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NEWSLETTER

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MVDCO ADVISORY SERVICES



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INCOME TAX & INTERNATIONAL TAX

Taxability of Indirect Transfer of Shares outside India

Income deemed to accrue or arise in India

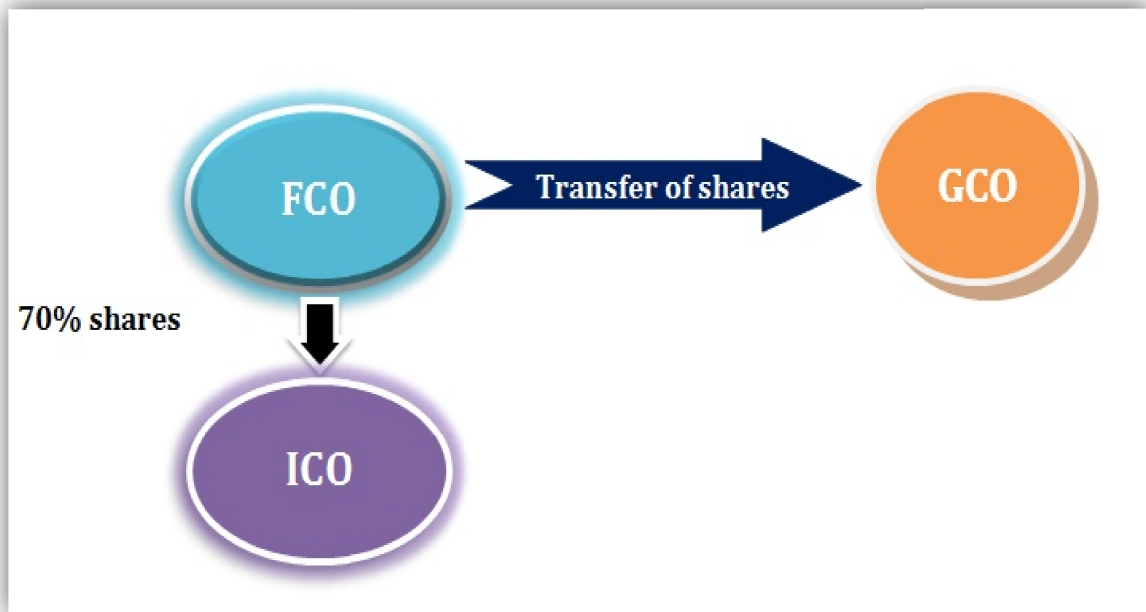
According to Section 9(1)(i), following income shall be deemed to accrue or arise in India:

All income accruing or arising, directly or indirectly,

- Through or from any business connection in India; or
- Through or from any property in India; or
- Through or from any asset or source of income in India; or
- **Through the transfer of a capital asset situated in India.**

INCOME TAX & INTERNATIONAL TAX(cont.)

Thus if FCO holds say 70% shares in ICO and if FCO transfers shares of ICO to another foreign Company say GCO, the income from such transfer shall deem to accrue or arise in India and therefore shall be subject to Capital Gain tax in India.



This is generally referred to as “Direct Transfer of shares” and this was always taxable in India, subject to the benefit, if any, available under the Double Tax Avoidance Agreements with various countries.

Indirect Transfer:

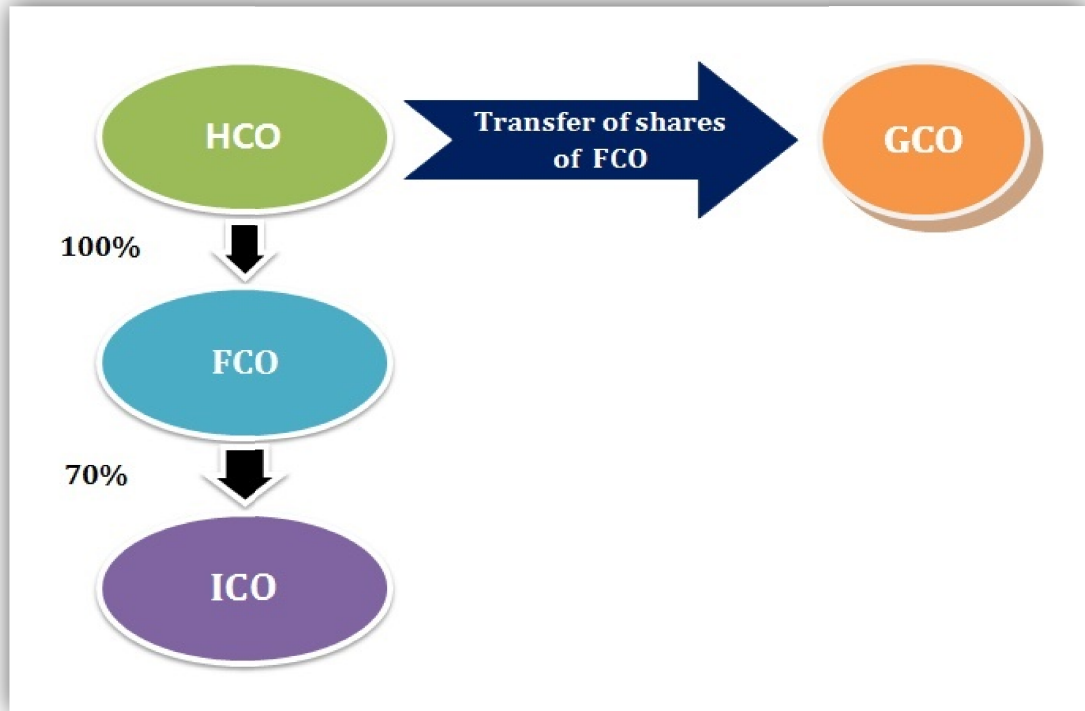
A clarificatory circular No. 5/2015 was issued on 26.03.2015 which clarified that an asset or a capital asset being any share (or interest) in a Company (or an entity) registered outside India shall be deemed to be and shall always be deemed to be situated in India, if the shares derives, directly or indirectly, its value **substantially from the assets located in India**.

Explanation 6 goes on to state that the shares shall be deemed to derive its value substantially from the assets located in India, if, **on a specified date, the value of such assets** –

- i. Exceeds **INR 10 crores** AND

INCOME TAX & INTERNATIONAL TAX(cont.)

- ii. Represents at least **50% of the value of all the assets** owned by the Company.



If HCO transfer any number of shares of FCO to GCO, then in spite of the fact that both the transferor (HCO) and transferee (GCO) are located outside India, the transaction will be subject to Capital Gain tax in India if following conditions are satisfied:-

1. If the value of 70% shares held by FCO in ICO exceed INR 10 crores AND
2. If the value of 70% shares held by FCO in ICO represents 50% or more of the value of all the assets owned by FCO.

Value of such asset (share):

Value of such share shall be the **Fair Market Value (FMV)** as on the specified date of such share without reduction of liabilities, if any.

Specified date:

- Date on which the accounting period of the Company ends, preceding the date of transfer.

INCOME TAX & INTERNATIONAL TAX(cont.)

- However, if the **book value of the assets of the Company** on the date of transfer exceeds the book value of the assets on the date of preceding accounting year end **by 15%**, the date of transfer shall be considered as specified date.

Explanation 7 carves out an **exemption** from such tax on indirect transfer of shares. It states that no income shall be deemed to accrue or arise to a non-resident from such transfer if the transferor, at any time in the 12 months preceding the date of transfer, neither holds the **right of management or control** in relation to such Company NOR holds **more than 5% of voting power or share capital** as the case may be.

Thus in the above example, if HCO, at any time in the 12 months preceding the date of transfer, do not hold right of management or control of FCO and do not hold more than 5% of voting power or share capital in FCO, any transfer of shares of FCO by HCO will not be regarded as income deemed to accrue or arise in India and therefore outside the taxation purview.

It is further clarified that, in the above example, if FCO, in addition to its investment in ICO, has several other assets that are located outside India, the income of HCO, on transfer of FOC shares, shall only be such part of the income as is **reasonably attributable to the assets located in India**.

It is however clarified that nothing contained in this clause shall apply to as asset which is held by a non-resident by way of investment, directly or indirectly, in Category I or Category II Foreign Portfolio Investor (FPI) under SEBI regulations.

Thin Capitalisation Norms:

Finance Act, 2017 inserted Section 94B with effect from Assessment year 2018 – 19 to deal with situation whereby many foreign Companies that set up their subsidiaries in India, form the Company with low equity share capital and infuse funds by lending money through External Commercial Borrowing (ECB) to meet the requirement of the Indian subsidiary Company.

By this way, the foreign Company is able to repatriate interest cost on the ECB, every year and also repatriate their capital in the form of ECB as per the terms of the loan agreement. Very little capital is left in the Indian Company that represents foreign direct investment of the foreign Company.

INCOME TAX & INTERNATIONAL TAX(cont.)

The newly inserted Section 94B states that where an Indian Company (this includes a Permanent Establishment of a foreign Company in India) borrows money from its non-resident associated enterprise (AE) and incurs any expenditure by way of interest or similar cost, such interest shall not be allowable in computation of income of the Indian Company to the extent it is regarded as “Excess Interest”.

“Excess interest” would mean an amount of total interest cost in excess of 30% of Earning before interest, taxes, depreciation and amortisation (EBIDTA) of the borrowing Company in the previous year OR interest cost to the AE for that previous year, whichever is LESS.

This can be explained by way of following illustrative examples:

Description	Case 1	Case 2	Case 3
EBIDTA	100	100	100
Interest paid to outside (Non AE)	40	30	20
Interest paid to foreign AE	<u>20</u>	<u>30</u>	<u>40</u>
Total Interest cost	60	60	60
<u>Disallowance of interest calculation:</u>			
30% of EBIDTA	30	30	30
Total interest cost in excess of 30% of EBIDTA (Total - A)	30	30	30
Interest paid to AE (Total - B)	20	30	40
Excess Interest (Lower of Total (A or B))	20	30	30

If Indian Company borrows from a lender who is not an AE but an AE has given implicit or explicit guarantee to the lender, such borrowing shall also be regarded as borrowing from an AE.

Where for any assessment year, the interest is not fully deductible, the excess interest so calculated, shall be carried forward to subsequent assessment year/s and it shall be deductible from against profits of any business carried on by the Company to the extent it falls within the maximum allowable interest as calculated above. No such excess interest can be carried forward for more than 8 assessment years immediately succeeding the assessment year for which the excess interest was first computed.

The entire Section 94B on thin capitalisation will not apply to Indian Company engaged in the business of banking or insurance.

INCOME TAX & INTERNATIONAL TAX(cont.)

It is clarified that 'debt' or borrowing would mean any loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discounts or other finance charges.

Stay of recovery of demand disputed before the Commissioner of Income Tax (Appeals):

A revised guideline was issued on 29th February 2017 that when an assessment order was disputed by the assessee before the CIT(Appeal), the Assessing officer should grant stay from recovery of demand if the assessee makes 15% of the disputed demand in question.

On review of this position, the CBDT has vide office memorandum dated 31.07.2017 revised the payment of tax of disputed amount from 15% to 20% to get the stay of recovery of demand from the Assessing Officer.

This modification comes into effect with immediate effect.



GOODS & SERVICE TAX (GST)

GST Registration Amendment (Section - 28)

Section 28 of the CGST Act, 2017 and Rule 19 of the CGST Rules, 2017 govern Amendment in Registration of GST. Application in Form GST – REG 15 is to be e-filed on the common portal along with relevant necessary documents, within a period of 15 days of such change.

In case of following changes (called changes in core field), the concerned officer shall, after due verification, approve the amendment within 15 days from the date of the receipt of the aforesaid application and issue order in form GST REG – 15 electronically.

- 1) *Legal name of business*
- 2) *Address of the principal place of business or any additional place(s) of business*
- 3) *Addition, deletion or retirement of partners or directors, Karta, Managing Committee, Board of Trustees, Chief Executive Officer or equivalent, responsible for the day to day affairs of the business.*

GOODS & SERVICE TAX (GST) (cont.)

Where the change/amendment relates to any particulars other than those specified above (called changes in non-core field) the certificate of registration shall stand amended upon submission of the application in Form GST REG – 14 on the common portal.

Any change in the mobile number or e-mail address of the authorised signatory submitted under this rule, as amended from time to time, shall be carried out only after online verification through the common portal.

*Where the proper officer is of the opinion that the amendment sought is either not warranted or the documents furnished therewith are incomplete or incorrect, he may, within a period of fifteen working days from the date of the receipt of the application in **FORM GST REG -14**, serve a notice in **FORM GST REG – 03**, requiring the registered person to show cause, within a period of seven working days of the service of the said notice, as to why the application submitted in FORM GST REG - 14 shall not be rejected.*

*The registered person shall furnish a reply to the notice to show cause, issued in **FORM GST REG - 04**, within a period of seven working days from the date of the service of the said notice.*

*Where the reply so furnished is found to be not satisfactory or where no reply is furnished in response to the said notice issued within the period prescribed, the proper officer shall reject the application submitted and pass an order in **FORM GST REG -05**.*

If the proper officer fails to take any action –

- a) Within a period of fifteen working days from the date of submission of the application, or*
- b) Within a period of seven working days from the date of the receipt of the reply to the notice to show cause the certificate of registration shall stand amended to the extent applied for and the amended certificate shall be made available to the registered person on the common portal.*

GOODS & SERVICE TAX (GST)(cont.)

Form GST REG-14

[See rule 19(1)]

Application for Amendment in Registration Particulars (For all types of registered persons)

1. GSTIN/UID			
2. Name of Business			
3. Type of registration			
4. Amendment summary			
Sr. No	Field Name	Effective Date (DD/MM/YYYY)	Reasons(s)
5. List of documents uploaded			
(a)			
(b)			
(c)			
...			
6. Declaration			
<i>I hereby solemnly affirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom</i>			
Place:		Signature	
Date:		Name of Authorised Signatory	
		Designation / Status:	

GOODS & SERVICE TAX (GST)(cont.)

Instructions for submission of application for amendment

1. Application for amendment shall be submitted online.
 2. Changes relating to - Name of Business, Principal Place of Business, additional place(s) of business and details of partners or directors, karta, Managing Committee, Board of Trustees, Chief Executive Officer or equivalent, responsible for day to day affairs of the business which does not warrant cancellation of registration, are core fields which shall be approved by the Proper Officer after due verification.
 3. For amendment in Non-Core fields, approval of the Proper Officer is not required.
 4. Where a change in the constitution of any business results in change of the Permanent Account Number of a registered person, the said person shall be required to apply for fresh registration.
 5. Any change in the mobile number or the e-mail address of authorised signatory as amended from time to time, shall be carried out only after online verification through the common portal.
 6. All information related to Permanent Account Number, Aadhaar, Director Identification Number, Challan Identification Number shall be validated online by the system and Application Reference Number (ARN) will be generated after successful validation of necessary field.
 7. Status of the application can be tracked on the common portal.
 8. No fee is payable for submitting application for amendment.
 9. Authorised signatory shall not be a minor.
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GOODS & SERVICE TAX (GST)(cont.)

GST on Expenses debited in Trading and Profit & Loss Account

Preamble:

GST applies on supply of goods and services except when exempted. Thus majority of expenses debited in Trading Account and Profit & Loss Account are subject to GST; such expenses may be in the nature of goods or services.

Following is the list of such expenses with further relevant information vis-a-vis GST i.e rate of GST, applicability of Reverse Charge Mechanism and eligibility of Input Tax Credit.

Rate of tax under GST on expenses debited to Trading and Profit & Loss A/c

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
1	Salary, wages & bonus paid to employee	0%	No	No	No
2	Messing to Staff (as per Contract with them)	0%	No	No	No
3	Electricity bill	0%	No	No	No
4	Transportation Charges (Non GTA/Track)	0%	No	No	No
5	Water Charges/ Plain Water/Tanker	0%	No	No	No
6	Bank Interest	0%	No	No	No
7	Interest on Vehicle Loan	0%	No	No	No
8	Professional Tax of employees	0%	No	No	No
9	BMC Tax	0%	No	No	No
10	Building / Property Tax	0%	No	No	No
11	Rent Deposits (except advance against rent)	0%	No	No	No
12	Other Deposits except Advance against Orders	0%	No	No	No
13	Petrol / Diesel/ CNG/Kerosene Expenses (Motor Spirit)	0%	No	No	No
14	Liquor Expenses for business	0%	No	No	No

GOODS & SERVICE TAX (GST)(cont.)

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
15	Registration Fees (ROF / ROC / RTO etc) (less than Rs. 5000/-)	0%	No	No	No
16	Bad Debt	0%	No	No	No
17	Provision for doubtful debts	0%	No	No	No
18	Donation	0%	No	No	No
19	Labour Welfare Contribution to Government	0%	No	No	No
20	Warranty Labour Charges (if there is no supply element)	0%	No	No	No
21	Fine & Penalties	0%	No	No	No
22	Conveyance Expense - Non AC Taxi, Auto, Bus, Train	0%	No	No	No
23	Loading & Unloading in relation to agricultural produce/ Hamali	0%	No	No	No
24	Rent Paid for residential use	0%	No	No	No
25	Godown Rent for agricultural produce	0%	No	No	No
26	News paper & magazines	0%	No	No	No
27	Remuneration to Director & partners	0%	No	No	No
28	Toll Exp	0%	No	No	No
29	Medical Service (Medical Service to employee & other related expenses) as per Contract	0%	No	No	No
30	Franking, Notary, Stamp paper	0%	No	No	No
31	Conveyance Expense - Radio Taxi like OLA & UBER or other AC vehicle	5%	Yes	Yes	No
32	Payment to Goods Transport Agency	5%	No	Yes	Yes

GOODS & SERVICE TAX (GST)(cont.)

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
33	Travelling in Train by AC or First class	5%	Yes	-	Yes
34	Job Work / Labour Charges for textile yarn & textile fabric	5%	Yes	Yes	Yes
35	Job Work / Labour Charges for Garment processing	5%	Yes	Yes	Yes
36	Job Work / Labour Charges for diamond , jewellery & precious metal	5%	Yes	Yes	Yes
37	Job Work / Labour Charges for printing of books, journals & periodicals	5%	Yes	Yes	Yes
38	Job Work / Labour Charges (Other)	18%	Yes	Yes	Yes
39	Food & Beverages Expense (Non AC restaurant)	12%	Yes	Yes	No
40	Food & Beverages Expense (AC restaurant)	18%	Yes	Yes	No
41	Room Rent in a hotel, lodge (Rs.1000 to 2500 per room per day)	12%	Yes	Yes	Yes
42	Room Rent in a hotel, lodge (Rs.2500 to 7500 per room per day)	18%	Yes	Yes	Yes
43	Room Rent in a hotel, lodge Above Rs.7500/-	28%	Yes	Yes	Yes
44	Fuel (Furnace Oil/LPG)	18%	Yes	Yes	Yes
45	Sales Promotion /Business Promotion	18%	Yes	Yes	Yes
46	Mineral water	18%	Yes	Yes	Yes
47	Truck/ Tempo Hire Charges	18%	Yes	Yes	Yes
48	Club & Membership fees	18%	Yes	Yes	No

GOODS & SERVICE TAX (GST)(cont.)

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
49	Advertisement Charges / Hoarding / Magazine / News Papers / Media	18%	Yes	Yes	Yes
50	AMC Charges	18%	Yes	Yes	Yes
51	Bank Charges - Service charges recovered	18%	Yes	-	Yes
52	Broker Fee & Charges	18%	Yes	Yes	Yes
53	Cancellation Charges	18%	Yes	Yes	Yes
54	Extended Warranty	18%	Yes	Yes	Yes
55	House Keeping Charges	18%	Yes	Yes	Yes
56	Insurance paid on goods & vehicle	18%	Yes	Yes	Yes
57	Health Insurance	18%	Yes	-	No
58	Payment to advocate	18%	No	Yes	Yes
59	Loading & Unloading - others/ Hamali	18%	Yes	Yes	Yes
60	Training Expense	18%	Yes	Yes	Yes
61	Payment to Post office for Speed post & parcel post	18%	Yes	Yes	Yes
62	Postage and Courier Charges	18%	Yes	Yes	Yes
63	Printing & Stationery (Flex Printing, Broad Printing, Notice Printing)	18%	Yes	Yes	Yes
64	Recruitment Expenses	18%	Yes	Yes	Yes
65	Commission Paid	18%	Yes	Yes	Yes
66	Rent Paid for commercial use of premises	18%	Yes	Yes	Yes
67	Godown Rent for commercial purpose	18%	Yes	Yes	Yes
68	Repair and Maintenance - Building / Electrical / P&M / Others	18%	Yes	Yes	Refer Note 1
69	Payment for Sponsorship Services	18%	Yes	Yes	Yes
70	Security Charges	18%	Yes	Yes	Yes

GOODS & SERVICE TAX (GST)(cont.)

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
71	Telephone, Mobile & internet Charges of the concern	18%	Yes	Yes	Yes
72	Sundry Expenses	18%	Yes	Yes	Yes
73	Sitting Fees, Commission or any other payment made to director by company	18%	Yes	Yes	Yes
74	Audit Fees, Account Writing, Professional Fees (other than Advocate)	18%	Yes	Yes	Yes
75	Research & Development Expenses	18%	Yes	Yes	Yes
76	Wall Paint	28%	Yes	Yes	No
77	Travelling Expenses International	28%	Yes	Yes	Yes
78	Cold drink	28% + 12% Cess	Yes	Yes	No
79	Repairs & maintenance Charges if it has not resulted into immovable property	18% / 28%	Yes	Yes	Yes
80	Electrical Fittings	18% / 28%	Yes	Yes	No
81	Staff Uniform Expenses	5% / 12%	Yes	Yes	Yes
82	Packing material & Packing Charges	5% / 12% / 18%	Yes	Yes	Yes

GOODS & SERVICE TAX (GST)(cont.)

Sr. No	Nature of Expense	Rate of Tax	Whether registered supplier will levy tax	Reverse Charge (If supply is unregistered)	Whether Eligible for Input Credit
83	Plant & Machinery	Actual Rate	Yes	Yes	Refer Note 2
84	Furniture & Fixture	Actual Rate	Yes	Yes	Refer Note 2
85	Motor Car	Actual Rate	Yes	Yes	No
86	Building	Actual Rate	Yes	Yes	No
87	Office Equipment including Computer, Software & Hardware	Actual Rate	Yes	Yes	Refer Note 2
88	Free Gift given to staff (Exempt up to Rs.50000/- per staff p. a)	Applicable Rate	Yes	Yes	No
89	Free Gift given to staff (Above Rs.50000/- per staff p. a)	Applicable Rate	Yes	Yes	Yes
90	Diwali/ New year Gift purchased & debited to P & L	Applicable Rate	Yes	Yes	No

Notes:

- 1) If repair & maintenance expenses result into immovable property, input tax credit is not available.
- 2) ITC is available fully. However if it is sold/disposed off/ scrapped/ discarded within 5 years, then ITC @ 5% per quarter is available for the used period and balance is to be reversed at the time of date of sale/disposal/scraping.
- 3) Input credit is available only if goods & services are used for business. If goods or services are used for personal purpose then input credit is not available. If goods & services are used partially for personal use and partially for business use then input credit is available proportionately.
- 4) If any item of expenses is taxable and if such goods/services are supplied by an unregistered person, GST is required to be paid by the recipient on Reverse Charge Mechanism (RCM) subject to Note no.5.

GOODS & SERVICE TAX (GST)(*cont.*)

- 5) As per Notification No 8/2017 dated 28/06/17, it is provided that if the aggregate value of goods or services or both debited to Trading A/c or expenses debited to Profit & Loss A/c or purchase of any asset obtained from unregistered suppliers is less than Rs.5000/- in a day, then tax is not required to be paid for such inward supplies by the recipient for that particular day.
 - 6) Details of all purchase of goods or services debited to Trading A/c or purchase of any fixed asset are required to be submitted in GST return whether purchased from registered person or unregistered person or from composition dealer.
 - 7) However, if any expense items are purchased from unregistered supplier & escape the payment of tax as per Note no.5 in view of Notification No.8/2017 dated 28/06/17 then same are not required to be submitted in GST return.
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