

AmCham's Note on Model Law of GST Bill

Structural Issues which need immediate attention of the drafting Committee

A. Input Tax Credit of Special Cesses

The 122nd Constitution Amendment Bill before the Rajya Sabha does not provide for amendment of Article 270 with regard to special Cesses. It is pertinent to point out that if the special Cesses were to continue in GST, then there will be some inconsistency as the explanatory memorandum to the constitution amendment Bill provides for subsuming of all Cesses but the Constitution Amendment bill did not provide for it. It was earnestly expected that this anomaly would get addressed by the Input tax credit provisions both at the central level and the State Level through provisions like 2(57) read with provisions of Sec 16.

However, the draft provisions as available in the public domain does not explicitly provide for the tax credits also. It is very pertinent that this important issue be addressed for Cesses like tea Cess, Rubber Cess, Automobile Cess and Sugar Cess as these would have far reaching implications on cost of production if they remain unintegrated at the Union/State Level.

B. Valuation of Stock Transfers –Transaction Value –Basis of determination

Stock transfers inside an enterprise between various branches can happen intra state or inter-state. As regards Inter State Transfers the Valuation provisions read with Valuation Rules clearly articulates that they will be taxed at Transaction Value.

As regards transfers intra state Section 7 articulates that all intra state supplies will be subject to the CGST and SGST tax. In the light of GST Valuation Rules, sub rule 3 of rule 5, the same will be value at Transaction Value.

In the light of both the situations, it is important to define transaction value for stock transfers as the tax on final value addition will be paid when the ultimate supply takes place to the consumer and hence any transaction tax based on a future realization of value may involve blockage of working capital.

Prayer

GST Valuation Rules to provide for a separate yardstick of value for stock transfers as these are not the final supplies to the consumer/customer. Methods that can be considered are:

a) Actual Cost of Production at the Plant from which they are being transferred. (CAS standards may be used for these purposes), or

b) MRP of the recipient State /territory where the goods are proposed to be sold after transfer.

C. MRP based Valuation System under Existing law –Section 15

Under the Central Excise law currently, most of the goods that have been prescribed for declaration of prices under Metrology Act are covered under MRP basis of Valuation. With the new section 15 of the CGST and SGST, code not providing for an MRP basis of Valuation there needs to be a discussion with the Industrial groups covered under MRP method of taxation so as to understand the gaps on going back to transaction value. Additionally, separate transition provisions need to be built in for MRP based goods which pay Excise Duty on MRP basis from further levy of GST as regards goods in the market on the transition date.

It is also relevant that, in various States like Karnataka, Orissa, Tripura, Assam, Maharashtra, Kerala and Meghalaya as regards Pharma Industry there is an option to pay VAT at first point only and hence this discussion also needs to cover this aspect.

Prayer

Separate working group needs to be put in place to understand impact of work back into transaction value and to draft separate transition provisions.

Example: -

Goods on transition date removed from factory on which MRP based duty would have been discharged on removal and only VAT needs to be paid when primary sale happens. As goods have already been taxed on MRP basis (less abatement), no further value can be ascribed to tax for CGST purposes.

D. Area based Exemptions

The existing draft legislation in Chapter XXIV or XXV does not cover the grand fathering of incentives (Union Schemes under ABE) nor has any hint been provided on the sunset period and the basis of phase out of exemptions. In addition, various States have been granting Industrial Incentives and the yardstick of reimbursements have been linked to VAT paid in States.

Prayer

The draft legislation does not provide any clarity on the outcome of the views of Empowered Committee on these issues and it is emphatic that a separate Chapter be inserted between Chapter XXIV and XXV on the status of all these schemes.

- List of State Schemes
- Operative ABE of the Union.

E. Approach to Input Tax Credit provisions

While it is encouraging to read that the credit of input tax has move from the concept of nexus to furtherance of business in section 2(57) of the draft law but there are a few conceptual gaps in the approach to tax credit:

- 1** The definition of Capital Goods under clause 2(20) of the draft law is not synchronized with the concept of furtherance of business as the place of business definition under Section 2(75) does not cover places where the dealer/registered person will maintain assets to serve the customers. Additionally, while Section 2(57) links input tax credit to furtherance of business but under Section 132 in sub clause iv of sub section 2, the Government has power to notify rules for credit of taxes used in or in relation to taxable supplies or services.
- 2** Capital Goods have been defined but considering various periods over which credit is given under the existing Union and State regimes, it is not clear from section 16 of the draft law as to the period over which capital goods credit may be allowed.
- 3** In the existing law, there is immunity as far as losses of inputs while they are in the course of production. With the GST law, the entire back end of job worker will get shifted to the principal manufacturer in terms of Section 43A and hence, appropriate delegated rules will have to be provided for immunity losses of inputs when they are used for producing intermediates and final products.
- 4** In the existing regime, as regards the Union CENVAT credit of goods which are used in creation of immovable property such as Factories etc. are not allowed credit. This restriction is also carried forward in the GST regime as per draft provisions of sub section 9(d) of section 16.

It is important that industries such as Cement, Iron and Steel have a large role in an integrated GST regime and in case credits for creation of infrastructure are not allowed a considerable portion of capital investment will remain unintegrated to the mainstream GST.

- 5** As regards goods received under cover of one Invoice and which are physically received in lots, the code mandates credit after all goods covered by the Invoice are received. This provision is harsh and credits needs to be given on pro rata basis based on quantities received.
- 6** The existing provisions of section 16 do not provide for transfer of inputs from one plant of a registered entity to another and in cases of retirement of plant of machinery the same does not provide for reversal of credit. It is expected that Rules will prescribe solutions for all credit situations and their exceptions.
- 7** Utilization of credit availed:

The current provisions contained in section 16 do not have any specific provisions for utilization of credits and the manner of utilization. Though the Returns will be uploaded on GSTN clearly specifying utilization of credits the provisions under sections 16 or 26 or 28.

F. Job Worker provisions

Under Section 43A, the responsibility for accounting of goods and payment of taxes shall lie with the principal manufacturer.

In terms of the law, there should be facilities extended like prevalent in current law which is Rule 16 B and C of Central Excise Rules so as to cover removal of semi-finished goods, and finished goods for carrying out certain processes.

Rules should be published as a draft Rules which will delineate the roles and responsibilities between Job worker and Principal manufacturer.

G. Tax Exemption under Section 10

The law mandates that the Central or State Government will be entitled to retrospectively clarify the scope or applicability of an exemption and this clarification may be issued within one year of the original date of notification and in case such clarification is issued, it shall be deemed to have effect from the date of the original notification.

It is disappointing that even before the law has come into discussion with Trade and Industry the EC and the GOI are contemplating of retrospective clarification. Under the GST law, there has to be a mandate which declares that retrospective legislation will be avoided at all cost barring rarest of rare cases.

Likewise, in Section 132 the GOI and State Governments have wrestled with itself the power to issue rules with retrospective effect. Any positive regime planned for the nation and for the next generation cannot be built on retrospective powers which only add to mistrust and suspicion.

H. Appeals –Amount in dispute – Pre Deposits – Penalty also included in Section 79

As regards pre-deposits, the code proposes that pre deposit of disputed amounts will include penalties levied in the respective orders. This is applicable as per Section 79 which extends to both CGST and SGST appeals.

It is pertinent that definition of tax payable under Section 2(94) only includes taxes which is GST but does not include any penalties levied under the law.

In actual litigation, it is a fact that penalty levied by the Department is dropped by higher Tribunals and Courts as the conditions or attendant circumstances for its levy or not met. It is also a fact that whenever the UOI or the state invokes a larger period for reassessment etc., it loses the dispute at the CESTAT or STAT level in at least 90% of the cases. Considering the track record for levying penalty in both legislations, it is fervently prayed

that in case of order on merits the appeal pre-deposit should not include the penalty levied in the order.

I. Revisionary Powers of the Commissioner

Under the scope of the Revisionary powers, sub section 5 to Section 80 (under SGST) provides that if an order passed by any authority below the Commissioner level involves an issue on which the STAT or HC has decided and the same is prejudicial to the interest of revenue in some other case and appeal in that matter is pending to be filed before an appropriate forum for such cases would be protected from being time barred until the final forum decides the matter.

It is strange that similar provisions have not been drafted when appeals of assesses are pending in some forums and similar matters are raised as disputed in subsequent orders. It is pertinent that provisions like section 158A ,158AA (recently enacted) of the Income Tax Act 1961 can be used even in the GST environment and care should be taken to draft the same as both parties to a litigation should have equal room in any litigation matter.

Additionally, there needs to be clarity on matters powers of Committee covered by Section 35 E of the Central Excise Act which also in way acts like a revision of the order of the adjudicating authority.

J. Appeal against orders of Advance ruling Authority –Section 99 and connected sections

Chapter XIX provides that an appeal against the order of the Advance ruling Authority created in each State will be made to an appellate authority. There are detailed sections such as 99 and 100 providing for the appeals and its consequences.

Considering the nature of issues, listed in sub section 2 of section 97, it would be preferable for the National Appellate Tribunal to hear these cases in its Apex Bench so that decisions are rendered quickly.

An appeal against the decision of the National Appellate Tribunal on Advance Ruling should go to the High Court and then to the SC.

K. Transaction Value Section 15 – Impact of Discounts or Incentives

The scope of Discounts given to trade are generally divided into 2 categories .The discounts given on the face of the Invoice at the time of sale is generally known as Primary Discount and is seen on the face of the Invoice. However, the entire trade and industry in India in sector like Domestic Electricals, Electronics, Home Utilities, Foods, Packed Foods, Beverages Personal Products, Cosmetics etc. also run schemes in which incentives are quantified after a particular calendar period. These Schemes have inextricable link to the sales of the product and also include consumer promotions which in turn get passed on through trade using the back to back relationship.

Considering that the proviso to Clause h of sub section 2 mandates that post supply discounts would be allowed as a deduction only if its established that it was known at the time of supply ,the trade and industry is doubtful that in all cases the quantum of post-sale discounts can be proved at the time of supply .It is possible to establish as per record all schemes that run and the targeted network of trade that will benefit from it but the quantum deductions get finalized only after the closure of the scheme running period and hence the restriction makes the post- sale discount abatement a non- starter.

Prayer

Post sale discounts should be deductible if adequate evidence exists of the schemes that create the liability and subject to the condition that reversal of credit by the corresponding counter party happens through the documentation process on the GSTN.

L. Meaning and Scope of supply –Section3

Schedule II referred in section 3 adverts what matters will be treated as supply of service under sub section 5 of the schedule and what matters are treated as sale of goods under sub section 6 of the Schedule.

In the light of this, the relevance of retaining a separate notification power as per sub section 3 on the State or the GOI for further items is not understood. In case there are other items upon which doubt exists the ideal outcome would be discussing them and list them in Schedule II.

M. Litigation prone issues included in Valuation Section 15

Clause d of Sub section2 -Taxes, Duties other than CGST or SGST or IGST

- The State Governments despite the Constitution Amendment Bill providing for subsuming of Entry 52 have not made any provisions in the local enactments in States like Maharashtra (Mumbai Metro), MP, Orissa etc. for phase out of the entry 52 levy currently imposed by States.
- AS the Entry 52 levy –Entry taxes will subsume with GST there has to be a clean road map by the EC or GST Council advising the concerned States and this White paper on phase out of Entry taxes should be published well ahead of the final draft GST law.
- Secondly, it is not understood what other taxes could go into the valuation base for purposes of section 15 and it will be pertinent to draw reference to a one example.
- Various States in the country have APMC Cess on notified goods and a few States are Karnataka, AP, and Maharashtra etc. The Cess levied by the APMC which is local regulatory body if considered as a part of Valuation will only add to the

inflationary cost of goods and hence a clear provision should be inserted mentioning the levies will be considered for valuation purposes.

Clause c of sub section1

- It is widely reported that Royalties and License Fees have been one of the many causes of Customs Valuation disputes that have time again reached the Courts. In this context the Government must through supplementary manuals for GST or through FAQ's provide ample examples of situations when Royalties would be includible in value of goods /services so that uncertainty and litigation is not encouraged.

N. Reciprocity in Law –Reference to Compliance Rating Section 116 of the Draft Law

While it is encouraging to see the GOI and States rating compliance of registered persons from point of view of encouraging voluntary compliance and the credibility of suppliers etc., it will be advisable in the same breadth to provide in law adequate Ombudsman provisions for addressing harassment complaints and improving stakeholder service.

The Commissionerate across the country on geographical or other possible divisions must be ranked in order of their service to stakeholders, courtesy shown during meetings, treatment meted when summon is issued etc.

O. Movement of Goods –in GST Scenario

With the GST regime one expected that the administrative controls on movement of goods will be removed. However, if one peruses the power to make rules under section 132 vide Clauses XXVIII and XXIX, there are powers under which rules will be made for these also.

Considering the avowed objective of GST of one national market, there should be no transit forms or declaration forms for movement of goods between one registered person to another registered person.

P. Corresponding changes in Customs Tariff Act for IGST levy (on imports)

Considering the impact of IGST tax on imports as per section 2 (c) of the draft IGST law changes to the Customs Tariff Act will have to be made for levy of Countervailing Duty and in this light it would be advisable for the EC to publish on a parallel basis the draft of corresponding amendments also so that adequate information and response is taken on those provisions

Secondly if countervailing duty is paid on the basis of MRP and if goods are resold in the State then special transition provisions should be made to prevent re-taxing of the goods on resale.

Q. Determination of tax unpaid or short paid or erroneously refunded –Sec 51, A B and Section 52 -Tax collected and not paid

It may be noted that Section 51A and 51B of the GST model law provides for completion of assessment/issue of the order by the proper officer within 3/5 years as the case may be from the date of filing the annual return. However, no time limit has been prescribed for issuance of a show cause notice for initiating the litigation (or demand).

This means that no minimum time gap needs to be maintained between issuance of a SCN and assessment order. Given the casual nature of functioning of the tax departments, they are likely to issue the SCN during the last few months of the aforementioned limitation period, thereby allowing very little or no time to the taxpayer to file their reply.

This would not only lead to unnecessary litigation but also the whole objective of completing the assessment within a given time frame will get vitiated.

Prayer

Exact time should be prescribed for issuance of show cause notice as is provided for under Section 73, Finance Act 1994.

R. Settlement of cases –Chapter VIII

Currently this Chapter falling under IGST law does not cover proceedings under CGST or SGST and hence these provisions need to be incorporated in the CGST and SGST law.

S. Schedule I to the GST law –Items to be treated as supply without consideration

The Schedule contains item 5 in which supplies from a taxable person to another taxable/non-taxable person in the course of furtherance of business is considered to be without consideration.

The content and the sweep of this entry is not fully understood and needs clarification as this schedule is covered in Section 3 that defines supply.

CLAUSE BY CLAUSE ISSUES IDENTIFIED FOR DISCUSSION

Preamble

- 1 Section 1** postulates that different dates may be appointed for different provisions of the Act. In case the Council envisages different dates for different provisions the White paper and the Act provisions must specify it in each relevant provision.
- 2 Section 2(19)** defines Capital assets while Section 2(20) defines capital goods. Though the definition clause of Business under Section 2(17) refers to capital assets in sub clause d therein, there needs to be more clarity from as to which of the definitions have impact on ITC.
- 3 Section 2(39)** defines earlier law and the same has been left blank.

4 Securities

Section 2(48) defines goods to include securities. It is not clear as to how securities can be taxed under GST. The tax on sale of securities is governed by Securities Transactions Tax and services of dealers in Securities is covered by the GST law. Clarity is required on the scope of the definition or the same needs to be covered by appropriate exemption.

5 Definition of Agriculturist: Section 2(8) read 2 (103) and section 9

Section 9 stipulates that an agriculturist will not be considered as a taxable person. However, under section 2(8) an agriculturist is defined as a person who cultivates land personally for purposes of agriculture. The matter that needs clarification is whether an agriculturist who gives all his lands on rent and does not cultivate it himself, would eligible to pay tax on the service income he gets out of the land so let out.

6 Section 2(1 A) of the Income Tax Act 1961 defines

Unless the context otherwise requires, the term “agricultural income” means:

- (a) any rent or revenue derived from land which is situated in India and is used for agricultural purposes;

Prayer

Considering that above income is taxed under State laws as per existing entry (List II entry 46) or scheme of taxation and also considering the definition in the Income Tax Act, an appropriate exemption would need to be given as per Section 10 for the above or the definition of agriculturist deserves to be amended in Section 2(8) of the draft law.

7 Reverse Charge –Section 2(85)

As the respective Governments will notify the reverse charge categories of supplies as per the provision the following needs attention

- a) Partial reverse charge should be avoided as this poses administrative hassles
- b) The reverse charge categories should be uniform between CGST and SGST
- c) The rate of abatement granted should be so notified that when cumulatively added the abatement percentage should be equal to hundred between CGST and SGST.

8 Administration –Chapter II –Section 4 to 6

The authority structure between Union and State does not appear uniform and the impact of this on powers when the officers sit together as appellate authorities on the Tribunal (when on deputation as Department/Technical member) can have implications on the smooth functioning of the Tribunal.

In the States the provisions advocate that the similar provisions will be put in place but all States do not have a Board of Revenue like CBEC that oversees the functioning of the VAT/SGST Department.

9 Composition Levy Section 8

Sec 8(1) postulates that in case of composition levy the tax levied would be lower than one per cent of the turnover during the year.

Sec2(104) defines only turnover in the State and does not define turnover which is the expression used in the section. It is also pertinent that the section uses another term aggregate turnover which is defined in section 2(6).

Prayer

Clarification is sought whether any separate turnover definition should be used for this purpose and if so the relevant definition needs to be incorporated in Section 2.

10 Taxable persons- Section 9 (3) (c)

The provisions lay down that any person receiving services which are liable to be taxed under Section 7(3) (RCM) and receiving services not exceeding Rs per year for personal use will not be considered as a taxable person. It is relevant that in case services received are in excess of the stipulated sum, there will be a need to register under RCM and pay tax though the services are used for personal purposes. A few of the RCM services that may be used for personal purposes are:

- a) Transportation of household effects while on transfer of employment
- b) Legal Services availed for personal disputes etc.

Prayer

Appropriate limits may be set in the light of the fact that services used for personal purposes is an B2 C situation while an RCM tax is essentially levied in B2B situation.

11 Remission of Tax –Section 11 read with Transaction Value Section 15(3)

Remission of taxes in section 11 is to be allowed on quantities found to be deficient due to natural causes. The section does not extend to Return of Goods remaining unsupplied due to non- acceptance of goods by consumers due to other reasons.

It is also pertinent that in section 15(3) discounts alone are permitted to be netted off from transaction value. In case of market return of goods the tax would have been paid earlier on supply and in case of no further resale the goods are returned to manufacturer and in these cases unless the charging code provides for remission of tax earlier collected, sales returns would remain a cost in the hands of the seller of goods.

Prayer

While it's pertinent that the transaction value takes into account the price paid or payable as the yardstick for tax, it would be specifically preferable to provide for remission even if goods are returned in the specific provision Section 11.

12 Reverse Charge mechanism for Goods –Section 12 read with section 7(3)

The draft law provides for taxation on the recommendation of the Council on RCM basis, to be levied on goods that the Council may deem fit. From a conceptual perspective Purchase Tax is paid on purchases from unregistered dealers in circumstances deemed under existing VAT laws.

RCM as the basis for taxation on recipient is widely used for services due to its administrative convenience and its usage as regards goods is not widely practised. In case RCM is used for goods which are exempted from tax from a turnover perspective, then credit provisions to recipients of such goods should be unconditional.

Additionally, trade between unregistered persons and composite dealers are widely prevalent as small scale resale trade is prominent in India. Adequate safeguards and ring fencing needs to be done so that tax effect does not get multiplied in such situations.

Prayer

RCM for goods should be avoided unless the goods are purchased by a registered dealer for further sale or used in course of business for production of goods /services.

13 Input Service Distributor –Section 17

The draft law uses the phrase “ITC distributed or being reduced thereafter” which needs to be defined as credit distributed is different from credit being reduced.

14 Section 24 –Issue of Credit Notes –Schemes introduced in market –Nexus to sale –Section 15

The draft law provides through proviso to clause (h) of sub section 2 of section 15 that Transaction value shall exclude post supply discounts

However, the proviso to sub section (1) of section 24 (the machinery provisions) mandate that no credit note shall be issued if the incidence of tax has been passed on to any other person.

Example: -

As regards Schemes which run in the market there is a time gestation and hence sale will happen first and out of the sale so made some quantity may be given as free in the market to encourage Sales. In the light of the gap in time the sale invoice could happen in month x and the credit note for the same may be issued in month z thereby attracting the mischief of the proviso as Return for period x would have been filed.

Prayer

Clarification is required on the impact of Section 24(1) as regards tax impact of credit notes issued for schemes launched for consumers /retailers subsequent to the primary sale happening from manufacturer to distributor.

15 Section 2(18) of AS –Substitution by Ind AS 108 –Business vertical

In view of substitution of IAS by Ind AS it would be better if the draft law refers to Ind AS instead of AS

16 Rounding of taxes –Section 137

The draft law provides for rounding off tax to the nearest one rupee but the income tax Act which can be taken as a bench mark has two separate rounding off limits, and they are provided separately as Income and Taxes in section 288A, B in the Income Tax Act. The Income Tax r/o provisions have moved into ten rupees and GST being hailed as a game changing legislation needs to have a round off limit at par with Income Tax Act.

17 Purpose of section 117 –Information Return

The section appears to have been derived from section 285BA of the income tax Act as in the Income tax law there exists scope that the Department of IT can flesh out certain transactions that have escaped being reported as income.

In a transaction tax like GST the efficacy of collecting information from agencies like Registrar under registration Act, Electricity Boards etc. are not visible.

In a transaction based tax inputs to Government on the transaction would be of more assistance than global data like energy consumed by an undertaking or properties registered by a Business concern which have no direct connection to the GST

18 Power to issue Rules Section 132

The power to issues rules have been drafted in 48 clauses. In the Act in various places, the code provides for rules which will be prescribed. Considering the act with the Rules would make a wholesome reading and this preparation is necessary as the rules provide for administrative controls and framework.

It would be helpful to the Trade and industry at large if the draft rules are also released in public domain as soon as possible.

Secondly Section 132 (1) provides the respective Government with powers to issue retrospective rules which appears to be anti –industry measure even before the first ball in the GST regime is delivered. Thirdly the power to issue rules includes regressive provisions in the section 132 (xxxii) which extend to even prescribing banderols, stamps for containers that carry taxable supplies.

Prayer

Retrospective Rules needs to be avoided in terms of ease of doing business with certainty and ease of doing business without any physical controls needs to be promoted.

Chapter – II

Issue

- Exports and Imports have not been defined. States can attempt to give their own definition of Export or Import of goods / services. Section 3 & 3A use the phrase “location of supplier”. CGST Act (whose definitions can be borrowed) defines location of supplier / recipient of services. There is no definition under IGST / CGST Act on “location of supplier / recipient of goods”.

Our Recommendation

- Exports and Imports should be defined under the IGST Act so that no state government can attempt to have their definition. The Definition of “location of supplier of goods” be provided otherwise the criteria is not clear.

CGST Act & IGST Act

Issue

- While sec 2(108) of the CGST Act states that Exports will be zero rated, there is no exemption provided under any sections of the IGST Act or CGST Act.

Our Recommendation

- Export should be zero rated and for this there should be a section providing for the same.

Chapter – IV (Section 6 – Place of supply of goods)

Issue

- Sec 5(2) – where the recipient arranges transport then legally the goods are delivered ex-works of supplier to the recipient. Sec 5(2A) intends to cover In-transit sale scenario and also cases where the goods are being delivered to a recipient or any other as per the instructions of a ‘Third person’. As per section 2(80) of the CGST Act, where the supply is for a consideration then recipient of the supply is the person who is to pay for the consideration. A supplier will always follow the instruction of his customer / buyer i.e. person who makes payment to the supplier. Sec 5(2A) of the IGST Act states on “direction of the Third person”. Why would a supplier follow instruction of a third person other than his buyer.

Also, the place of supply is regarded as principal place of business of the third person. Many companies/ tax payers doing business across India, will have operations in multiple states and hence will have principal place of business in multiple states. In such a case which principal place of business has to be considered? Also, it is not clear what will be place of supply for the 2 sales in a typical In-transit sale model e.g. A in Delhi sells to B of Haryana who instructs the goods to be supplied to C in Maharashtra. A arranges transportation from Delhi. While the goods are in movement B sells the goods to C by transfer of documents to title. Need clarity on the place of supply for:

- 1st sale from A to B
- 2nd sale from B to C

Our Recommendation

- As per the current clause there will be no interstate supply of goods when buyer arranges transport. If that the intent then it should be clarified, else the clause should be amended as follows:

“Where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of goods shall be location of goods at the time at which the movement of goods terminates at the destination instructed by the recipient”

Clear rules for In-transit sales are desired to avoid any interpretation issue/ disputes. If the final destination of the goods is already known, then the place of supply for all sales can be the destination state. Where the final destination is not known, then the office of the buyer which places order to the supplier for the 1st or subsequent sale other than the last sale. For the last sale the place of supply will be the destination state.

Chapter – IV (Section 6 – Place of supply of goods)

Issue

- Import of goods is treated as in the course of interstate trade or commerce.

If the provisions of section 5 are applied to Imports, then delivery by recipient will be taken, either:

- a) At port of export (Indian importer arranging transport from port of export); or
- b) At port of import (Foreign exporter arranging transport till port of import in India).

Basis above:

- For (a) there will be no place of supply in India i.e. no IGST?
- For b) the place of supply will be the port of import instead of the place where the imported goods are taken for use / consumption / sale. Meaning thereby a factory in Madhya Pradesh importing raw materials at Mumbai port, place of supply will be state of Maharashtra and not state of Madhya Pradesh.
- A transaction / supply of goods may fall under 2 sub-section of section 5 e.g. an equipment can be manufactured at plant, disassembled for transportation and again assembled at site. In such a case, if there is an In-transit sale involved, then 2 sub-sections will get invoked i.e. (2A) as well as (4).

Our Recommendation

- For a), it should be clear whether any GST is intended to be levied on such transaction.
- For b) type of transactions, the place of supply should be the place where the imported goods are intended to be re-sold / used / consumed / stored by the Importer.

It is suggested that a sub-section is inserted to outline the order of precedence in case a supply falls under more than one sub-sections.

Chapter – IV (Section 6 – Place of supply of services)

Issue

- Import Sec 6(12)(a) states that in case of lease circuits (telecommunication services), the place of supply will be where the lease circuit is installed.
- In case of leased circuit the connectivity is between 2 locations which may be in different states. Further the lease circuit may run through various states.

Our Recommendation

- Need more clarity on the rules for Lease circuits / MPLS / IPLC

Issues relevant to Banks from Model GST Law

Place of provision of service (POS)

Proposed in GST Model Law

- **Determinants of 'Place of Provision of Services' (POS) are :**
- For services linked to account – location of recipient of service is defined as:
 - GST registered address if services received there.
 - Fixed establishment elsewhere if service received at place not registered for GST.
 - If service received at more than one place, location which is more concerned directly with receipt of service.
 - In the absence of all above, location of usual place of residence of recipient
- For all other services – location of provider

❖ Recommendation

For Banking and Financial Services, Place of Provision of Services should be determined as under:

- B2B – location of service recipient
- B2C – location of service provider

Location = GST Registered address would be address which is requisitioning the service. Putting onus of establishing the 'receipt of service' at the said location should be a responsibility of the 'Service recipient', who too would be a GST assessee.

➤ **Registration & Three layer taxation**

- Separate registration to be taken in each State and Union Territory from where services are supplied.
- Further, depending on the POS, banks will have to charge state-wise CGST and SGST or IGST for inter-state transactions.

❖ **Recommendation**

Under present regime most of the banks have centralized registration. Under the GST regime too banks be provided with option to opt for Centralized Registration. In line with our recommendation for centralized registration, on the output side the levy should be only that of IGST for all Banking Transactions. This will remove uncertainty, complexity and will facilitate seamless GST credit to the end consumers.

Additionally complete process to be facilitated for set off of SGST / CGST and IGST against output IGST levied by Banks.

➤ **Centralized return filing and assessments**

- Separate registrations for each state effectively mean separate GST return filings and state wise audits/assessments.

❖ **Recommendation**

- In line with our recommendation for centralized registration regime for banks, we recommend centralized return filing and assessment process for banks

➤ **Time of supply for reverse charge**

One of the factors determining the Time of Supply (TOS) is the 'date of receipt of services'

- a. Time of supply determinants are :
- b. date of receipt of service
- c. date of invoice
- d. date of payment to vendor
- e. date of debit in books of recipient

❖ **Recommendation**

Under present regime time of supply determinants are

- a. date of invoice
- b. date of completion
- c. date of realization of invoice / advance

These need to be continued.

➤ **GST on purchase / sale of foreign currency**

GST payable on exchange of currencies:

- Where RBI Reference rate available, difference in value post converting the currencies at the RBI Reference rate.
- Where RBI Reference rate is not available GST to be 1% of the value of INR equivalent of currencies exchanged.

➤ **Recommendation**

Under present regime time FX transactions are taxed as under:

- a. Transaction taxed at slab rate.
- b. There is an upper cap on the tax cost.
- c. No tax on 'inter-bank transaction' / transactions between ADs / Money Changers.

This needs to be continued.

Levy of IGST on Exports – Ultra Vires

- Article 269A of the Constitution Amendment Bill provides exclusive power to the Parliament to make laws with respect to GST on supplies made in the course of interstate trade or commerce. This article and various others of the Constitution Amendment Bill do not provide for power to frame rules concerning exports. Further, the articles do not deem import or export to be interstate transactions.

All that article 286(2) does is that it provides the parliament with power to make laws for determining imports and exports. Section 2(c) of IGST takes into account exports. Such an action without the power under Constitution would be ultra vires.

Prayer

Constitution Amendment Bill should provide for with power to make rules in respect of imports and exports or it should deem imports and exports to be interstate transactions. Else, the draft bill should be amended to be in consonance with the Constitutional Amendment Bill.

- Place of supply in case of imports and exports

Section 3 of IGST provides that place of supply and location of supplier must be in different States. Now in case of imports and exports, one of the location will be always outside India. Such location outside India cannot be regarded as a different State. Thus, the scheme of section 3 fails in case of imports and exports.

Prayer

A clause must be added providing for place of supply rules specifically for imports and exports.

- Valuation of taxable supply Section 15 of CGST/SGST Act provides that the value of supply of goods and/or services shall be the transaction value. The provision does not provide the time of supply till which all the inclusions would have to be factored for determining the transaction value.

Prayer

The section should be suitably amended to factor the termination of supply of goods and/or services.

- Valuation Rules – Rejection of declared value

The provisions provide that declared value may be rejected if the proper officer has reason to doubt truth and accuracy of the value. Further, situations listed for doubting the truth and accuracy are illustrative in nature. It is pertinent to note that in the illustrations, the term used is 'significantly lower'/significantly higher' as a comparative to judge the accuracy and value is vague and is liable to challenge.

Prayer

A mechanism should be provided for determining the term 'significantly higher' and 'significantly lower' in order to avoid unnecessary litigation.

- General rule for determination of value

Under the GST Valuation Rules, the rules provide that the value of supply shall be the transaction value in case the goods are transferred from one place of business to another place of same business. The question that arises is whether there can ever be a transaction value when the goods are transferred from one place to another place within the same business. Further, the rule provides that where supply consists of both taxable and non-taxable supply, the taxable supply shall be deemed to be for such part of the monetary consideration as is attributable thereto. The rule does not lay down any mechanism through which the value attributable to taxable supplies would be determined.

Prayer

There should be a mechanism for providing the value attributable to taxable supplies.

- Charging section deficient – can be ultra vires Article 265

The Supreme Court through various judgments has noted that every charging section must provide four key elements. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If these components are not clearly and definitely ascertainable it is difficult to say that the levy exists. Now,

the charging section under CGST Act and IGST Act lacks this essential component and this may lead it to being ultra vires.

Prayer

The charging section under the Model Law should provide for all four essential elements.
