

Interpretational issues in FMCG Industry

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Issues in FMCG Industry

Taxability of Discount Scheme



Post Supply Discounts

Case Study 1 : Discount based on purchase made by distributor from retailer

Dependent upon purchases made by distributor. For eg. If distributor shall purchase 100 units of a product, he shall be provided with additional 3% discount

Case Study 2 : Discount dependent upon sales by distributor to retailer

Distributor to be provided with additional 3% discount if he sells 100 units of the product to retailer



Case Study 3 : Goods sold at lower price by retailer

Distributor to ask the retailer to sell goods at lower price to the customer and recover differential from the manufacturer

Case Study 4 : Sale to Corporate Customer

Retailer to be provided with additional 3% discount on sale made to corporate customer

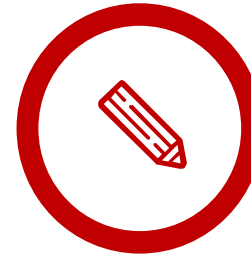
Case Study 5 : Organisation of event by distributor for manufacturer

Displaying of product by the distributor at special strategic location



Section 15(3)(a) – Discount on invoice

The value of the supply shall not include any discount which is given before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply.



Section 15(3)(b) – Post Supply Discount

The value of the supply shall not include any discount which is given--

(b) after the supply has been effected, if--

such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

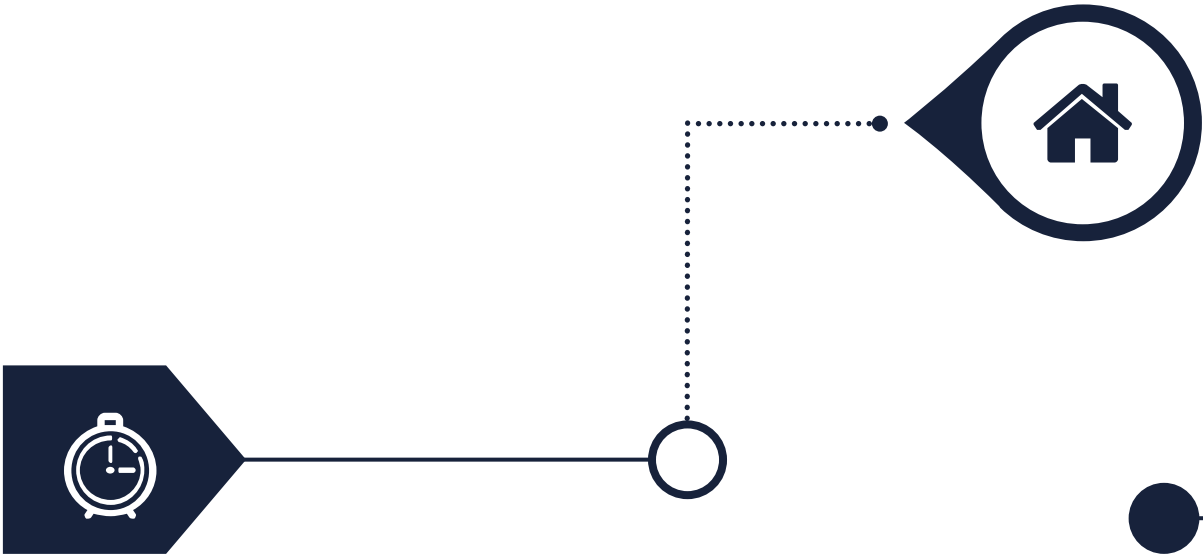
(i) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.



UOI vs Bombay Tyres International Private Limited – Supreme Court

Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, **if established under agreements or under terms of sale or by established practice**, the allowance and the nature of discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because **they are not payable at the time of each invoice or deducted from the invoice price.**



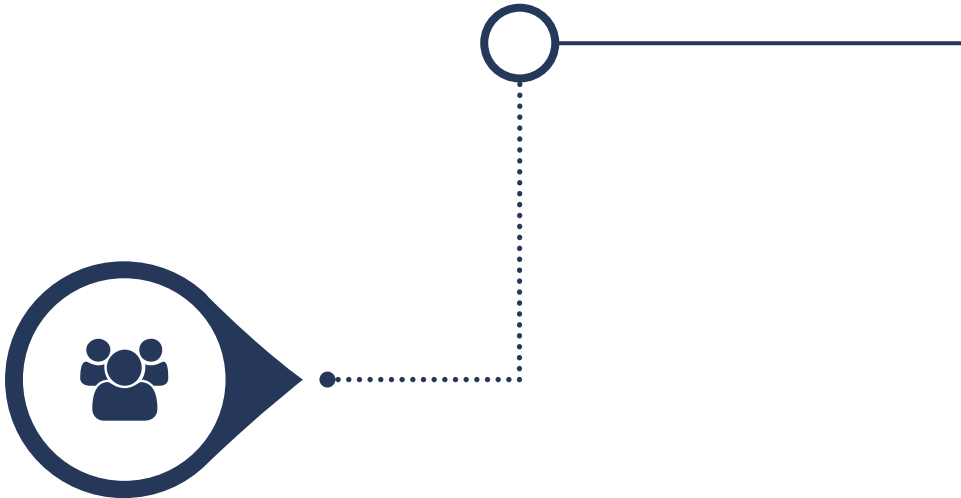


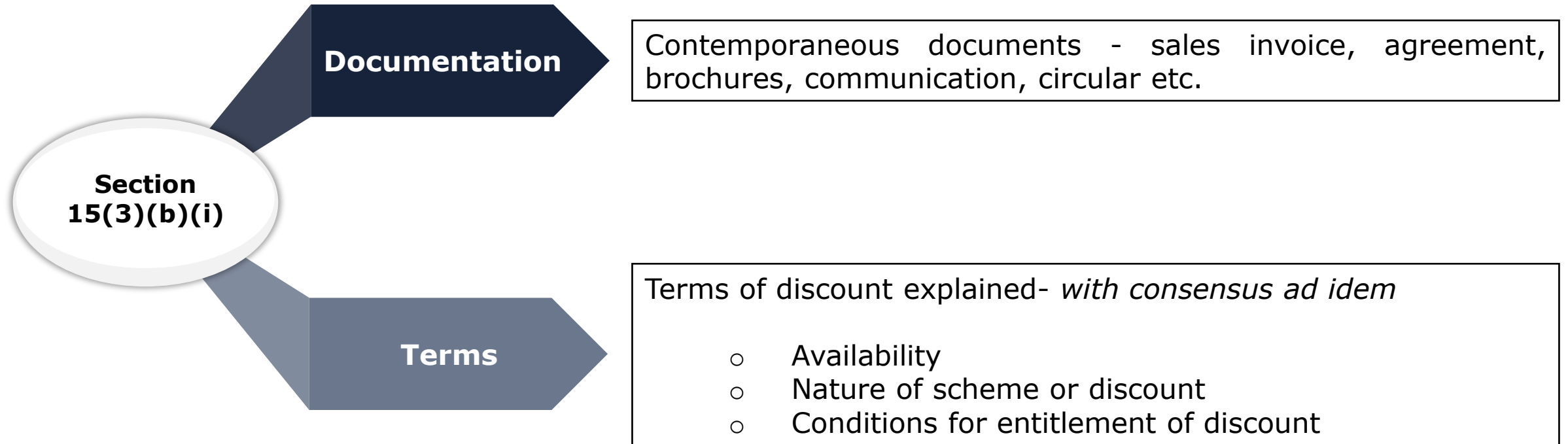
IFB Industries Ltd. Vs State of Kerala [SC] and Godavari Fertilizers and Chemicals Ltd. v. Commissioner of Commercial Taxes [AP HC]

A discount given by means of credit notes issued subsequent to the sale is as much a trade discount admissible to deduction in determining the turnover of a dealer.

SOUTHERN MOTORS Vs. State of Karnataka 2017 (358) E.L.T. 3 (SC)

- ✓ To reiterate, trade discount though an admitted phenomenon in commerce, the computation thereof may depend on various factors singular to the parties as well as by way of uniform norms in business not necessarily enforceable or implementable at the time of the original sale.
- ✓ To deny the benefit of deduction only on the ground of omission to reflect the trade discount though actually granted in future, in the tax invoice/bill of sale at the time of the original transaction would be to ignore the contemporaneous actuality and be unrealistic, unfair, unjust and deprivatory.

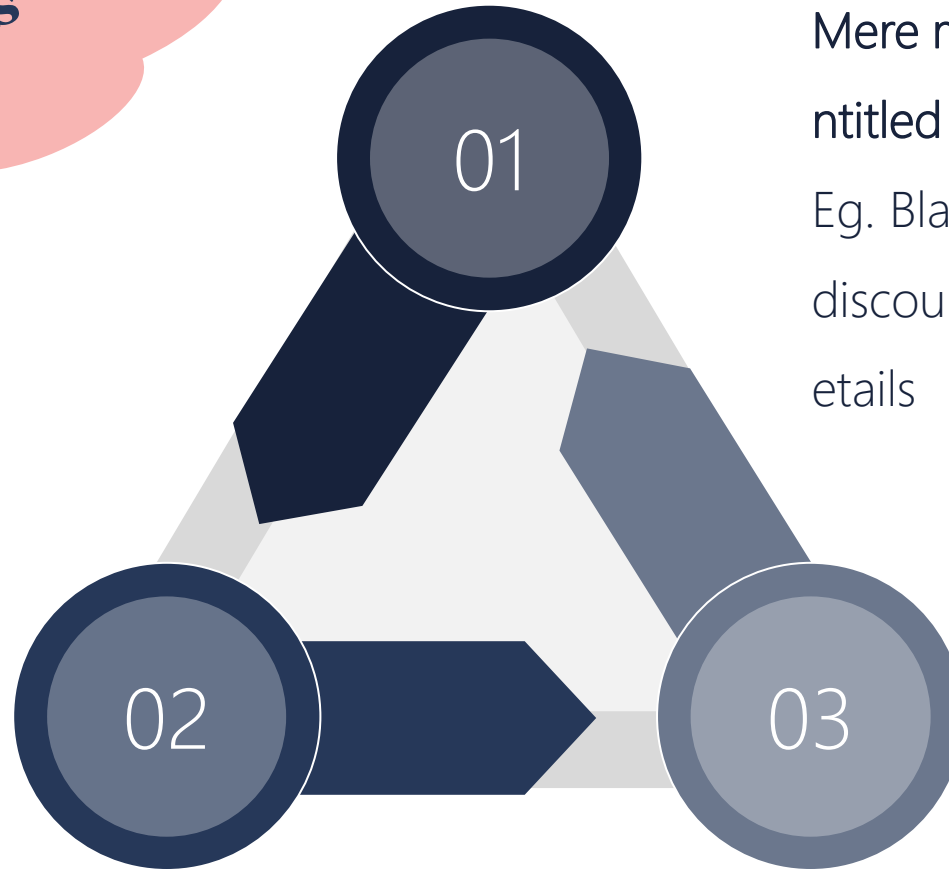




How much is sufficient?

Event linked to discount (i.e. criteria) are given, without quantum of discount

Eg. Purchase Target communicated, but no details of amount, rate etc.

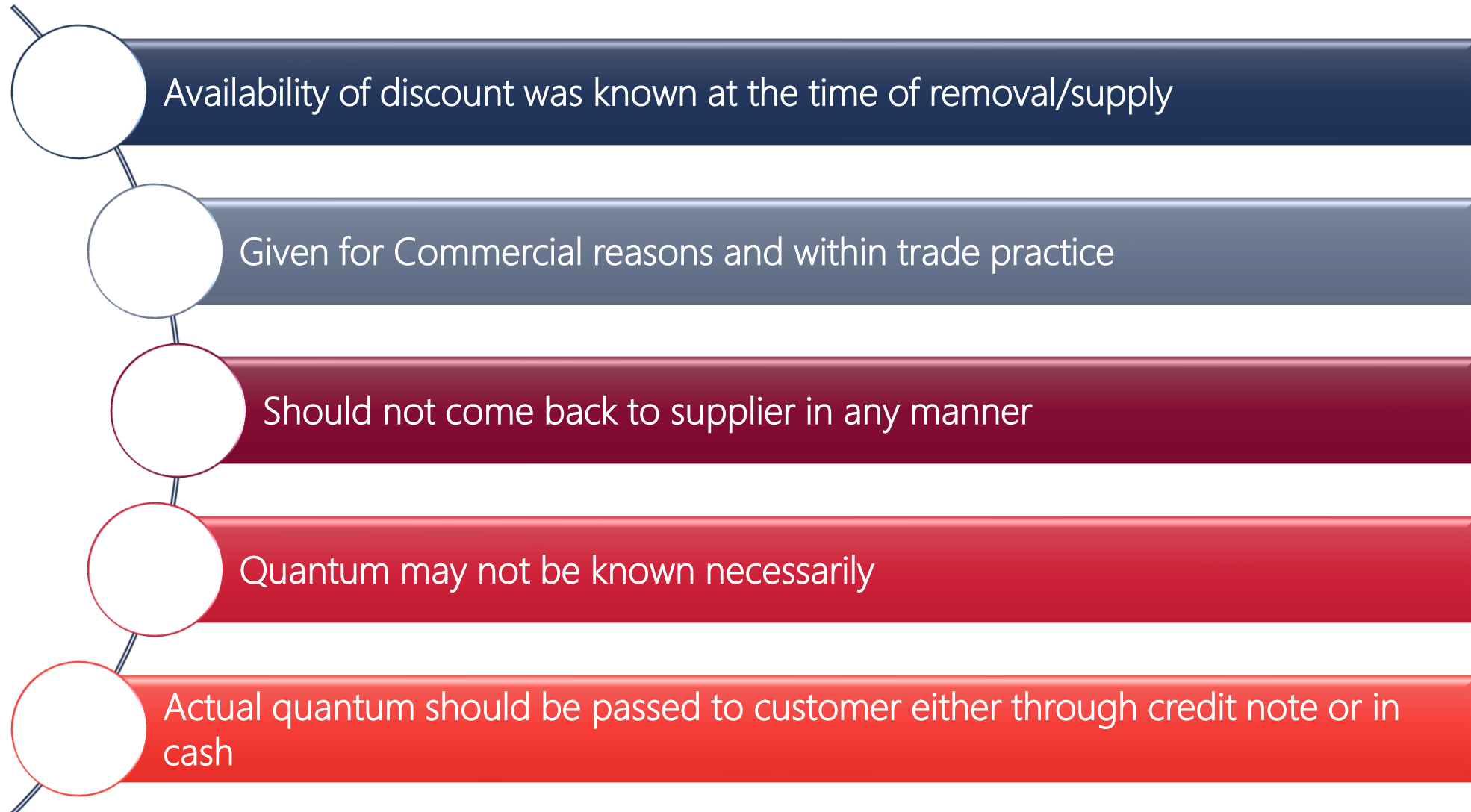


Mere mention that recipient will be entitled to discount

Eg. Blanket circular announcing that discount will be given without any details

Computation criteria informed but not triggering event

Eg. Overall discount of Rs 50000 (without any criteria)



Case Study 1 : Discount based on purchase made by distributor from retailer

- ❑ Shall qualify as post supply discount if all the conditions met
- ❑ Issuance of **Credit Note** (Both GST and Commercial Credit note) – **Allowed**
- ❑ Where **commercial credit note** issued – **No** need for **input tax credit reversal** by distributor
- ❑ **Credit note issued under Section 34** – ITC needs to be reversed by the distributor

Discount based upon purchase made by distributor from manufacturer

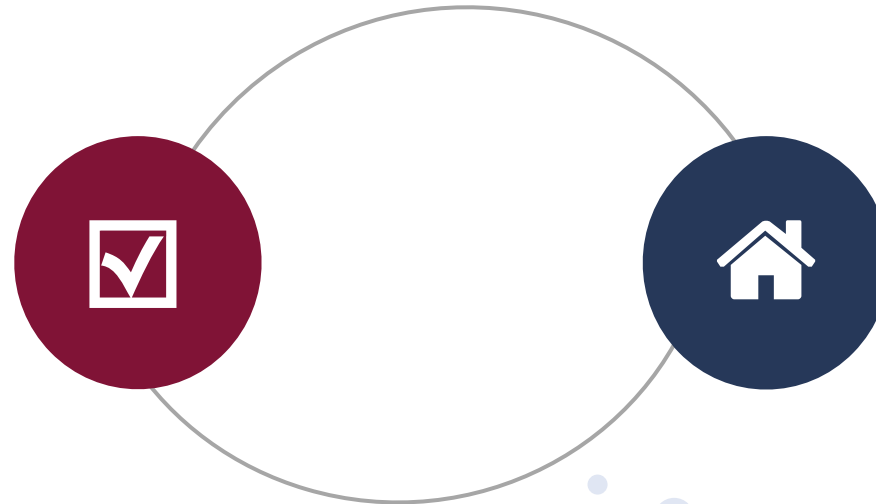
Section 34(1): *Where one or more tax invoices have been issued for supply of any goods or services or both and the taxable value or tax charged in tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where goods supplied are returned by recipient, or where the goods or services supplied are found to be deficient, the registered person who has supplied such goods or services or both, **may** issue to the recipient one or more credit notes for supplies made in a FY*

Case Study 2 : Discount dependent upon sales by distributor to retailer

Jurisprudence under earlier regime

:

- a. **CST Mumbai vs Sai Service Station Ltd**
- b. **Sharyu Motors vs CST Mumbai**
- c. **Satnam Auto vs Commissioner of Central Excise and ST, Meerut**
- d. **M/s Popular Vehicles and Service Ltd. Vs CCE**



As per various jurisprudence referred below, incentives received by dealers on achieving sales target shall not be considered to be promotion or marketing service under business auxiliary services.

Please note that the said judgments does not talk post supply discount and its inclusion/exclusion in value of service

Retail Incentive Scheme – AAR under GST

M/s Kwaliti Mobikes (P) Ltd – AAR

Karnataka

Distributor received volume discount – wholesale and retail

Observation : Since the amount received in the form of credit note is actually a *discount* and not a supply by the applicant to the authorised supplier, the applicant need not issue tax invoice for this transaction.

- *Volume Discount/Wholesale discount settled through commercial credit note – Not a supply by distributor*

Incentives Offered

- Manufacturer introduced various incentives **on off-take and retail targets** of the dealer on certain specified vehicles (Say Model A and Model B).
- Schemes were in the nature of providing accessories, loans with soft interest rates, free extended warranty, or free insurance cover provided for the vehicles. Also includes cash discount on invoice.

Manner of disbursement

- Based on the performance of the dealers in the previous months vis-à-vis the target achievement, the incentive amounts paid in respect of each brand of cars i.e. Model A and Model B.
- Model A carried lower duty than Model B.
- The amount of incentive payable in the system was given as ‘discount’ on sale of Model B only (on invoice discount).

Whether discount? Whether price adjustment is allowed?

Tata Motors Ltd. Vs Commissioner of Central Excise, Tribunal - Mumbai

- That is, it is not known at or prior to the removal of the goods; it is not in accordance with any established trade practice. **It is not passed on as a price reduction of the goods to which it pertains to. It is not a trade discount at all** so as to be eligible for exclusion from the assessable value.
- It is a compensation for the services rendered by the dealers on behalf of the manufacturer, masqueraded as a discount; it is not passed on to the end-customers; and it is not passed on as a price reduction of the goods to which it pertains to.
- Appellant chose to pass on incentive amounts to dealers in guise of special discount by reducing transaction value of only Indigo cars purchased by dealers during subsequent months and not by adjusting running account of dealers with appellants.

Case Study 3 : Goods sold at a lower price by retailer

Case Study 4 : Sale to Corporate Customer



Is it a post supply discount?

Shall it be treated as consideration received from third party and tax be paid on the entire amount?

As per Section 2(31) of the Act, consideration shall inter-alia include payment made whether by the recipient or by any other person

Shall it be treated as supply of separate service?

As per Clause 5(e) of Schedule II agreeing to the obligation to do an act shall be treated as supply of service under GST

Case Study 5 - Nature

Organisation of event by distributor for manufacturer

Where distributor organize an event or do any task for the manufacturer to promote the sales of his product, the same shall be treated as supply of service by distributor to manufacturer

For eg.

- ***Displaying of product at a strategic location***
- ***Running a promotional campaign***
- ***Displaying banner of manufacturer's products at distributor's premises***

ITC on Gift vis-à-vis- Sales promotion



Foreign trips (Voluntary)

**Poster/hoardings/brochures
/price list**



Buy one get one

**Calendar/diaries/
pens/crockery**

**Gifts on achievement of
target:- Voluntary/ scheme**

Section 17(5)(h)

Input tax credit in respect of goods lost, stolen, destroyed, written off, or disposed of **by way of gifts or free samples** shall not be available

Free Samples

Free samples are small and packaged portion of merchandise distributed free, especially as an introduction to potential customers

Gifts

- Gift ordinarily means something which is given voluntarily to other person without consideration and the donor should not derive any advantage from such gift.

- ✓ It is pertinent to mention that term 'gift' is not defined under the CGST Act, 2017. Hence, recourse can be taken from parallel legislations

- ✓ As per Section 122 of Transfer of Property Act, 1882, "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

- ✓ Dictionary meanings-
 - *Merriam Webster Dictionary-* "something voluntarily transferred by one person to another without compensation; the act, right, or power of giving.

 - *Black Law Dictionary-* Gift is "a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money."

BMW India Private Limited, 2021-VIL-91-AAR (HAR)

Brief facts-

Availment of input tax credit on Goods Distributed as free of cost

Decision-

- ✓ The promotional items procured by the BMW and supplied during events on FOC basis qualify as gifts
- ✓ The company is ineligible to take the input tax credit on such goods owing to restriction under Section 17(5)(h) of CGST Act,2017

CASE STUDY

- ✓ Brochures / Price List / Means of Communication
- ✓ Diaries / Pen / Calendar

Page Industries Limited 2021-VIL-21-AAAR (KAR)

Observations

The applicant in the instant case disposes of/issues the distributable goods such as carry bags, calendars, diaries, marketing material such as displays, posters etc. free of cost to franchisees and distributors



Rulings

The ITC denied on all such promotional and marketing items given to the franchisees and distributors on FOC basis as they same qualify as gift and restriction under Section 17(5)(h) of the GST Acts.

Under UK VAT laws , Sl. No. 2.12 of VAT Notice 700/7 specifies "point of sale display material" that :

"No vat is due if you payable point of sale display material to retailers, or other business customers, for no considerations and the material provides direct promotional supports for your goods. Examples includes display stands, posters and other similar materials.

***Schedule I- Deemed supply
Permanent transfer or disposal of business assets where input tax credit has been availed on such assets***

Surfa Coats India Pvt Ltd -Karnataka AAR

- ITC on services procured for offering free trips is not available as it is similar to gift.
- The taxpayer is not eligible to avail ITC on the inward supplies of goods and services given as incentives in the form of gifts of goods and services to its dealers. Moreover, the AAR observed that free travel services provided to its dealers without consideration would not qualify as 'supply'

Input tax credit in respect of **goods** lost, stolen, destroyed, written off, or disposed of by way of gifts or free samples shall not be available



- ❑ It may appear at first glance that one item is being sold free of cost without any consideration. In fact, it is not an individual supply of free goods but a case of two or more individual supplies where a single price is charged for the entire supply. It can at best be treated as supplying two goods for the price of one.
- ❑ Taxability of such supply will be dependent upon as to whether the supply is a composite supply or a mixed supply and the rate of tax shall be determined as per the provisions of section 8 of the said Act
- ❑ ITC shall be available to the supplier for the inputs, input services and capital goods used in relation to supply of goods or services or both as part of such offers.



Sanofi India Ltd Maharashtra AAR

- Shubh Labh Trade Loyalty Program: In this scheme, the distributors/whole sellers earn reward points basis the quantity of goods purchased and goods sold by them. These points can then be redeemed in the form of items, to be selected basis the availability of the product and reward points earned
- Brand Reminder: As an advertisement tool, the company distributes products like pen, notepad, key chains etc. with their name engraved on it, for the purpose of their brand promotion

ITC denied as promotional items were given voluntary and not under contractual obligation, hence restriction under section 17(5)(h) applies

Clarification : Ireland Department and Customs on Mixed Supplies of Goods and Services:

If there is a requirement of the customer to pay a consideration in connection with the receipt of an product, even if the supplier describes part of that product as "gift" or as being "free", it does not come within the term of gift for tax purposes. Where there is a consideration it is always referable to all the products supplied.

Accordingly, the same will be categorized as Mixed Supply.

Input Tax Credit Vs Mixed Supply

Moksh Agarbatti Company , 2020-VIL-97-AAR (GUJ); Biostadt India Limited, 2019-VIL-60-AAR(MAH)

Issues-

Availment of input tax credit on Goods given under incentive scheme

Decision:

- ❖ Free goods offered on purchase of specific quantity of goods not satisfy the condition availment of ITC under section 16
- ❖ Free goods offered on making payment as per defined schedule not eligible for availment of ITC under section 16
- ❖ No written agreement with customers
- ❖ Denial of ITC by AAR under sec. 17(5) in case where no GST is paid on output stage

ITC on Equipment's/ material at retailer premises

ITC on Equipment's/material at retailer premises



Issue 1:

Fridge are directly installed at the customer location.

Issue 2:

Advertisement board are placed at the following locations:

- a) Various public place viz. highway, metro etc.
- b) Customer shop
- c) Seminar

Issue 3:

Single contract entered with HO for advertisement:

- a) Product wise
- b) State wise
- c) Pamphlet distribution

Legal Background: Section 16(2) allows Taxpayer to avail Input Tax Credit subject to the fulfilment of following conditions:

- a) *Possession of Tax Invoice;*
- b) Received the goods or services;**
- c) *Payment of Tax to Government; and*
- d) *Filing of Return*

Explanation to Section 16(2)(b) which states that it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise.

Tattvam panorama:

The word “received” in isolation would be incorrect. the term ‘received’ referred in Section 16(2)(b) means “received the supply”. the term “received” does not mean actual physical receipt of the goods.

Notably, in Pre-GST regime physical receipt of goods was a necessary condition for availing Cenvat Credit as per Rule 4(1) of Credit Rules.

Under GST laws, ITC is allowed based on actual receipt of supply of goods or services (i.e. constructive receipt) instead of physical receipt of goods or services.

Thus, ITC is allowed in all the cases discussed in the previous slides.

Treatment of Expired goods

Legal Background:

A. Section 17(5)(h): ITC not allowed if goods lost, stolen, destroyed, written off

a) *Good lost*

b) *Stolen*

c) **Destroyed**

d) *Written off*

B. Section 17(2) read with Rule 42 & Rule 43: ITC needs to be reversed if ITC availed goods and services

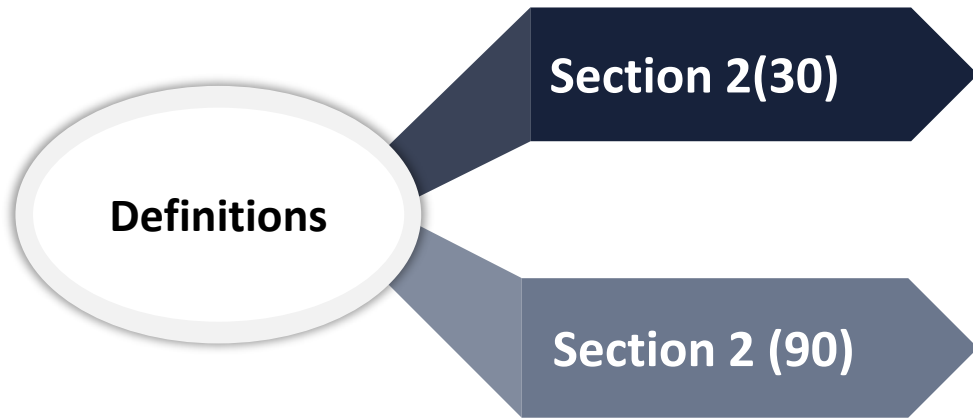
- Directly in connection with destroyed stock
- Common to destroyed stock

Expired or Destroyed Stock

S. No.	Description of Issue	Tattvam Panorama
Issue No. 1	ITC on input services directly used in procurement of such goods	Input services are not required to reverse as requirement for reversal is only for goods.
Issue No. 2	ITC on common inputs and input services used for such stocks	<p>Rule 42 & 43 are not applicable are same applicable if goods are partly used in business and partly for other purpose.</p> <p>Notably, Section 17 provides that ITC is not allowed even if the same are used for business purposes.</p>
Issue No. 3	Issuance of Credit Note towards destroyed stock	<p>It is difficult to identify the original invoice for issuance of credit note. Such Credit Note needs to be raised before 30 November of next financial year.</p> <p><u>Recommendation:</u> <u>Supplier should receive tax invoice against the expired stock and does not claim ITC. Notably, if such expired stock is sold as Scrap, then Supplier can claim ITC and utilise the same towards output liability.</u></p>

Case studies on Mixed and Composite Supply





Composite Supply

A supply made by a **taxable person** to a recipient consisting of two or more **taxable supplies** of goods or services or both, or any combination thereof or any combination thereof, which are **naturally bundled** and supplied in conjunction with each other in the **ordinary course of business**, one of which is a **principal supply**;

Principle Supply

means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

Illustration.— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;



Composite supply

Section 2(74) of CGST Act

- “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

Illustration.— A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;



Naturally Bundled?- Education Guide in Service Tax

Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate.

Perception of the consumer

- If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business



Practices of service providers

- Majority of service providers in a particular area of business provide similar bundle of services.
- For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.

Nature of services

- If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service
- For e.g., service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business

Other Illustrative indicators of bundling of services in the ordinary course of business

- There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.
- The elements are normally advertised as a package.
- The different elements are not available separately
- The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

Mixed Supply Vs. Composite Supply



Case Study: Pepsi Co. is engaged in manufacturing and selling of soft drink Pepsi. To promote its sales, Taxpayer is selling its product in the promotional scheme i.e. Buy 1 Pepsi and Get 1 KitKat Free. Both the products are sold for a single price, say Rs. 50

Note that the product Pepsi attracts 40 percent (GST = 28 percent and Compensation Cess = 12 percent) and KitKat attracts 18 percent.

Issue: Whether Pepsi Co is required to pay GST at 40 percent or 18 percent ?

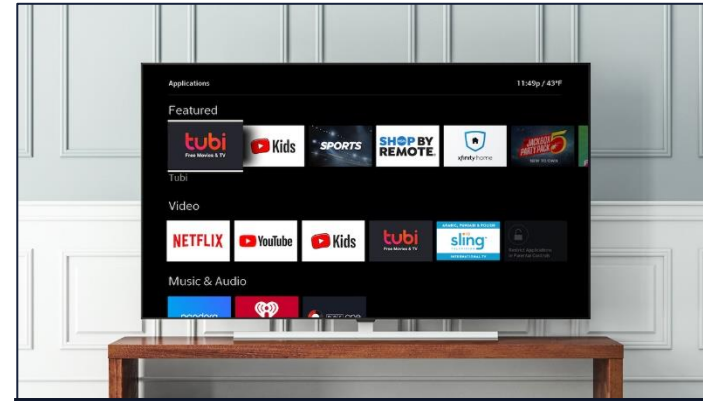
Tattvam panorama: Two or more individual supplies (i.e. Pepsi and KitKat) for a single price qualifies as mixed supplies. Thus, GST shall be applicable which attracts highest GST rate i.e. Pepsi = 40 percent.

Bundled supplies: A measure to promote sales, but caught in spider's web



Camera with its accessories
(i.e., Bag and Memory Card)

- A. Camera with charger – Composite Supply
- B. Camera with accessories – ?????



Free Live Subscription on purchase of TV

Free Head Phone



Home Theatres Free with TV

Mixed Supplies



Buy 'One' - Get 'One' offers

Composite

TATTVAM


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