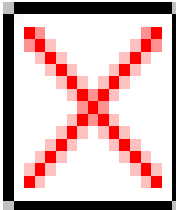


Supply under GST - a loopy loop

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Background



IN

an effort to unify multiple taxes levied on manufacture of goods and services and Purchase and sale of goods respectively by the Center and the States, a comprehensive dual tax system called Goods and services Tax, GST for short was introduced from the July, 1, 2017 throughout India on a one Nation, one tax Principle.

Briefly the scheme

GST was to consist of a two part taxation under the concurrent jurisdiction of the Centre and the state as per Article 246A(1) on the one hand and under the exclusive jurisdiction of the Centre separately on the other, as per Article 246A(2) & Article 269A(1).

Broadly the Constitution

As per the first part of taxation under Article 246A(1), all the previous subjects of taxation of the Centre coming under List I & that of the states coming under List II, were all merged into GST, with the exception of Alcoholic Liquor for human consumption and the sole exception of 5 Petroleum products.

Levy of Alcoholic Liquor for human consumption by the states was saved by the new Article 366(12A) and levy on the manufacture and purchase and sale of Petroleum Products by the Centre and the states were saved respectively by Clause 17(a)(i) & Clause 17(b)(ii) of the 101st Constitution Amendment Act, 2016 vide entries 84 of List I and entry 54 of List II.

New arrangement in place

By the above scheme, both the Centre and the states are enabled to tax all goods and services without any distinction unlike in the past, at a single point called Supply, on a common value base, equally, at such rates as specified on the recommendations of the GST Council formed as a constitutional body under Article 279A to decide all matters of GST between the Centre and the states.

Petroleum products- a twist

As far the Petroleum products, though brought under GST already vide Article 366(12A), their taxation under GST is put on hold until such time the GST Council notifies a date from which its levy under GST can be operationalized.

Until such time, the old system of taxation of Excise and State VAT will continue in respect of those five specified Petroleum products under the residuary items of Entry 84 of List I and Entry 54 of List II respectively of the Centre and the States.

New term supply found to mark event of taxation

In the past, events of manufacture, rendering of service, purchase/sale of goods were the point of taxation. The said concept has been sunk into a new event of taxation called supply.

But no definition of supply found

A fresh event of taxation has been identified under GST, so to say and a new term also coined called supply, to earmark taxability of Goods and service under Article 366(12A). However, one is surprised to find no definition of the term supply in the Constitution.

Place of supply a special privilege, only of the Centre

Article 269(5) reserves an exclusive right for the Centre to formulate the principles for determining the place of supply, where Supply of goods or services takes place in the course of inter-state trade or commerce, which is in perfect tune with Article 246(A)(2).

Intra-state Supply not even a residuary matter of the States

Where Supply of goods or services takes place in the course of intra-state trade or commerce is a residual situation given rise to by the Centre after application of the inter-state test.

What is considered a residuary matter of inter-state supply is also only apparently the domain of the states to assume, for one needs to find the definition of intra-state supply also only under the Integrated goods and Services Act.

Host Act borrows a basic definition from a guest Act

When Sec 20 of the IGST Act borrows the definition of supply from the CGST Act among many definitions, it is strange and self-contradicting to find Sec 2(65) of the CGST Act borrowing the definition of intra-state supply from Sec 8 of the IGST Act to define intra-state supply under the Parent Act.

Inter-State Supply includes Imports/Exports

An explanation incorporated under Article 269(A) deems supply of both goods and services in the course of Import into the territory of India or Export out of the territory of India, to be in the course of inter-State trade or commerce.

This is in accordance with amendments made in Article 286 by Clause 13(i) of the 101st CAA, 2016 in respect of the description of 'supply of goods and services' in place of merely 'goods' existing earlier in Article 286.

Law making powers touched briefly

Further, the law making powers in matters of inter-state trade or commerce of goods and services is that of the Centre including imports and exports as per the erstwhile practice under Article 286 now amply backed by Article 246(A)(2) read with Article 269(A)(1).

Supply not defined anywhere in the Constitution

From the above detailed discussion what emerges clearly is that the newly made central provision of GST under Article 366(12A) defines, what is Goods and Services Tax without defining the basis of the very tax on which it needs to be levied namely Supply.

Scope of Supply as defined under the CGST Act

Sec 7(1). Scope of Supply.- For the purposes of this Act, the expression 'supply' includes-

- (a) All forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
- (b) Importation of services, for a consideration whether or not in the course or furtherance of business and
- (c) The activities specified in Schedule I, made or agreed to be made without a consideration.

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1),--

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council
Shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to sub-sections (1), (1A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as - (a) a supply of goods and not as a supply of services; or (b) a supply of services and not as a supply of goods.

Scope of supply briefly analyzed

The above definition of supply broadly covers all forms of supply of goods and services, which is an all-inclusive definition left with ample scope for the legislature to defend levy on anything under its ambit.

But that does not mean it can assume within its scope even activities and transactions not covered by the GST. Nor is it the right way to exclude such activities and transactions by tucking them away under a Schedule and keep adding more of what you fail to perceive as taxable under GST.

Terming them, neither as supply of goods nor as supply of services won't do, when we are basically left with not even a definition of Supply in the Constitution.

In the same way, it is also not at all understandable in terming Alcoholic Liquor for human consumption, as a supply not leviable to tax and hence to be construed as a non-taxable supply.

In *Mohit Mineral Pvt Ltd Vs UOI* - [2020- TIOL-23-SC-GST](#)

the Gujarat High Court held that the transaction that takes place between two non-residents outside India cannot be brought under the scope of supply under inter-state tax and therefore such transaction cannot be covered under the expression non-taxable supply.

Accordingly, vide the 2018 GST Amendment Act through Notification [2/2019-Central Tax](#)

dated 29.01.2019, additional Para 7&8 were added under Schedule III w.e.f. 01.02.2018 to accommodate a) out and out transactions and b) high seas sales.

This solitary act of the Government is ample proof to demonstrate that Schedule III items are out of the confines of exempted supply.

Similarly, Transactions in securities, money, and actionable claims are all not in the first place within GST and therefore it is needless to segregate and put them under Schedule III to the Act with a tag reading as neither supply of goods nor services.

So is electricity and interest on deposits, which are not in the first place leviable to tax under GST, not to speak of exempting them under a Notification issued under Sec 11 incorrectly, so that someone can misinterpret it as forming part of an exempt supply. [Notification No. [12/2017-CT \(R\)](#), Sl. No. 25 & Entry 28(a) refers]

From the scheme of taxation set out under the constitution, especially under Article 246A(1)&(2) read with Article 269(1) & (5), the Centre has no powers if one traces back to the constitution, to either assume, authorize or make a definition of supply in parts that fails to be in sync with the whole new scheme and enactment of the GST Legislation.

Terming certain activities or transactions which are straight out of GST, some as Supply and others as not a supply and yet others as supply but not leviable to tax and hence non-taxable are highly arbitrary as one could see clearly from the above discussion.

Accordingly, the definitions it has hastened to make under the basic definition clause under Sec 2 of the Act are striking discordant notes with rest of the scheme of taxation and plunges everyone in utter confusion.

An array of Sections & a brief commentary - it's all a loopy loop

The following commentary on the sections and the implications they have in turn on the transactions may call for a relook to assess further ramifications they may have upon the operation of the Scheme;

Sec 2(6) defines Aggregate turnover includes exempt supply while exempt supply includes non-taxable supply while non-taxable supply includes non-GST supply. So a chain reaction is possibly triggered by a misconception of the term supply.

Sec 2(47) defines exempt supply which includes non-taxable supply

Sec 2(78) defines non-taxable supply includes that which is not leviable to tax. Then what about activities and transactions which are neither supply of goods nor services? They are not at all leviable to tax. Can you equate them to non-taxable supply then? If not, why?

Sec 2(105) defines supplier in relation to goods and services. How should one call a person carrying out business activities or transactions as Listed in Schedule III if they are neither supply of goods nor services?

Sec 2(107) defines taxable supply as supply leviable to a tax under the Act. By and large, the only straight forward definition of all, one must think.

Sec 7(3) defines Scope of supply terming certain activities and transaction neither as goods nor services under a Schedule III carved out for the said purpose

Sec 9-Levy

As per sub-section (1) above, Alcoholic Liquor for human consumption is out of GST. Is it not appropriate to consign it away from taxation same as the items under Schedule III, as it not at all a supply of goods.

As per sub-section (2) above Petroleum products numbering 5 therein, are not yet leviable to GST and in the event of the definition of supply not being applicable to them as yet, will it not be required to equate them to the items listed out under Schedule III as a non-supply instead of calling it, not a supply?

Sec 17(3) - Mis-apportionment of Credit

1. Misalignment between 17(2) & (3) in relation to computation of exempt supply by adding the value of the RCM supplies which is again going to be under challenge of a writ shortly as per the understanding of the Author.

2. Misinterpretation of Para 5(b) of Schedule II in Sec 17(3) which is against the decision of the Gujarat HC in the case of Principal Commissioner *Av. A Alembic Limited* [2019-TIOL-1495-HC-AHM-ST](#) albeit under the existing Law. Sec 174(2) should come to the rescue of the aggrieved under the GST Law.

Sec 22 - Registration based on the definition of aggregate turnover definition will go wrong as well if based on the above misinterpretation of exempted supply definition to include non-GST activities which includes even items such as Petroleum products, electricity and interest on deposits which are seemingly made to look like either not leviable to tax or exempt from tax so as to be deliberately include them within the mischief of exempted supply so as to rope them into registration net, when they are truly neither.

Sec 31(3)(c) - Supply of exempt goods under a bill of supply instead of an Invoice will be right document to issue for the purpose of the electronic return process of GST.

Do you see a loopy loop out there in all the above sections inter-connected with the term supply, which is supposed to be the true corner stone of GST?

An array of questions with a short explanation

While many including the Author think it is not fair to add the value of non-leviable-to-tax items and the value of Schedule III activities and transactions for various purposes such as computing aggregate turnover for registration, payment of tax, claiming of threshold exemption, inclusion of RCM supplies/non-levy/non-GST/Schedule III supply in exempted supply for apportionment of Credit and for deciding upon issue of invoices vis a vis bill of supply on such dispatches and so on, there are some who do think it is all right to include them all in the scope of supply.

This is sure to give rise to a chain of questions to pop up such as the following;

If some of them count for computing exempted supply then what is the grand idea of calling them as -

1. Not yet into levy of GST
2. Out of GST levy and
3. Exempted when they are not at all under GST?
4. Neither supply of goods nor supply of services but including those supplying them under the definition of supplier?

Author's end note

In conclusion, the Author is of the strong view that the definition of supply under Sec 7 of the CGST Act is so jinxed up that it needs badly a thorough revamp so as to stave away any new litigation in the future.

Will the Government quickly respond to these concerns and address them in a positive way without resorting to retrospective amendments to quell the upsurge of questions and litigations is the quandary everyone faces truly!

(The Author is a Former Assistant Commissioner/CBIC Master Trainer GST and currently a Senior Associate, Indirect & Corporate Taxes, at RANK Associates, Chennai. The views of the Author are purely personal.)

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