

## **Overview of Basic Concepts of GST Law**

### **1.1 Background**

India has had a number of taxes introduced at various points of time. Under indirect taxes we have had central excise, central sales tax, value added tax, service tax, luxury tax, entertainment tax, betting and gambling tax, entry tax in States and many more. Each of these taxes was administered by State or the Centre. They had different threshold exemption, taxed different activities / events, their own classification entries, differing valuation, demand and recovery mechanisms, which made it difficult for doing business. The Government as a part of a 40 years old unfinished agenda of implementing value added tax in India merged 11 indirect taxes of the Centre and States. This was done on a consensus approach to get all States on board which lead to the pristine principles of an ideal GST to be diluted quite substantially. The Goods and Service Tax was been implemented on 1<sup>st</sup> July after Constitutional Amendment in 2016.\*<sup>1</sup> Some transaction / products like electricity, 5 petroleum products, stamp duty, liquor have been kept in out of GST in line with the States demand and considerations of possible fall in gross revenue. Some of them may over period of time be merged. Presently 5 petroleum products are being seriously examined which do not require any constitutional amendment and only require the GST Council to recommend and Centre and States to agree.

The main objectives of GST are:

- Enlarge the tax base now that India is moving towards being a developed economy,
- Encourage the parallel economy which presently contribute less on nothing to the tax to join the mainstream,
- Avoiding the cascading impact of multiple levies. i.e tax on tax,
- Reduce the multiplicity of taxes on transactions and lead to a common market,
- Reducing the cost of compliance for Government and assessee and
- Reduce the interface between the tax payer and the administrators by using information technology.

The experience in the last 10 months on the total collections has not been very encouraging though the economy continues to grow at more than 7% per annum. GST has helped the direct tax collections to clock a 16% growth to some extent. The GST collection post July 2018 till ate however has not been up to the expected level compared month to month ( March 17 to March

---

<sup>1</sup> The Constitution Amendment Bill of 2014 was passed on 14<sup>th</sup> July 2016.

18) even though the number of registrants has increased by more than 30%. The parallel economy has registered but not paying the tax due, maybe availing excess credits in transition and in normal course and awaiting the decision on reverse charge from unregistered suppliers. The technology infrastructure was pushed through without the normal user testing. The ill effects of the big bang reforms with credit matching instead of a graded implementation has led to many compromises with frequent amendments and government is unable to implement GST effectively.

The improvements expected in the coming months could be as under:

1. Simplify the return filing process so that at least the business to business part of the economy is enabled to transact business freely,
2. Build capacity and expand the IT infrastructure to be able to manage billions of transactions,
3. Continue to broaden the base,
4. Correct the several restrictions and drafting lacunae,
5. Postpone the credit matching mechanism,
6. To win back the trust of the tax payer with simpler law over period of time,
7. To put IT based identification of tax leakage areas and identifying the errant tax evader and
8. Get the annual GST audit put in place to identify and correct the transitionary errors as well as errors due to lack of understanding of the law.

## **1.2 Scheme of GST**

### **1.2.1 Levy**

The levy of GST under section 9 of the CGST Act and section 5 of IGST is on supply of goods or services or both within the State and outside the State respectively. It has also been fastened on the receiver of the specified goods and services. This under s 9(3) and valid levy.

Further procurements from unregistered suppliers also planned to be taxed ( presently suspended upto 30<sup>th</sup> June 2018) to provide a level playing field to the Indian tax compliant supplier as well as the tax compliant receiver. This is called the reverse charge.

Initially it was expected that the rate of tax between services and goods would be only one. However now that we have a number of rates and classification of goods and services becomes important. The exemptions to goods and services have also been provided to a limited extent.

Identifying the activity as a supply of goods or services is also needed as the time of supply and place of supply would determine payment of IGST or CGST ( UTGST) and the principles to be followed for goods and services to determine the same are different. It would also determine whether liable on exports or imports.

#### 1.2.1.1 Supply

Supply has been defined to include all the activities which were hitherto covered in the 11 State and Central taxes which have been subsumed in GST. This very wide definition is normally applicable only if activity is in furtherance of business and with a consideration. The wide definition of “business” means that almost all activities are covered including the activities by Government and supplies to Government unless specifically excluded.

#### Supply with Consideration

The normal supply includes agreeing to supply goods or services in the course of business. Business has been defined widely to include associations, government etc. and one may have to be very careful in saying that it is not a business.

It specifically includes: sale, transfer, barter, exchange, license, rental, lease and disposal.

It also specifically includes import of services for a consideration whether or not the activity is a business. Therefore imports on personal account also would be liable.

#### Supply without Consideration

Schedule I provides for the activities which are considered to be liable even though there has been no consideration. They are:

- ITC availed business assets being transferred even if it is permanent. The receiver would be eligible for credit.
- Supply made between distinct person (same PAN- different States) which means that stock transfers would also be liable.
- Supply between related persons in the course of business. Services to employees who are also considered as related therefore supplies which are not part of their gross emoluments would also be liable.
- Import of goods from related parties

- Supply of goods by agent to principal or vice versa when agent is working on behalf of the principal.

Supply also excludes certain activities which are not a supply of goods or services[ Sch- III] :

These activities are as under:

- Services by employee to employer
- Services by court or tribunal
- MLAs, MPs and persons who hold posts in bodies established by Central or State Government.
- Sale of land and sale of building other than those under construction.
- Actionable claims other than lottery, betting and gambling.
- Gifts from employer to employee not exceeding Rs. 50,000.

### 1.2.2 Reverse Charge Mechanism

In the economy of India we have had a large number of the goods and services being provided by the unorganised trade/ industry supplying to the final consumer as well as the trade and industry. Some have been specified as payable by the specified receiver such as Goods Transport agent, sponsored, advocate, services from outside India etc under section 9 (3). This is a carry forward from the service tax regime.

In general there are some suppliers of goods and services who may be small and below the threshold limit of Rs. 20/ 10 Lakhs. In addition there are those who have been avoiding the tax by not raising invoices or keeping themselves under the limit by having multiple businesses. Therefore one more levy on receipts from unregistered suppliers by registered persons had been imposed under section 9 (4) of CGST and 5(4) of IGST. This levy has been postponed due to the adverse impact on many SMEs in the initial period. Many SMEs do not have proper accounting policies and business is done on trust. Since they need to be competitive they do not invest on record keeping to the extent they should be doing. The income tax for many unorganised sectors needs to be calculated based only on the gross turnover with a percentage of deemed income less some specified deductions. In the present system where a SME supplier does not pay the tax or file the return, the receiver is to repay the provisional credit along with interest.

### 1.2.3 Small Supplier Exemption

The registration is exempted to those who supply goods or services below an aggregate value of Rs. 20 Lakhs per year. A smaller limit of Rs. 10 Lakhs has been fixed for smaller States which are underdeveloped. This exemption however is not available for the following:

1. One who is liable for reverse charge under section 9 (3) of CGST or 5(3) of IGST for specified services,
2. One who is liable for reverse charge under section 9 (4) of CGST or 5(4) of IGST for any supplies from unregistered suppliers ( kept in abeyance till 31<sup>st</sup> March 2018),
3. Involves in e- commerce business through a e commerce operator,
4. Engages as a casual taxable person or non resident person making taxable supplies,
5. Online data base service provider outside India,
6. Person who is required to deduct tax,
7. Person who does interstate supply of goods ( interstate supply of services is allowed within the exemption)
8. Agent of a principal and
9. Any person notified by Government.

### 1.2.4. Composition

In India due to the large number of entrepreneurs being uneducated or unorganised in sectors like man power supply, construction, hotels, small traders States came up with alternative tax collection mechanisms which did not need maintenance of proper records. These schemes however were used by many whose turnover was in crores. In some States there was no limit fixed due to compromises made. In GST also considering that such real smaller players are in high numbers a scheme of lower payment of tax has been implemented. The tax rates are: traders -1%, Specified Manufacturers- 1% and Suppliers of food & beverages- 5%. This is available up to Rs. 1 Crore subject to the following conditions:

1. Person having business in different States needs to be separately registered in all of them. (In other words, a person cannot be in composition in one registration and outside in another registration). The aggregate turnover from all locations should not exceed Rs, 1 crore,
2. Service providers cannot opt for this scheme except those engaged in the supply of food and beverages, (outdoor caterer/hotel etc.),

3. No input tax credit is available to such person,
4. Such person cannot collect the composition tax from the recipient\*<sup>2</sup>,
5. Composition dealer cannot have any stock which are procured outside state /imported in hand before opting composition,
6. Person who makes any supply of goods through an Electronic Commerce Operator cannot opt for the scheme and
7. Person who is a manufacturer of such goods as may be notified on the recommendation of the Council cannot opt for the scheme. Ice cream, pan masala and Tobacco products under chapter 24 are notified till date.

The advantage is that even if 1 family has 100+ PAN cards and consequently 100+ GST registration under composition scheme, it would be legally valid as long as it is not a sham.

The disadvantage of the composition scheme when one is an intermediary is that the ITC is not availed + there is a tax outflow which the receiver cannot avail. Therefore the composition scheme is not beneficial to those in B2B activity but to only those who supply to the final consumer [ B2C].

### 1.3 Inter and Intra State supply

The intra state supply is where the location of the supplier and the place of supply of goods or services or both are within the State. Interstate supply would be when location of the supplier and the place of supply of are in different States or Union territories. To determine whether within the state or outside one would require to examine the place of supply section 12 or 13 of the IGST.

The applicability of types of GST in normal transactions can be seen in table below:

Type of Transaction	Type of Tax
Supply of Goods, or of services, or both within the State (Same transaction would suffer both types of tax)	SGST or UTGST of respective State
	CGST
Supply of goods, or of services, or both in course of inter-State trade or commerce	IGST

<sup>2</sup> Government is examining whether the composition tax charged could be available as credit to the receiver.

Supply of goods, or of services, or both in course of Import into the territory of India	IGST
--	------

## 1.4 Classification

Classification means categorizing products and services into chapter headings under chapters to ensure that there is uniformity across the States in India as well as with the world at large. GST as in case of Customs and Excise has followed the Harmonised System of Nomenclature (HSN) but listed in form of schedules as was done under VAT. VAT was never an advanced or well drafted law.\*<sup>3</sup>

The impact of a wrong classification can lead to either one not being competitive as others are charging less for final supplies to consumers or face demands which can destroy the business as liability for payment for differential tax could be for upto 6 1/2 years coupled with interest and penalties. The denial of credit if intent to evade is upheld could lead to instant bankruptcy.\*<sup>4</sup>.

Killing the goose that lays the golden egg is an old saying which would apply here.

There had been continuous and monthly changes to the rates till November 2017 which were at times decided without much application of mind. Hopefully a final list would be made available which would be the rate applicable from 1<sup>st</sup> July 2017 itself to avoid further confusion as Government is rectifying incorrect classification.\*<sup>5</sup> in the Budget of 2018.

The understanding of the product or service in terms the agreement, usage, how perceived in the trade, how advertised could give one an idea of the item and general understanding on where it needs to be classified. However in GST one would have to refer to the various schedules set out to identify where the product / service would be appropriately classified.

The schedules mentioned have enumerated the description of goods and refer to the Customs Tariff Act. There are also general rules of interpretation set out in sequence which need to be applied. They are as under:

1. As per the titles, terms of heading and description in the schedule ( read with the section/ chapter notes)

<sup>3</sup> The classification in schedules with chapter headings coming in all schedules is confusing. The HSN format maybe adopted

<sup>4</sup> When interest, penalty and possible prosecution exists, not allowing credit is a draconian provision.

<sup>5</sup> Many dealers/ service providers have not followed unreasonable classification. Some have not even invoiced. Since the fault is of poor drafting, the retrospective amendment for rates should be announced for all changes till 31<sup>st</sup> march 2018.

2. Unfinished or incomplete goods classified as respective goods
3. Mixtures as per dominant item of mixture
4. Specific description prevails over general
5. Mixtures of different material as per material which gives the essential characteristics
6. If all above is not possible, then as per heading, which appears last in all schedules.

The classification under the Customs Tariff is based on the Harmonised System of Nomenclature which can be a valuable guide as it is more descriptive. (2017 edition) The earlier customs and central excise law has a history of classification disputes. These case laws may provide a good direction when there is a doubt.

The practitioner would require to refer to a good commentary as well as an updated comprehensive commodity wise classification book to be able to advise appropriately

### **1.5 Exemption**

Exemptions under GST have been grudgingly given which is the right way to go about as far as goods are concerned. In services the earlier exemptions in service tax have been trimmed. The broad basing of taxation has been achieved to some extent. However quite a lot of fine tuning is required to avoid disputes. The provision that one cannot opt for payment of GST in case of doubt for unconditional exemption is quite inappropriate as GST is not a settled law. If one errs in favour of revenue one maybe penalised.\*<sup>6</sup> The best practice is to read the exemption strictly to see if one is eligible for the benefit. Once eligible if there are purely procedural requirements then one can be liberal. A good practice is to write to the jurisdictional GST officers seeking a confirmation to have a defense to ensure no denial of credit in future.

The goods which are exempted are set out in schedule – I – notification 1/17 and services which are exempted have been set out in Notification 12/17 dt. 28.6.17 as amended from time to time.

The entrepreneur or the consultant may be tempted to start with the nil or lower rate which may not be the proper procedure to be followed. The product or service should be first understood and classified without reference to the rates. Fitment into the description is paramount. Then the rates and alternative classification examined for the appropriate classification and finally eligibility for exemption. There are very few exemptions in GST as compared to the erstwhile VAT, service tax and central excise laws. In the present classification many challenges are observed in the Nil vs 5% rate; and the 18% vs 28% rate. It would depend on the product /

---

<sup>6</sup> On count of no liability there no credit one may face denial of credit for 6 years which could destroy the business.



service being in intermediary stage (less issues as credit available to next stage) and it being a final product/ service (more issues as consumer is only interested in the final price).

Any mistake in classification especially at a lower rate could be catastrophic for the business as the differential tax with interest and penalty may be in multiples of the net profit earned.

Demands would also be made after efflux of time which means that the profit after tax and after distribution should be sufficient to pay the differential tax. Consequently the capital or investment itself can be eroded.

## **1.6 Rates of Goods and Services**

We have a number of rates in GST due to the federal structure and varied culture, economic disparity and nature of our people. The broad list of GST rate as per the given schedule is as follows:

### **1.6.1 Rates for Goods**

- **5 per cent.** in respect of goods specified in Schedule I,
- **12 per cent.** in respect of goods specified in Schedule II,
- **18 per cent.** in respect of goods specified in Schedule III,
- **28 per cent.** in respect of goods specified in Schedule IV,
- **3 per cent.** in respect of goods specified in Schedule V,
- **0.25 per cent.** in respect of goods specified in Schedule VI

Additionally some cesses have also been set out for few products.

### **1.6.2 Rates for Services:**

- **5 per cent.** - Rent a cab, job work relating to textiles, supply of food ( AC or Non-A/c Restaurants ,eating joint etc.), GTA service- Reverse Charge Mechanism, Print Media advertisement etc.,
- **12 per cent.** –, Accommodation where tariff is between Rs.1000 to Rs.2500/-, Business class air travel, GTA on forward charge etc.,
- **18 per cent.** - General Rate – all services not covered in other rates including specified construction services.
- **28 per cent.** - Luxurious hotels accommodation, Gambling, Amusement park entry etc.,

Note: There have been a number of changes in rates due to some good classification practices not having been followed initially. Government says that it would over time rationalise them after

making proper fitment. This exercise was done in central excise by having only 1 basic rate in the last decade.

### **1.6.3 Rates under Composition:**

- 1% in case of Traders and manufacturers
- 5% in case of Suppliers of Food and Beverages Service (Restaurant, eating joint etc.)  
This is redundant and should be omitted as it would lead to inability to collect this amount.

Note: It may also be noted that in the first year a number of changes are expected. The changed rate would be applicable from the date of notification. Change would be only prospective unless made applicable retrospectively which for the changes made till date has not been done.

## **1.7 Valuation**

### **1.7.1 Valuation law**

Valuation disputes in the past were frequent in central excise and started in service tax and less in VAT. However most of the issues got resolved as the law developed in central excise. In service tax few disputes arose due to subjectivity and lack of comparison which are reaching finality at the apex court this year. In VAT transaction value was much simpler and only issues of evasion used to come up. Many States restricted the credit when goods were sold below the cost.

In GST surprisingly the valuation principles under central excise for goods and service tax for services have been adapted with market value concept of Customs added.

The transaction value is to be adopted where the supplier and recipient are not related and the price is the sole consideration. ( Section 15) This value needs to be adjusted for aspects which impact the price. The transaction value would include:

- taxes paid other than in GST,
- amounts incurred by the receiver which are in relation of the supply,
- incidental expenses including packing , commission etc charged by the supplier,
- interest or late fee or penalty for delayed payment of consideration,
- subsidies directly linked to the price other than Central/ State subsidies.

The transaction value (TV) would exclude:

- the discount which is given before or at the time of the supply and
- that which is known at the time of supply ( target, quantity discount) provided the recipient has reversed the Input Tax Credit.

Where the TV is not determinable then one would have to refer to the GST Rules 27 to 35.

Government has also reserved the right to specify valuation methods. The list of related person has also been provided.

### **1.7.2 Valuation Rules ( Rule 27- 35)**

The valuation rules prescribe different methods for different types of transactions making an attempt to arrive at a fair price ( not tainted by relationships and other advantages). Important ones are as under:

#### Normal Method to arrive – Adjusted Transaction Value ( Rule 27)

- i. When consideration is not wholly in money then the open market value of the supply would be considered. Open market value could be said to be comparable untainted value at the same time.
- ii. Where not possible to get the above value then the value received in money and the money value of other consideration. Example of this could be as under:
  - Amortised value of capital goods supplied free of cost ( cost/ possible usage)
  - Advances impacting the price ( Advance for machinery/ working capital). The bank interest saved by the supplier,
  - Component supplied free of cost for incorporation. The value of the component,
  - Reasonable means to arrive at the advantage can be used.
- iii. Where ii) above not possible then the value of goods or services which are akin. This value may require to be adjusted for realities and maybe subjective.
- iv. Where iii) not possible as 110% of the cost of production or provision of service. ( Rule 30)
- v. Where iv) also not possible then any reasonable means consistent with the above principles. ( Rule 31)

#### Pure Agent Supply ( Rule 33)

There are times when the contract could be for supply of some services but could also involve supply of services or goods from other third parties.

Pure agent is one who:

- enters into an agreement to be an agent to incur costs or expenditure while providing the service contracted for,
- does not hold title to the goods or services supplied to the recipient,
- does not use such goods or services for himself or for provision of service of the recipient and
- receives only the actual amount incurred ( no margin)

The conditions for excluding value of supply are as under:

- i. the supplier acts as an agent of the recipient for the supply and payment both received and made on behalf of the recipient,
- ii. the payments made to third parties is separately indicated in invoice of such pure agent
- iii. the above supplies are in addition to services provided on own account.

Examples of such transactions could be as under:

- A Custom House Agent who arranges import may pay port charges, terminal handling charges, rent of plot, pay the customs duties, etc in addition to his services of providing liaison and co-ordination.
- A Resident Welfare Association arranging for 3<sup>rd</sup> party services like security, lift maintenance, housekeeping etc while ensuring that the members needs are co-ordinated sourced and it is clear from the contracts entered into with the 3<sup>rd</sup> parties.

#### Valuation of Supply to Distinct person (branches/ division) ( Rule 28)

In this case the valuation to distinct persons could be the open market value, if not available value of goods or services of like kind and quality and if that is also not possible 110% of cost ( Rule 30) or reasonable method ( rule 31)

Further an option of supplier charging 90% of the price charged by the recipient.

A major relaxation is that where the credit is eligible to the recipient, the value declared in the invoice shall be deemed to be the open market value. It is suggested that this relaxation be tempered with reasonableness to avoid disputes.

#### Valuation of supply through Agent ( Rule 29)

In this case an option has been provided for the supply of goods either way of going for the open market value or 90% of the price charged for supply to unrelated parties. If this is not possible then to follow 110% of cost ( rule 30) or reasonable method ( rule 31).

#### Specific Valuation Methods ( Rule 32- Optional)

- i. For exchange of foreign exchange the value shall be the difference between buying and selling rate as declared by RBI.  
If not available then 1% of the value of Indian Rupees received or paid.  
Further an yearly option to value at 1% of the gross currency exchanged up to Rs. 1 Lakhs ( subject to minimum of Rs 250- If less than 25,000), if more then Rs1,000 + ½ % between 1- 10 Lakhs, if more then 5,000 + 1/10%of amount exceeding 10 lakhs subject to maximum of Rs60,000/-.
- ii. For Air travel – 5% of basic fare for domestic or 10% for international fare. Basic fare is the fare used for paying commission in the normal course.
- iii. For Life Insurance Business the value would be arrived at after deducting the investment allocation and where not determinable as in a single premium policy 10% deemed to be value. In all other cases it would be 5% of the 1<sup>st</sup> premium and 12.5% of the subsequent premiums.
- iv. Resale of Second hand goods by person in that business would be the value calculated as the difference between the purchase and sale price. If the difference is negative, no tax need be paid.
- v. Physical or digital vouchers value would be the redemption value. ( most cases the face value)

In some cases the tax payer may have charged one consolidated price inclusive of tax. This is also called cum tax value. In such cases the value would be determined as under:

Rate is 18 % IGST then =  $100 \times 100 / 118 = 84.47$ .

It is expected that some of the disputes which existed for goods and service valuation would continue in the GST regime and many settled position of law may be revisited unless a comprehensive circular on old settled cases as relevant to GST is issued.

## **1.8 Input Tax Credit (ITC)**

### **1.8.1. Basic Understanding**

The principle of set off is that the GST paid at the earlier stage on supplies received ( capital goods, inputs, input services) is allowed as a deduction from the tax payable. In normal businesses the eligible credits are reduced from the cost of procurement/ purchases. In most businesses the margins would be less than the eligible credit which may be as high as 17 whereas margin is only 4-7%.

In the earlier regime only in Central Excise and service tax among the central levies the set off was available. VAT input tax credit was allowed for the procurement within the State. The service provider was unable to get the VAT credit and the traders the service tax credit. Most of the dealers did not get registered under central excise to enable themselves to pass on the duty of excise or the additional duty of customs (CVD) or the special additional duty (SAD) when they imported or dealt with imported goods. There were some indirect taxes where credit was not available for adjustment and payment of net amount. That is to say the whole tax as applicable was payable as under:

1. Basic Customs Duties
2. Luxury tax
3. Betting & Gambling tax
4. Octroi/ Entry Tax
5. Entertainment Tax

There were some taxes which were not available for credit at all even in VAT or Central Excise/ Service Tax as under:

1. Basic Customs Duty/anti dumping duty/safeguard duty

2. Central Sales Tax ( whether or not against the “C Form”)
3. Luxury Tax
4. Octroi / Entry Tax ( In some States this was adjustable to the VAT)
5. Betting & Gambling Tax
6. Entertainment Tax
7. Special additional duty (SAD) credit was not available to trader. However there was a system of refund to be claimed from Customs after goods are sold on payment of VAT due to the fact that the SAD was in lieu of VAT/ CST and credit was not available.

Now in GST the ITC has been expanded partially since there is no indirect tax other than GST. Credit is available unless restricted. To this extent the taxes on taxes is also avoided.

However where no GST is paid then credit would not be available. The excluded activities where GST is not applicable as on date are:

- a. Electricity presently a State subject
- b. Taxes on immovable property also a State subject.
- c. 5 Petroleum Products which are substantially used in businesses: Petrol, Diesel, Aviation Fuel, Natural Gas.....<sup>\*7</sup> .....

The industry would like that the GST be imposed on all the above as the taxes paid on expenditure in furtherance of business on the above activities are quite substantial. Presently the credit lost in the above could be more than Rs.2 Lakh crores! In the past IDT regime also this credit was not available but moving to GST it should have been. May be enabled in this year.

The eligibility of adjustment or utilisation of the credit of IGST/ CGST & SGST of one State needs to be understood.

The State GST would be eligible for credit for that State which is logical. Credit would also be available for payment of the GST in that State. The State GST would also be available for payment of IGST.

The CGST collected in a State would be available for credit and for adjustment when paying the State GST. Central GST as understood collected by a State would not be available for CGST of another State. For a multi state tax payer the CGST of Karnataka may not be usable in Bihar for

---

<sup>7</sup> Government is examining whether petroleum products could be included in the GST. Maybe in the next budget.

payment of CGST. However similar to SGST the CGST in a State can be used for payment of IGST.

IGST can be utilised for adjustment and payment of IGST, CGST or SGST in that State. It means that IGST credit is preferable to either SGST or CGST.

There is a restriction on order of utilisation which needs to be kept in mind.

IGST – Used first for IGST then if balance available for CGST and if balance further available for SGST.

CGST of State – Used for CGST in that State first and if balance is there then for payment of IGST. If balance available then can be carried forward.\*<sup>8</sup>

SGST of State – Used for SGST in that State first and if balance is there then for payment of IGST. If balance available then can be carried forward.

### **1.8.2. Eligibility of Credit**

GST was to completely remove cascading of mutil point duty as well as restrictions built over a period of time. In the earlier regimes the Cenvat Credit as well as VAT ITC was restricted for several items. The credit is available subject to conditions as under:

1. He is having a tax invoice or other tax paying document which has been uploaded by the supplier,
2. He has received the supply or goods or services,
3. Tax has been paid on such supply\*<sup>9</sup> ( by the supplier)
4. Return is to be furnished by the receiver,
5. He is to pay the supplier within 180 days. If not credit and interest thereon would be added to his output liability.\*<sup>10</sup> Credit of tax available on full payment at any later date.
6. In regard to capital goods where depreciation is claimed on the GST credit availed, then credit is not available.
7. The time limit for credit is the due date for filing of the return of September of next financial year or furnishing of the annual return whichever is earlier.

---

<sup>8</sup> There is a demand from industry that at least CGST of one State can be used for CGST of another State.

<sup>9</sup> The non compliance by the supplier is subject to action against him. Making the buyer liable for that is unreasonable and may see challenges.

<sup>10</sup> This again is quite unreasonable and government should not invade the business decision. The major defaulters in making payment in time is the government and the PSUs.



The law also provides for enabling credit of input tax and restrictively capital goods credit in case of various special circumstances such as a composition dealer, a small trader or one who is exempt becoming taxable, one who has taken registration, certificate from a chartered accountant etc. subject to conditions. GST is a procedural law and requires compliance of the rules as prescribed. The vigilant only would be able to avail optimum credit.

### **1.8.3 Blocked/ Restricted Credits**

We examine the continuing restriction under section 17(5) of CGST Act and extent briefly as under:

- i. Motor Vehicles and Other Conveyances. Exceptions where credit would be available are:
  - if used for transportation of goods
  - if used for making taxable supplies ( only for such service providers) of: further supply ( distributor of MV); transportation of passengers ( bus operators, cab operator )or for imparting training ( driving, flying etc)

Note: The conveyances for transportation of goods could cover cars, buses, boats, airplanes etc. The industries who could claim the credit for transportation of goods could be any who use them for business. Commonly the transportation / logistic industry, construction industry, mining, manufacturing, catering etc. In the past they may not have availed the credit.

The credit of lease of motor vehicles and other credits related to motor vehicles like insurance, repair etc used in furtherance of business would be available.

- ii. Works Contract for immovable property other than plant and machinery or where the service is used further for works contract.
- iii. Goods and services for construction of immovable property other than plant and machinery for himself. This means that a builder cannot avail the credit for inputs of a contractor for a building meant for renting or manufacture of taxable goods. However if the contractor / developer is selling the property ( before completion) then he can avail the credits of goods or services used.
- iv. Membership of a club, health or fitness centre- are barred even if used for furtherance for business.
- v. Travel benefits to employees on vacation such as leave or home travel concession

- vi. Food, beverages, outdoor catering, beauty treatment, health services, cosmetic/ plastic surgery unless used for making a further supply in the same category or as an element of composite/ mixed supply.
- vii. Rent a cab, life insurance and health insurance unless used for making an outward supply or the Central/ State govt notifies that it is obligatory for employer to provide.
- viii. Goods or services used for personal consumption.
- ix. Goods lost, stolen, destroyed, written off or disposed off by way of free gift or free samples.

The above provisions are subject to different interpretations and have been hotly disputed with most issues being in favour of the tax payer in the past. Auditors may refer to an analytical commentary (latest at least post February 2018) or the background material on GST of May 2018 of the Institute of Chartered Accountants of India. [tdtc@icai.in](mailto:tdtc@icai.in) to understand the compliances as well as the benefits.

The person who has opted for composition would not be eligible for any credit till he opts out at which time he would be eligible for credit of the stocks in hand. The non resident dealer who imports goods can utilise the credit of such goods if eligible otherwise.

The person who receives a notice consequent to evasion ( sec 74) or transports goods liable to GST ( sec 129) without payment of tax or such goods are confiscated (sec130) shall not be eligible for ITC. This is particularly a very harsh provision in the light of the complexity, frequently changing law and quasi judicial orders with total revenue bias.

Note: The credit should only be denied to a person who uses goods or services for personal/ private use. All other denials are unreasonable and do not move to a seamless credit system. There could be many genuine cases where due to lack of knowledge of the complex provision one makes an error. Further the evader would be liable for stringent penalties, interest and further action of prosecution. The denial of credit could close the trade or business which should not be the intention of any tax law. This is especially true when even the senior tax officers openly share their lack of knowledge of this new law after more than 10 months.

#### **1.8.4 Apportionment**

The assessee maybe having non taxable or exempt supplies or use the goods for non business purposes or a combination. In such cases he would be eligible for only credit to the extent used

for taxable and zero rated ( direct exports and SEZ) supplies. This would be as per the rules in this regard.

The value of exempt supplies would include supplies on which recipient is liable to pay under reverse charge\*<sup>11</sup> value of securities\*<sup>12</sup>, sale of land, sale of completed building\*<sup>13</sup>.

For banking, financial institution or a non banking financial company an option of avail 50% of the eligible ITC on capital goods, inputs and input services is available. One can opt for it once a year. This 50% would not apply for transactions within the entity where GST has been paid.

### **1.9 Place of Supply**

Place of Supply (POS) have the twin objective of confirming whether a transaction is deemed to be in India or Outside India as well as determine the State/Union Territory in which the levy accrues. The POS under GST generally follows the destination principle. However to take care of international best practices as well as practical issues to ensure that the States get their dues, some exceptions are there in goods and bit more in services.

An honest mistake can be costly as one may pay GST on reverse charge when not liable or not pay when liable while importing services. In case of export the same mistake can be made. Paying IGST to wrong State or in place of Local SGST + CGST may also lead to demands and simultaneous refund necessity which would block funds.\*<sup>14</sup>. If the mistake is detected after 2 years, there can be no refund claim for the tax paid but for demanding the tax not paid, there would be still one and a half years available.

The POS for goods would depend on the location of the supplier as well as where is the place of supply. If in the same State then it would be an intra state supply ( State GST + CGST) ) and if not then interstate supply ( IGST). Pertinent Sections in CGST = 10-14; and in IGST= 12 & 13. Therefore understanding this aspect in detail is important for the auditor.

### **1.10 Time of Supply (TOS)**

The time of supply triggers the levy of GST. The law provides that the TOS would be the earliest of payment, delivery of goods / provision of services, invoicing. Some differences have been

---

<sup>11</sup> This is wholly unreasonable as credit is not availed by the supplier at all. ITC would not be used for receiving goods or services.

<sup>12</sup> Investments will give income automatically and services used would be minimal and specific services not eligible.

<sup>13</sup> Similarly sale of land or building in cities the common services would be minimal and specific services not eligible.

<sup>14</sup> Industry would be relieved if the adjustment can be done in the back end by the technological means.

carved out when dealing with relatives and differing commercial transactions. Some of those specified are as under:

Reverse Charge – 60 days from date of issue of invoice or date of payment. If with related parties then date of recording of supply.

Vouchers – Where supply is identifiable along with the rate – then date of issue of voucher. If not then the date of redemption.

Interest, Late fee or penalty for delay in payment – On receipt of amount.

In case of non-recording- When return filed or payment made ( maybe post an audit or investigation)

### **1.11 Job Work/ Repair**

The job work route is followed to a large extent to ensure concentration on core competencies, lower costs for specialised agencies and quality enhancement. Job work is understood as working on goods supplied by the principal. There may be situations where some material is also added by the job worker. Where job worker adds substantial material, the transaction may not be called a job work and it may be advisable to supply on payment of tax and get back on payment of tax. Job worker in this case may need to be registered and avail the credit. Section 143 enables supply of goods for job work without Payment of GST. There are time limits for receipt back for inputs, capital goods except for moulds dies, jigs and fixture. When not received back they would be deemed to have been supplied as on the date of initial supply.

The practical business aspects of directly receiving the inputs, capital goods etc, direct supply to customer after the processing, supply to other job workers have been enabled. Scrap and waste may be supplied back or disposed of by the job worker on payment of appropriate taxes.

Repairs may be covered herein but not specifically covered.

### **1.12 Tax Collection at Source- E- Commerce Operator (ECO)**

The proliferation of internet and purchase through it in India has been tremendous. Supplies of goods and services using software has been growing exponentially and these transaction need to be taxed in India. There are different types of transactions as under:

- a. ECO provides a place to meet and supplier supplies goods or services directly to the buyer. ECO will get a commission based on amount of per lead.
- b. ECO supplies the goods or services to the buyer directly or indirectly and payment is made online to the ECO. If direct then ECO is a regular supplier. If not then he would be an operator.
- c. ECO delivers and collects food, merchandise etc. Here if considered an agent then under GST tax needs to be paid either by the supplier or the ECO.
- d. There could be many variants of the above.

The intermediary software platform on which the buyer and seller meet and complete a transaction has now been made liable to register if he has a presence in India. The ECO who is not having a presence in India would have to have a representative in India who would need to register. The primary responsibility for payment of GST remains with the supplier.

Under Section 52, the ECO would have to deduct 1% or less from the supplier payment and pay the same to the revenue as Tax Collection at Source. This would help the revenue to track those who transact on these sites.

Considering the many facets of such business including the extra territorial jurisdiction and feasibility of monitoring this provision has been put on hold upto 30.6.2018.

### **1.13 Tax Deduction at Source – Specified Recipients**

The local VAT laws had provided that procurement by Public Sector Units, Government Concerns and at times even larger Companies would be subjected to a deduction of Tax at Source akin to the TDS under Income Tax. This amount of VAT would be available as a payment proof for the dealers who provided works contract services and in some cases even on goods supplied. The deductor was required to remit the tax to the State Government and file a return to enable the dealer to be able to take a set off of the tax already paid. There have been large scale non-compliance by the deductors in the past.

Under GST, section 51 provides similarly that a department of Central/ State government, local authority, Governmental agencies or notified persons shall deduct tax at 1% and pay to Government along with an electronic statement of outward supplies. In the present GST regime there does not seem to be any reason for this provision to be made applicable. However once it is notified and then made effective this deduction will have to be done.

### **1.14 Demand, Interest & Penalties**

The tax may at times not be paid, underpaid, credit may not be reversed or partially reversed, refunds maybe excess claimed due to inadvertence, lack of knowledge or intentionally. The tax payer who identifies the non/ short payments etc could sou moto pay with interest and disclose in his returns. Section 73 sets out the time limit for order to be 3 years form the due date of furnishing annual return or from date of erroneous refund. The show cause notice is required to be issued at least 3 months earlier. In cases of fraud, misstatement, suppression leading to short or non payment or excess credit or erroneous refund then the period for notice within 6 years of the time limit for the order. The show cause notice is required to be issued at least 6 months earlier. There are other offences specified for transportation and dealing in goods/ services without payment of GST. Since the provisions of demand and recovery are especially harsh, tax compliant assessees may opt for voluntary review of their compliances of get the annual audit of GST done concurrently to avoid interest and penalties.

The notice would need a reply to be made which needs to explain the factual background and the concurrence to the notice or the reasons / ground on which it is not applicable. This would be followed by a personal hearing and on an order dropping the demand or confirming it.

The amount would be recovered by way of voluntary payment or from monies owed to the assessee ( bank/ NBFC), by selling goods belonging to assessee, from other person who owe money, as arrears of land revenue through the District Collector or through the magistrate as fine.

### **1.15 Appeals and Revision**

The resolution of notice is open to challenge by the revenue ( in case order in favour of assessee) or by the assessee himself in case of adverse orders. The first appeal would lie to the Commissioner Appeals and next to the Appellate Tribunal. The final fact finding authority is the Tribunal.

In case of question of law the High Court may hear the appeal. The final authority is the Supreme Court where any order passed by the Tribunal ( Regional or National bench) could be heard on questions of law.

### **1.16 Transitional Provisions**

The fact that GST was applicable from 1<sup>st</sup> July required many provisions for enabling continuation of business without impacting or stopping them. The main provisions in transition are briefly explained as under:

1. Migration of existing tax payers: All those having a valid PAN were provided a provisional registration and after additional information provided a final registration. Those who did not provide the information got the provisional registration cancelled.
2. Carry forward of cenvat by those registered earlier under central excise or service tax as well as ITC under VAT: The compliance under these laws by the unorganised and smaller assesseees was quite poor and many made mistakes while filing their form( tras-1) which was closed in November 2017. Courts have interfered and for those who did not file due to issues in uploading have been allowed to file again.
3. Balance of Capital goods cenvat credit: This has also been enabled to the extent of credit not carried forward.
4. Credit on stocks: The stocks in hand with a trader, manufacturer or service provider would be in available as inputs, semi finished goods or finished goods. The tax involved in these goods would be eligible for credit subject to conditions. Two schemes were provided for those who had invoices and those not in possession. Large number of SME have not claimed it (trans-1) and it is understood that many have claimed it excessively.
5. Transition provisions were also there for goods or services in transit, Input Service Distributor balance, centralised service providers, job work, price revisions, refunds, goods on which TDS was deducted under the VAT law etc. The law provided whether the issue would be under the earlier law or GST.

The transitional provisions and their compliance have been done with by passes due to system restrictions and lack of knowledge on the part of the majority of assesseees. Many disputes are expected and Courts would rule to enable many such unfair restrictions. Some however may not be amended.

The cautious tax compliant assessee may get a compliance of transition done in depth to avoid demands in years to come as also claim justified credit carry forward which may have been missed.

### **1.18 Other Miscellaneous Provisions**

Some important provisions have been discussed hereunder briefly:

1.18.1 Advance Ruling: The facility for getting a written clarity for goods or services or both on aspects of: applicability of GST; classification; applicability of notification ( including exemption); determination of time and value; admissibility of ITC; whether one requires registration.

1.18.2 Anti Profiteering: This provision is addressed to those who profiteer ( excessive margins/ profits ) taking advantage of reduction in tax rates or get higher input tax credit. The consumer could apply for relief. It may not have any significant impact and is applicable only for a short period.

The GST law in bits and pieces is an improvement over the VAT law and also to some extent the service tax provisions. However this dilution maybe due to the consensus approach adopted as well as over dependence on the executive which has resulted in a law which is loaded against the tax compliant and honest tax payer. This article has been extracted from the GST audit book in progress expected to be published within 1 month of Notification of the Audit formats by GOI.