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Supply- Taxable Event under Model GST Law-Inclusive and Subjective

With step-by-step progress towards Goods and Services Tax (“GST”), the Country is all set to witness the biggest indirect tax reform of unmatched importance in independent India. GST would mark a paradigm shift in the indirect taxation of our Country and the concept of origin based taxation as practiced currently, would no longer be there. In line with the global practices, concept of destination based taxation would usher in under GST. At the same time, 17 of the major taxes levied under the Indirect taxation i.e. Central Excise, Service tax, VAT/CST etc., would be subsumed under the ambit of GST, resulting in change of the taxable event as well.

Taxable events in present indirect tax regime

Determination of the taxable event in any tax law is of utmost significance as the levy of tax is based on occurrence of that event. Before we proceed further to understand and analyse the taxable event under the GST regime, it is imperative to first understand the taxable events under the present indirect taxation:

Tax/ Duty	Taxable Event	Section/ Act	Relevant Provision
Service Tax	Service provided or agreed to be provided by one person to another in the taxable territory	Section 66B of the Finance Act, 1994	<i>“There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.....”</i>
Excise Duty	Manufacture or production of goods in India	Section 3 of the Central Excise Act, 1944	<i>“There shall be levied and collected in such manner as may be prescribed, 1(a) a duty of excise to be called the Central Value Added Tax (CENVAT), on all excisable goods (excluded goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).....”</i>

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Customs Duty	Goods imported into, or exported from, India	Section 12 of the Customs Act, 1962	<i>“(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.....”</i>
CST	Sale of goods in the course of Inter-State trade	Section 6 of Central Sales Tax Act, 1956	<i>“(1) Subject to the other provisions contained in this Act, every dealer shall, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, not being earlier than thirty days from the date of such notification, be liable to pay tax under this Act on all sales of goods other than electrical energy effected by him in the course of inter-State trade or commerce during any year on and from the date so notified.....”</i>
VAT	Sale of goods in the course of Intra-State trade	As per the provisions given in respective State VAT Acts, like under DVAT, Section 3(2) of the DVAT Act, 2004 provides that <i>“Every dealer shall be liable to pay tax at the rates specified in Section 4 of this Act on every sale of goods effected by him....”</i>	

“SUPPLY” – the taxable event under the Model GST Law

In the Model GST Law, a uniform and single taxable event ‘supply’ would replace multiple taxable events i.e. manufacture, provision of service and sale, etc., as prevalent in the present regime. Thus, the constant monitoring and compliance required for keeping track of varied tax trigger points at present would fade away in GST, but, simultaneously, the term ‘supply’ will hold the greatest significance and shall be important in determining the taxability of all transactions, whether commercial or otherwise under GST regime.

Section 3 of the Model CGST/SGST Act, 2016 [also applicable for the Model IGST Act vide Section 2(f) thereof] specifies the meaning and scope of the term supply, broadly, in the following manner:

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Broad Category	Sub-section of Section 3	Particulars
	1	Supply includes:
Normal supply of goods and/or services	1(a)	All forms of supply of goods and/or services 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 .
Import of service	1(b)	Importation of service, whether or not for a consideration and whether or not in the course or furtherance of business .
Supply Without consideration	1(c)	A supply specified in Schedule I (Matters to be treated as supply without consideration), made or agreed to be made without consideration.
Supply of goods v/s Supply of services	2	Schedule II (Matters to be treated as supply of goods or services), in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as either supply of goods or supply of services.
Principal Agent Transaction	2A	Where a person acting as an agent who, for an agreed commission or brokerage, either supplies or receives any goods and/or services on behalf of any principal, the transaction between such principal and agent shall be deemed to be a supply.
Power(s) of Central/State government	3	Subject to sub-section 2, the Central or a State Government may, upon recommendation of the GST council, specify, by notification, the transactions that are to be treated as:- (i) a supply of goods and not as a supply of services; or (ii) a supply of services and not as a supply of goods; or

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Broad Category	Sub-section of Section 3	Particulars
		(iii) neither a supply of goods nor a supply of services.
Branded service by an aggregator under trade or brand name	4	Notwithstanding anything contained in sub-section 1, the supply of any branded service by an aggregator, as defined in sec 43B, under a brand name or trade name owned by him shall be deemed to be a supply of the said service by the said aggregator.

Inclusive definition of term 'supply'

Despite being the first step for taking off under GST regime, the Model GST Law has chosen to define 'supply' in an inclusive manner, without even defining what 'supply' actually means. Thus, the proposed definition of the term 'supply' under the Model GST Law suffers from ambiguity as it starts with the word *"Supply includes..."*.

It is crucial here to note that the term "includes" is generally used to expand the meaning of the former word. Even, the wide import of term "includes" has been settled in number of judicial pronouncements to establish that its usage expands the meaning. In the case of ***Doypack Systems (Pvt) Ltd. Vs. Union of India [1988 (36) ELT 201 (SC)]***, the Hon'ble Supreme Court has interpreted the meaning of the term 'includes', as ***"It is well settled that the word 'includes' is an inclusive definition and expands the meaning."***

Similarly, in the case of ***Tata Consultancy Services Vs. State of Andhra Pradesh [2004 (178) ELT 22 (S.C.)]***, the Hon'ble Supreme Court has interpreted the meaning of the word 'includes', to suggest that ***"...When the word 'includes' is used in an interpretation clause, it must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. [See Scientific Engineering House Pvt. Ltd. v. Commissioner of Income-tax, Andhra Pradesh (1986) 1 SCC 11]."***

Manifestly, the settings of the definition of 'supply' as adopted by legislature, leaves the interpretation of the term 'supply' open for all, including tax payers and the Centre & the State Governments, which would lead to bizarre outcomes. The prudent approach here could have been to draw the meaning of such a crucial definition in crystal and definitive

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manner. Here, it would not be out of place to look at the meaning of term supply, as adopted in the other countries like Canada, Malaysia where GST is applicable.

Under Canadian Goods & Services Tax *“supply means the provision of property or a service in any way, including sale, transfer, barter, exchange, licence, rental, lease, gift, or other disposition”*. Similarly, under Malaysia Goods & Services Tax, where GST made applicable with effect from April, 2015, Section 4 thereof defines supply as *“subject to subsections (2) and (3), “supply” means all forms of supply, including supply of imported services, done for a consideration and anything which is not a supply of goods but is done for a consideration is a supply of services.....”*

Keeping in mind, the importance the term supply would entail in GST, the term supply could have been defined in exhaustive manner to ensure the boundaries restricting any sort of wide interpretation of the taxable event. Ironically, the Model GST Law has chosen the other way round and any activity having the characteristics as stipulated in Section 3 of the Model CGST/SGST Act, can be contemplated as supply even if not so envisaged by the legislation as such.

To add more woes, Section 3(1)(a) of the Model CGST/SGST Act, uses the term “such as” while covering all forms of supply of goods and/or services under the taxable net. Thus, all or any form of supply which is made for a consideration by a person in the course or furtherance of business, would be supply to attract GST. Even barter and exchange would be taxable under GST with the question requiring clarification as to whose supply it shall be treated as and what would be the valuation. Furthermore, the Model GST Law has gone a step ahead to even tax the supplies made without consideration as per Schedule I. The Schedule I to the Model CGST/SGST Act, comprises of a list of matters/ transactions, which would be treated as ‘supply without consideration’, which are as under:

- Permanent transfer/disposal of business assets.
- Temporary application of business assets to a private or non-business use.
- Services put to a private or non-business use.
- Assets retained after deregistration.
- Supply of goods and/or services by a taxable person to another taxable or non-taxable person in the course or furtherance of business. But, this will not cover goods sent for job work.

Perusal of the above provisions reveals that the government wants to levy tax on each and every transaction entered by a taxable person and don't want to leave any room for charging GST. Even any business assets/ services used for private/ non-business use, shall

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also be treated as supply. This can be best understood with a simple example of a Company providing mobile phones to its employees, which are used for making business calls and personal calls as well. Since, use of mobile phones for making personal calls would be exigible to GST, valuation would be another problematic area and it would be an uphill task to bifurcate the usage of business assets/services to a private or non-business use. At the same time, one may also ponder as to how the department will ascertain the proportion of personal and business use or administer such transactions for levying GST.

It may not be out of place here to mention that on one hand, the credit of GST will be restricted to so much of the input tax as is attributed to the purposes of business only [as per Section 16 of the Model CGST/SGST Act], but, on the other hand, GST would be payable on business assets/services put to a private or non-business use. Thus, the assesses would have despairs from both the sides.

In the light of above discussions, it is critical that the lawmakers should wake up to the realities of the situation and ensure to have concrete taxable base by defining the term 'supply' in clear and unambiguous manner, which is the pivotal term under the proposed GST regime, that would be the centric point to determine levy & collection of GST. Knowingly or unknowingly, the Model GST Law has sown the seeds for another series of fresh litigation, which the present indirect taxation is crippled with, when it comes to determining the test of manufacture for levy of Excise duty or rendering of services to levy Service tax. The law is striving hard even as on date to settle down after several decades of jurisprudence. It would indeed be quite interesting to watch how the term supply is re-defined, amended, explained, substituted in the Final GST Law, keeping in mind the long trodden path so far.

Thanks & Best Regards,

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