B' contests the case *inter alia* amongst the ground that 'A' does not own the Copyright.
- **2024 (1<sup>st</sup> July):** 'A' & 'B' arrive at a settlement whereby 'B' agrees to pay 'A' 150 crores.

# Terms of Settlement

- 'B' acknowledges 'A's copyrights in the albums and that he should have taken a licence before the use. 'A' agrees to withdraw the suit on the following terms
- **Pre-suit compensation (2015-2020) :** 150 crores payable as follows:
  - 15/7/2024 : 75 crores
  - 15/10/2024 : 75 crores
- **Post- suit compensation (2020-2024) :** 100 crs. payable as follows:
  - 15/9/2024 : 50 crores
  - 15/11/2024 : 50 crores
- **Future license Fees post 1<sup>st</sup> Juy 2024:** 1 year license fee - Rs. 12 crores payable monthly [ 1 crore per month]

## **'A' Pays GST without waiting for due dates of payment as follows:**

- **Pre-suit Compensation** : Billed on 1<sup>st</sup> July 2024: 150 crores – Tax paid on 21<sup>st</sup> August, 2024 through GSTR-3B.
- **Post suit compensation** : Billed on 1<sup>st</sup> September, 2024 : 100 crores – Tax paid on 21<sup>st</sup> October, 2024 through GSTR-3B.
- **License fees post 1.7.2024** : Tax paid each month as and when payment falls due after raising an invoice.

## DEPARTMENT ISSUES SCN ON 'A' (Grounds)

- 'A''s supply to 'B' is not a '*continuous supply of services*'
- **Pre-suit compensation (Rs. 150 crores)**: Tax should have been paid during **2015 - 2020** at the beginning of each F.Y. on Rs. 30 crs. for each FY (150/5)], but tax paid only in August, 2024. Hence there is delay in payment.
- **Post-suit compensation (Rs. 100 crores): 2020 to 30.6.2024: Tax should have been during 2020 - 2024.** But tax paid only on 21<sup>st</sup> October, 2024. Hence there is delay in payment.
- **1 year license fee** : Tax should have been paid on 12 crs. when license is granted (1<sup>st</sup> July) by 21<sup>st</sup> August, 2024 since it is not a continuous supply. Hence there is a delay in payment.
- SCN seeks to levy interest & penalty
- What are 'A's defenses.

## A's reply: GST on pre-suit & post suit compensation

- There is no 'supply' 'made or agreed to be made' by A to B by grant of license to use copyrighted music in its albums prior to 1.7.2024. There being no supply- no tax was payable. Hence question of delay in payment of tax does not arise.
  - Section 9 imposes GST on 'supply' of goods or services. Section 7(1)(a) defines scope of supply as follows:

*"7(1)(a) For the purpose of this Act, the expression "supply" includes –*  
**all forms of supply** such as sale, transfer, barter, exchange etc. **made or agreed to be made** for a **consideration** in the course or furtherance if business"
  - Thus, a supply must actually be made or there must be an "agreement" (a consensus or understanding) to make a supply. If there is neither a supply or nor is there an agreement to make a supply there is no tax.

- From 2015 to 2020: There is no license – Hence suit. Hence no supply
- From 2020 to 2024: 'B' has disputed A's copyrights. Hence no license. Hence no supply.
- Since no supply no tax.
- No consideration arrived at prior to 1<sup>st</sup> July, 2024. Consideration determined only on 1<sup>st</sup> July, 2024 (date of settlement agreement) which provided for various milestone payments. There being no consideration during 2015 – 1<sup>st</sup> July, 2024, no tax is payable. Hence question of delay in payment does not arise.
- It would be impossible to pay GST during 2015- 1<sup>st</sup> July 2024 on 250 crores (150 crs + 100 crs) when consideration itself determined on 1<sup>st</sup> July, 2024. Based on doctrine of impossibility of performance 'A' cannot be said to have defaulted in delayed payment of tax on time. [See *CIT vs Engineering Analysis Centre of Excellence* (2022) 3 SCC 321]

- Pre & Post suit compensation is essentially a compensation for past infringement which is in the nature of liquidated damages and not consideration for supply. [See Circular no. 178/10/2022-GST dated 3.8.2022:  
*"7.1.5.Examples of such cases are damages resulting from damage to property, negligence, piracy, **unauthorized use of trade name, copyright, etc.**"*

**LAST ARGUMENT FOR PRE & POST SUIT  
COMPENSATION & ALSO LICENCE FEE - TAX IS PAID  
WITHIN DUE DATES AS PER TIME OF SUPPLY  
PROVISIONS.**

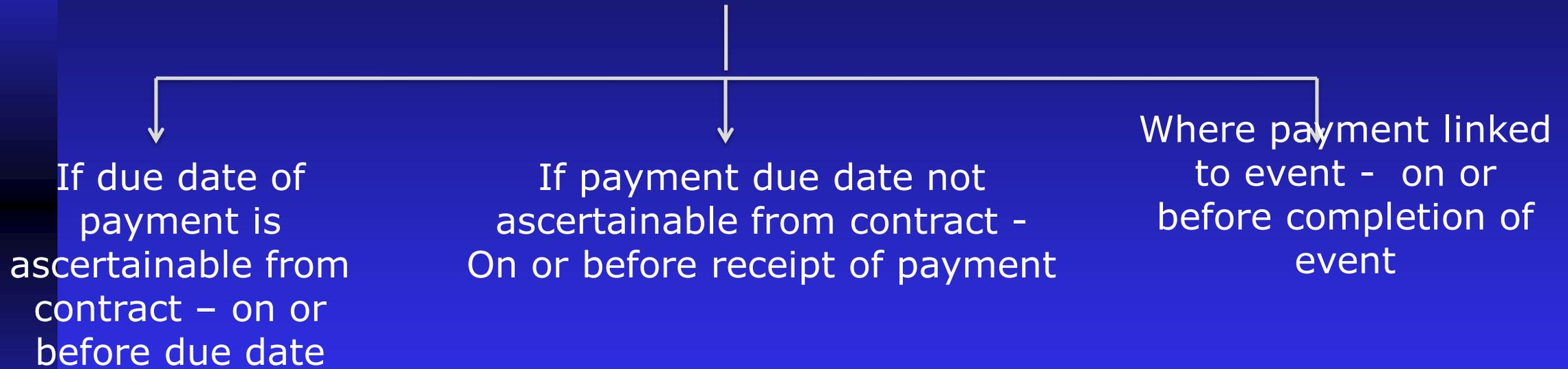
## Section 13(1) – Time of supply of services

- Earliest of -
  - Date of receipt of payment
  - Date of issue of invoice where invoice issued within *'prescribed'* time
  - Date of provision of service if invoice not issued within *'prescribed'* time

Time limits for issue of invoice is therefore important

- **Time limits for issue of invoice**

- **Non- continuous supply** – section 31(2) r.w.r. 47 – 30 days from date of supply of service.
- **Continuous supply of services** – section 31(5) of Act.



**Whether licence to use copyright in albums is non-continuous supply or continuous supply?**

- What is 'Continuous supply of service'? [Section 2(33)]

*"continuous supply of services" means a supply of services which is provided, or agreed to be provided, **continuously or on recurrent basis**, under a **contract, for a period exceeding three months** with **periodic payment obligations** and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;"*

- Continuous supply – 3 conditions must be fulfilled cumulatively:
  - Supply must be provided **'continuously' or on a 'recurrent basis'**;
  - Period of Contract must exceed 3 months;
  - There must be periodic payment obligations.
- Pre-suit, Post-suit compensation (if at all under contract) and yearly license – period exceeds 3 months and there are periodic payment obligations. **But is the supply provided on 'continuous basis'?**

**Shorter Oxford English Dictionary Sixth Edition defines “continuous” (adjective) as:**

*1. Characterized by continuity; extending in space without a break; **uninterrupted in time or sequence**; acting without interruption; connected.*

**P Ramanatha Aiyar’s Advanced Law Lexicon – 4<sup>th</sup> Edition – Volume 1 – Page 1032**

**“Continuously.** *The word ‘continuously’ is one definitely means **uninterruptedness in time sequence** or essence and it would also mean “recurring at repeated intervals so as to be of repeated occurrence.” Raymond Ltd. V. M.P. Electricity Board, AIR 2001 SC 238. [MP Electricity Board Agreement for High Tension Supply, cl. 23]”*

**UK Internal VAT manual explaining “continuous supply of services”:**

“With a continuous supply of services (for example the provision of telephone service) rather than an outcome, what the customer receives might be described as a recurring stream of supplies, each portion of which is significant in terms of the

*customer being able to use and consume them. In this case the supplies are never "completed" in the same way as the other categories are. The supply might be terminated but this is more a case of the supply ceasing rather than something finally being accomplished.*

***Examples of the type of supply that can meet this criteria include***

- *the services of a trustee;*
- ***regular or periodic maintenance work;***
- *services supplied by credit card companies to retailers;*
- *club membership;*
- *management services;*
- *agency services;*
- *long-term loans or secondments of staff; and*
- ***hire, lease or rental of equipment.***

*The above list is not exhaustive and is intended for illustrative purposes only. Whether something amounts to a continuous supply of services will ultimately depend on the individual facts of the case."*

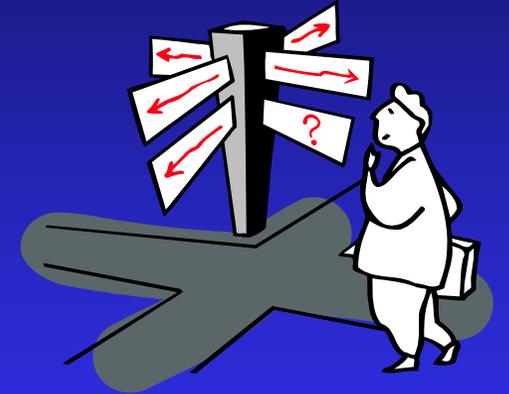
- License to use copyrighted music albums enables the user to legitimately use and consume the copyrighted music (supply in this case) '**uninterrupted sequence of time**' during the period of license rather than as a one time activity. E.g. AMC or hire of equipment, etc.
- Hence supply of service by 'A' to 'B' is a 'continuous' supply. SCN contention that it is not a continuous supply is incorrect.
- Present case, date of payment of consideration ascertainable from contract [Section 31(5)(a)]. Hence invoice to be issued on or before receipt of consideration.
- 'A' has issued invoices before the due dates of payment of consideration.
- No delay in payment of tax. Hence no interest or penalty payable.



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