

Indirect Tax - Deemed Supply - Present Vs GST – 3

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In the previous article, we had briefed on the term supply and its scope in GST. As discussed, the definition of supply is inclusive in nature. That means, in addition to what we normally understand as supply, it shall include those activities specified or deemed as supply in the definition of supply.

Once an activity is considered as supply, the next question would be whether such supply is of goods or services to decide on the place and time of supply. Though in most of the cases we could segregate the matters into either goods or services, there are certainly some grey areas where the segregation is not conclusive.

For example, in case of works contracts, only the service portion in the works contract is presently subject to service tax and the material portion attracts state VAT. Similarly in case of other construction contracts, restaurant services, software, etc., such activities are attracting both service tax and VAT though both taxes are supposed to be mutually exclusive.

Article 366 (29A) of the Constitution provides the list of activities that shall be deemed to be the sale of goods irrespective of the general understanding. Hence, such activities shall attract state sales tax subject to valuation method provided by the respective state. At the same time, Sec 66E of the Finance Act where in the activities listed there in are deemed to be the services for the purpose of service tax levy.

Most of the activities such as works contract, Hire purchase transaction, transfer of right to use, supply of food for human consumption listed in article 366 (29A) and Sec 66E have led to confusion among the assessee as to cascading of multiple taxes on same transaction.

Further, though valuation method has been prescribed under both VAT and Service tax law, sometimes the total value on which tax is levied is exceeding the value of the services itself. For example, presently in case of Annual Maintenance contract services, K-VAT is levied on 75% of the value whereas service tax is levied on 70% where assessee ultimately end up in paying taxes on 145% of the contract price! which is certainly should not be the intention of law. Similarly in case of Software products, most of the assessee charging both VAT and service tax on the entire value of the software to avoid disputes from the respective departments.

In order to avoid such contradiction in GST regime, Government has introduced a schedule in the proposed GST law where in it has segregated such disputable activities into supply of goods and supply of services.

The summary of Schedule II which provides matters to be treated as supply of goods or services and the comparison with current position is as follows:

SI No.	Nature of activity	Example	Present Position	Position under GST
1	Transfer of title in goods	Sale of furniture	Deemed sale of goods – 366 (29A)	Supply of Goods (SOG)
2	Transfer of goods, right in goods, undivided share in goods without title	License to use software	Transfer of right to use goods with or without title - Deemed sale. Transfer without right to use – Declared service u/s 66E	Supply of Services (SOS)
3	Transfer of title in goods where property in goods will pass at a future date upon full payment	Finance lease	Deemed sale of goods – 366 (29A)	SOG
4	Lease, tenancy, license to occupy land/ building	Renting of residential / commercial property	Renting of immovable property – declared service.	SOS
5	Treatment or process which is applied to another person's goods	Welding/ cutting/ painting	Job work not amounting to manufacture – service	SOS irrespective of manufacture or not
6	Disposal of business assets with or without consideration	Sale of office computers	Sale of goods – only with consideration - subject to VAT	SOG with or without consideration
7	Goods held for business put into private use with or without consideration	Use of office car by director for family trip	No taxes levied as far as there is no consideration. Could be treated as service when there is a consideration	SOS
8	Business assets are sold by third party to recover any debt	Auction by financier	Conflicting views – both in favour and against department	SOG by the business entity
9	Deemed transfer of business assets when the person cease to be taxable person unless such business is transferred as going	When the output services become exempt vide notification,	No such deeming fiction	SOG

	concern /is carried out by personal representative being taxable person	business assets held by assessee is deemed to be supplied		
10	Renting of immovable property – declared service.	Renting of shops at malls	Declared service – Subject to exemption on residential dwelling etc	SOS
11	Construction of a complex, building, civil structure	Construction of apartments	Declared service – subject to service tax except where the entire consideration has been received after issuance of completion certificate	SOS
12	Temporary transfer or permitting the use or enjoyment of any intellectual property right	Franchise	Declared service	SOS
13	Development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software	Tally / Oracle / SAP etc	Many controversies as decisions in favour of both goods as well as services + Declared service	SOS
14	Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act	Non-compete fee , Notice period recovery	Declared Service	SOS
15	Works contract including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;	Annual maintenance services / construction services	Service portion in execution of WC – Declared service. Transfer of property in goods – Deemed Sale	Entire works contract is SOS
16	Transfer of the right to use any goods for any purpose	Hire purchase contracts	Transfer of right to use goods with or without title - Deemed sale.	SOS

			Transfer without right to use – Declared service u/s 66E	
17	Supply of goods, being food or any other article for human consumption or any drink	Restaurant services	Service portion in supply is subject to service tax wherein goods portion is subject to sales tax	SOS
18	Supply of goods by any unincorporated association or body of persons to a member Thereof	Supply of food, gaming tools, books etc by any club to its members	Concept of Mutuality. Association and members thereof are considered as distinct person for the purpose of service tax.	SOG

Important decisions under Indirect tax laws:

- *Indian Hotels and Restaurants Association vs UOI [2014 (34) STR 522 (Bom):* Deeming fiction in service tax (Declared services) is valid and does not encroach on the States power to tax sale of goods - *Valid even under GST law.*
- *Greater Noida Industrial Development Authority vs CCE [2015 (40) STR 95:* Term 'lease' would cover a lease for any period including a lease in perpetuity/ lease for 99 years. Therefore the activity of long term leases is also service subject to service tax – *Supply of service in GST*
- *L&T vs CT (2013 TIOL (46) SC):* The amounts receivable for only the activity of construction and not the value of immovable property which is completed as on date of buyer approaching the developer would be specifically covered in declared services entry of works contract. – *Disputes are likely to continue in GST regime on the completed portion of construction. Even the immovable property could be treated service as anything other than goods is service! If excluded the valuation of immovable property could be a thorny issue.*
- *State id AP vs Rashtriya Ispat Nigam Ltd:* Transfer of right of goods involves transfer of possession and effective control over such goods. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control – *Transfer of right to use is deemed to be supply of services under GST*

Conclusion

The supply attracts levy under GST law. However, classifying such supply into supply of goods and supply of services are crucial in order to determine time of supply, place of supply and the valuation related aspects. Wrong classification could lead to different tax treatment and the legal implication thereon. Concepts of time of supply and place of supply would be discussed in the upcoming articles.

We value your feedback which may be send to

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Note: Further the readers may kindly refer the book on Goods and Service Tax – A Primer by Madhukar Hiregange and K.S.Naveen Kumar published by Walters Kluwer – CCH for better understanding.

This article is also published on leading Tax Portal www.taxguru.in.