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GST Charcha: Retrospective Application of Merchant Trading, In-bond sales and High sea sales covered in Schedule III

One of the significant changes proposed by the GST Council in its recently concluded 28th meeting on July 21, 2018 is inclusion of following transactions in Schedule III to the CGST Act, 2017 (i.e. activities or transactions which shall be treated neither as a supply of goods nor a supply of services):

- **Merchant trading** i.e. supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into the taxable territory.
- **High seas sales** i.e. sale carried out by the actual consignee shown in the Bill of Lading to another buyer while the goods are yet on high seas or after their dispatch from the port of loading and before entering the customs frontier of India.
- **In-bond Sale** i.e. Sale of imported goods from customs bonded warehouses

Further, it has been proposed that these transactions shall not be regarded as exempt supply for reversal of input tax credit.

Indeed, the proposal of keeping the said transactions out of the scope of exempt supply turns out to be a very beneficial and trade friendly measure for the taxpayer as it will help the taxpayer to avail input tax credit, which otherwise would have been blocked had it not been kept out of the scope of exempt supply.

The aim of this GST Charcha is to draw a conclusion whether the said changes should be made applicable retrospectively or prospectively.

The general principle of fiscal jurisprudence entails that a new tax amendment should govern the present and the future events and not the past events. On the other hand, while discussing the retrospectivity of a statute, the Hon'ble Supreme Court in the case of ***Commr. of Income Tax-I, New Delhi Vs. Vatika Township P. Ltd [(2014) 227 Taxman 121 (SC)]*** has held that if a legislations confers a benefit to the taxpayer without inflicting detriment to any other person or to the public in general and where the object of the legislators was to confer such benefit to the taxpayer, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect.

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Out of total 46 amendments so proposed by the GST Council, it becomes very pertinent to note that the amendment to include merchant trading transactions, high seas sales and sale of imported goods from the customs bonded warehouses for home consumptions in Schedule III have been found to be beneficial for the taxpayer and termed as trade friendly measure. Further, to buttress the argument, the rationale/remarks in the Draft of proposed amendments specifying said transactions are put out of the scope of 'exempt supply' not only shows the benefit the said amendment wants to transfer but also shows the declaratory nature of the amendment.

Further, to have retrospective application of the amendments, it should be declaratory in nature and which try to remove the anomalies from the existing understanding of the law. There are certain ingredients that make an amendment **declaratory** in nature.

The declaratory statutes have a common characteristic of removing doubts existing to the common law, or the meaning or effect of any statute. The legislature wants to do away with the vice of double taxation as recently, clarifications were issued by the CBIC with respect to in-bond sales and high sea sales (and amendments made to Customs Tariff Act) clarifying that IGST shall be charged only once and that too as an additional duty of customs at time of clearance of such goods.

Therefore, this amendment proposed to remove the double taxation on the sale of imported goods in the Customs Bonded warehouses, and High Seas Sale along with non-levy of IGST on the merchant trading transactions is in pursuance to the aim of the legislature to do away with the ambiguities in the statute.

Though the amendment does not mention these amendments to be 'clarificatory' but while determining the nature of the Amendment, regard must be given to the substance of the amendment rather than to the form. This is precisely what the amendment is trying to convey when it declares that from now onwards the merchant trading transactions, high seas sales and the sale from customs bonded warehouses of the goods imported shall be included within Schedule III of the CGST Act, 2017. Further, the said transactions have been declared to be out of the scope of 'exempt supplies'.

Conclusion:

Thus, it can be safely concluded that the said amendments proposed are declaratory in nature and fit for having a retrospective application for the benefit of the taxpayers.

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But, it is highly advisable that the proposed amendment of stated transactions should be made applicable retrospectively being clarificatory in nature. This would help in reducing unwanted litigations.

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