

GST - Supplying a clear definition

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JUST when we seemed to have mastered the art of waiting for GST, the 122nd Constitutional Amendment Bill (the Bill) has infused new life into our enquiries into what is GST and unlearn old tax laws and reorient ourselves to the new tax law. The new tax regime will change many old concepts without really changing the approach to study and apply the law. The Statement of Object and Reasons to the Bill states that the purpose of the amendment is to introduce the goods and services tax (GST) conferring concurrent taxing powers on the Union as well as the States including Union Territories with Legislature, to make laws for levying GST on every transaction of supply of goods or services or both.

As one comes across the 'subsuming' nature of GST to mean replacing a plethora of indirect taxes, we shall study this term through a more fundamental discussion. The taxable events we currently follow are broadly manufacture, service and sale - all of which will now be subsumed and the taxable event will be supply of goods or services or both. The Union at present does not have the power to tax transfer of property - sale and deemed sale [Article 366(29A)]. It will get the power to tax such transactions though on account of a 'supply'. To a layman, supply would be to make something available to another, or to fulfil a want of another - something very different from sale.

Sale does involve supply of a thing, service, or a transfer of right, and is not a mere supply in the plain sense of the term. 'Supply' as compared to sale may be satisfied by merely facilitating use/possession of a good or rendering of service. Will supply include transfer of property, can there be a supply of rights, are interesting questions. The legislations to come - Central GST and State GSTs and before that model legislations, will hopefully provide clarity.

The general understanding is that India will not bring real estate - transfer by way of sale of immovable property into the GST ambit. Stamp duty is not proposed to be subsumed. As per the Sale of Goods Act, goods include only movable property, as immovable property is covered under Transfer of Property Act. The present Service Tax law expressly excludes transfer of title in goods or immovable property, by way of sale, gift or in any other manner. How will GST legislation reconcile this position when tax on sale of goods is getting omitted from the State List? Will transfer of immovable property be covered under GST legislation or

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not? This article is not about these questions, rather, it is more on supplying some fuel for thought.

Supply as defined by the developed world

A look at the definition of supply or taxable supply in certain jurisdictions will assist us in arriving at reasonable assumptions on the shape of the impending definition of supply in the Indian GST statutes. Sixth Directive on VAT of EU defines supply as [under Article 5(1)] “a supply of goods is the transfer of the right to dispose of tangible property as owner”. Member-States can consider certain interests and rights as tangible property like right of user of immovable property (as right *in rem*) and shares giving ownership or possessory rights over immovable property. Hire purchase and transfer of goods under contract where commission is payable on purchase and sale are also treated as supplies as per the EU law.

The VAT Act, 1994 of **United Kingdom** indirectly seeks to include concepts of transfer of property and ownership when it defines supply of goods as ‘any transfer of the whole property in goods’, with the exception that the transfer ‘of any undivided share of property’ or ‘of the possession of goods’ is a supply of services. The transfer of possession of goods will be a supply of goods if possession is transferred under an agreement for sale or an agreement that provides that at some future point ownership will transfer.

Compared to the above, the **Australian** law is more exhaustive in terms of syntax though the definition is inclusive and, therefore, not exhaustive in terms of coverage. According to the GST Act, a supply is any form of supply whatsoever. As this does not provide any meaningful guidance, it is elaborated by way of an inclusive clause to say that supply includes (a) a supply of goods; and (b) a supply of services. This inclusive list encompasses provision of advice or information; a grant, assignment or surrender of real property; a creation, grant, transfer, assignment or surrender of any right; a financial supply; an entry into, or release from, an obligation: to do anything, to refrain from an act, to tolerate an act or situation. Any combination of any 2 or more of the matters listed in this inclusive clause will also be covered under supply.

Indian GST law as it evolves seeks to draw heavily from **Canadian** GST law in view of commonality of the federal structure of both countries. **Canada** has a complex GST system and the relevant provisions are covered under Part IX of the Excise Tax Act. According to this statute, “supply” means the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition. It is significant to note that Canadian law does not use the word ‘goods’ but ‘property’ and property is defined

to include both movable and immovable property while the Indian GST appears to keep immovable property out of the new tax system. Another aspect worth paying attention to pertains to our own commodity tax system. Given the legacy of sales tax in India and the fact that even Central Excise law has provisions for valuation of certain commodities based on MRP, may be 'supply' in Central GST and State GST Acts needs to be expressly defined as including sale and transfer.

Coming to services, EU defines 'supply of services' to mean any transaction which does not constitute a supply of goods under Article 5, and the Indian Constitutional Amendment Bill seeks to define services in a similar manner. Under **EU** law, the term also includes 'obligations to refrain from an act or to tolerate an act or situation'. Indian Service Tax law post-negative list follows EU in this regard as the declared service under Section 66E(e) of Finance Act, 1994 is similarly phrased. UK VAT Act adopts a similar definition when it states services as 'anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a 'supply of services". We have to wait and see how the term 'consideration' finds its 'rightful place' in the Indian GST law as and when draftsmen get ready for this exercise. A slightly modified definition of service has been adopted by **New Zealand** GST Act to state that services would mean anything which is not goods or money.

Supply under GST law of developing nations

The definitions of supply in **EU, UK, Canada** and **Australia** may appear to be well-drafted but disputes involving the question as to whether a particular activity can be considered as supply arise time and again and test the limits of jurisprudence. While the above provisions of EU and other developed nations are *ad nauseam* mentioned by the intelligentsia and fiscal economists, one sees relatively lesser use of such concepts as they prevail in **Asian** or **African** nations. It will be surprising to learn that **Botswana** has adopted a rather elaborate definition of supply. According to its VAT statute, supply of goods means a sale of goods or a grant of the use or right to use goods or a transfer or provision of thermal or electrical energy, heat, gas, refrigeration, air conditioning, or water. The definition of supply of services more or less conforms to such definition in several VAT statutes when it states supply of services means anything done which is not a supply of goods or money, including granting, assignment, cessation, or surrender of any right; making available a facility or advantage; or refraining from or tolerating any activity.

The Guide on Supply released by **Malaysia** states that the definition of supply for GST purposes covers all forms of supply where goods and services are supplied in return for a

consideration and supply of goods and services without consideration is not a supply unless it is deemed to be a supply. It also cites examples of supply as including sale, barter, exchange, license, rental, lease and right to use. A supply of goods involves transfer of ownership of goods from one person to another person and 'goods' means any kind of movable and immovable property such as machinery, motor vehicle and house. It also includes transactions under hire purchase and finance lease agreements. Regarding services, **Malaysia** considers any activity that is not a supply of goods as supply of service. "Services" mean anything done or to be done including the granting, assignment or surrender of any right or the making available of any facility or advantage and it may include a transfer of possession of goods without transferring the ownership.

Indian GST law - Certain pointers on supply

The definitions as above will be relevant in the Indian context as Article 366(29A) of the Constitution on deemed sale has been retained in this 122nd Amendment Bill though it was sought to be omitted in the 115th Amendment Bill brought in 2011. Tax on sale of goods is being omitted (Entry 54 of List II) but transactions like hire purchase or composite contracts which involve both goods and services need to be factored in the GST legislations in view of the chequered legal history in taxing them. One may be tempted to say that given the concurrent nature of taxing powers of the Union and the States insofar as GST is concerned, a turf war (jurisdictional issue in legal parlance) is not likely but we need to wait to come to such conclusions.

The biggest gain from GST as put forth is seamless credit. For credit there must be supply and it must be taxable. Will our law provide for treatment of zero-rated supplies as taxable supplies whereby when the final output is not GST paid, input credit will be available? It is relevant to note here that in respect of certain excise duty exemptions, both full and partial, non-availment of credit is a pre-condition for admissibility of exemption. In the GST scenario the Indian indirect law has to conceptually move from this position and extend credit in case of zero-rated supplies so that the credit mechanism is sustained throughout the supply chain till the goods reach the end consumer.

Defining taxable event is an arduous task as the natural resistance to compulsory collection of tax levy leaves the ground fertile for diverse interpretations and numerous challenges spread over decades. While certain activities may be deemed to constitute the taxable event, when difficulty arises in taxing such activities, the fundamental issue of taxable event being the chargeable event triggering the tax liability at the first instance cannot be belittled. Even though *Delhi Cloth & General Mills Co. Ltd.* case - **2002-TIOL-12-SC-CX-CB** provided

the test of manufacture for levy of excise duty way back in 1962, the law did not settle down for several decades thereafter. The years to come will indeed be quite interesting to watch when supply is defined, re-defined, amended, explained, substituted, interpreted, re-interpreted, struck down and retrospectively validated.

This Article was published in www.taxindiaonline.com