

# Chapter 1

## Preliminary

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| <b>1. Short title, extent and commencement</b> |
| <b>2. Definitions</b>                          |

### Statutory Provision

<b>1. Short title, extent and commencement</b>
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| <p>(1) <i>This Act may be called the Central Goods and Services Tax Act, 2017.</i></p> <p>(2) <i>It extends to the whole of India<sup>1</sup>.</i></p> <p>(3) <i>It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:</i></p> <p><i>Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.</i></p> |
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| <p>1. <i>The Central Goods and Services Tax Act, 2017 has been implemented in the State of Jammu and Kashmir from 8<sup>th</sup> July, 2017 through Constitution (Application to Jammu and Kashmir) Amendment Order, 2017, the Central Goods and Services Tax (Extension to Jammu and Kashmir) Ordinance, 2017 and the Integrated Goods and Services Tax (Extension to Jammu and Kashmir) Ordinance, 2017.</i></p> <p>2. <i>Certain provisions were came into force on 22.6.17 and remaining provisions on 1.7.17 as notified by the Central Government and hence appointed day for the CGST Act, IGST, UTGST Acts, SGST Acts was 1<sup>st</sup> July, 2017. However, the appointed day for the State of Jammu and Kashmir was 8<sup>th</sup> July, 2017.</i></p> <p>3. <i>With the Jammu and Kashmir Reorganization Act, 2019 having come into effect from 31 Oct 2019 although Presidential assent was received on 9 Aug 2019, (i) J&amp;K GST Act is made applicable to UT of J&amp;K and UTGST Act is applicable to UT of Ladakh (ii) 'tax period' has been amended to be from 1<sup>st</sup> Oct to 30<sup>th</sup> Oct and 31<sup>st</sup> Oct to 30<sup>th</sup> Nov vide Notification No. 62/2019-CT dated 26<sup>th</sup> Nov 2019 and (iii) special transition procedure till 31 Dec 2019 with a 'TO based credit transfer option' along with new registration in UT of Ladakh.</i></p> |
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<sup>1</sup> Omitted vide The Central Goods and Services Tax (Extension to Jammu and Kashmir) Act, 2017 w.e.f. 08.07.2017

**Title:**

All Acts enacted by the Parliament since the introduction of the Indian Short Titles Act, 1897 carry a long and a short title. The *long title*, set out at the head of a statute, gives a fairly full description of the general purpose of the Act and broadly covers the scope of the Act.

The *short title*, serves simply as an ease of reference and is considered a statutory nickname to obviate the necessity of referring to the Act under its full and descriptive title. Its object is identification, and not description, of the purpose of the Act.

**Extent:**

Part I of the Constitution of India states: "Article. 1 India, that is Bharat, shall be a Union of States". It provides that territory of India shall comprise the States and the Union Territories specified in the First Schedule of the Constitution of India. The First Schedule provides after the reorganization of J&K and unification of UT of Dadra and Nagar Haveli and UT of Daman and Diu vide Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Bill, 2019, we now have twenty-eight (28) States and eight (8) Union Territories.

Part VI of the Constitution of India provides that for every State, there shall be a Legislature, while Part VIII provides that every Union Territory shall be administered by the President through an 'Administrator' appointed by him. However, the Union Territories of Delhi and Puducherry have been provided with Legislatures with powers and functions as required for their administration.

India is a summation of three categories of territories namely – (i) States (28); (ii) Union Territories with Legislature (3); and (iii) Union Territories without Legislature (5).

**Other Relevant Articles of Constitution**

The readers who wish to have a deeper understanding of GST may examine the articles of the Constitution which were amended vide Constitution 101<sup>st</sup> Amendment Act, 2016 which received Presidential assent on 16 Aug 2016 and are relevant to GST. Brief of each is provided hereunder:

Articles 245(2): Law not invalid on ground that has extra territorial jurisdiction. Important for Place of supply – Section 11 and 13 of Integrated Goods and Services Tax Act, 2017.

Article 246: Sets out that Parliament has exclusive powers to tax activities in List I; State legislature has exclusive powers to tax activities in List II; and both have concurrent powers to tax activities in List III. GST is NOT levied under the legislative powers traceable to art. 246.

Article 246A(1): Amendment provides notwithstanding Article 246 and subject to article 254(2), Parliament and State legislature have power to impose tax on goods and services. Within the State, GST is levied under the law making powers traceable to art. 246A.

Article 246(2): Further only parliament has powers to tax interstate activities.

Article 249: Parliament has overriding power in GST.

Article 250: Parliament has overriding power in case of emergency

Article 254: Inconsistency in law- Parliament has powers to supersede.

Article 268: Stamp duties are in Union list- collected by State.

Article 269: Imports deemed to be interstate activity. Interstate taxes collected apportioned as per GST Council recommendation.

Article 269A (5): Parliament to have exclusive jurisdiction to determine inter-State character of any supply. Intelligible provisions need to be framed in this regard and not by any delegate but by Parliament itself. Although GST is understood to be a 'destination based tax', the destination of supply is not left to be decided as a 'question of fact' but a 'question of law'. And due to the exclusive jurisdiction of Parliament (and not State Legislatures) to determine the 'destination of supply' and to this end, we find 'place of supply' provisions in IGST Act and not in CGST Act / SGST Acts.

Article 270: Distribution of taxes on stamp duties, consignment sales, surcharge or cess, central GST and IGST used for paying CGST. This is as decided by the Finance Commission.

Article 279A: GST Council composition: Chairman- Union Finance minister; Vice Chairman- 1 chosen from among the State; Union Minister of State; and 1 Minister of Finance or other Minister of State for each State.

Article 279A(5): GST on 5 petroleum products deferred to a date to be specified by GST council.

Article 286: States cannot tax import or export or supply outside the State.

Article 366(12A): Goods and services tax means any tax on supply of goods or services or both except alcoholic liquor for human consumption.

Article 366(26A): Services means anything other than goods.

Article 366(29A): Defines 'tax on sale or purchase of goods' which was the guiding light under the erstwhile tax regime but has not been repealed on introduction of GST. Effect of its continuation on the operation of GST is on the careful disuse of this expression and use of the expression 'supply'.

#### **Relevant Entries in Lists:**

Entry 52: List II - Entry Tax (now omitted). Some legal experts have a view that States will have inherent powers as the basic structure of the Constitution cannot be changed.

Entry 54: List II - Only 5 petroleum Products and alcoholic liquor for human consumption other than inter-State trade.

Entry 55: List II – Advertisement (omitted).

Entry 62: List II- Entertainment and amusement to local bodies- restricted

Entry 84: List I - Only 5 petroleum products and tobacco products continue.

Entry 92 and 92C: List I – omitted (read section 19 of Constitution 101<sup>st</sup> Amendment Act)

**Commencement:**

The CGST Act came into operation on 1<sup>st</sup> Jul 2017, the date appointed by the Central Government. However, certain provisions i.e., Sections 1,2,3,4,5,10,22,23,24,25,26,27,28,29, 30, 139, 146,164 were made effective from 22<sup>nd</sup> Jun 2017 mainly in relation to the provisions of registration and migration.

**Statutory Interpretations and Legal Maxims:**

The legislations through which GST has been introduced in India has to be read considering the general principles of interpretation and may also need to follow legal maxims laid down over centuries. Some principles and legal maxims have been set out below:

- (a) When reading the law the plain language is to be given effect. Meanings contrary to plain language are not permissible.
- (b) Apparent omission in law cannot be made good or rectified by Courts. Necessarily to be amended by making representation (*Casus Omissus*).
- (c) Purposive interpretation preferable to advance the remedy and not the mischief. (*Heydon's Rule*)
- (d) Notifications issued to further public welfare the law should be reasonable, just, sensible and fair. Normally not to cause hardship, inconvenience, injustice and avoid friction in system.
- (e) Law which is vaguely worded, the entire provision can be read as a whole, harmoniously.
- (f) The Act prevails over the Rule.
- (g) In taxation, 'form prevails over substance' of a transaction unlike welfare legislations.
- (h) Illustrations cannot modify the law.
- (i) Explanation cannot expand the scope of the provision.
- (j) Terms which are together, need to be of same genus (*ejusdem generis*) or gathered by the company they keep (*noscitur a sociis*)
- (k) Multiple non obstante clauses, the last provision would prevail.
- (l) In case of doubt, the later provision prevails.
- (m) Vested rights not to be affected retrospectively.
- (n) Rights once vested are indefeasible, but until they vest, rights are 'in choate'.
- (o) Non-fulfilment of 'vesting conditions' become 'divesting conditions' *qua* those rights.
- (p) Parliament can make law retrospectively to cure defects.
- (q) Levy provisions must be interpreted to favour taxpayer, if wordings are not clear.

- (r) Exemption provisions must be interpreted strictly and to favour the Revenue.
- (s) Exemptions in GST cannot be notified retrospective, even if omission was erroneous.
- (t) No presence of guilt needed for penalty unless specified specifically.
- (u) In GST, 'burden of proof' lies on revenue to impeach liability self-assessed by taxpayer, except in case of section 155, where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.

The above are some indicative principles and not exhaustive.

## 2. Definitions

In this Act, unless the context otherwise requires-

*(1) "actionable claim" shall have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882;*

One may refer to section 3 and then section 130 of Transfer of Property Act, 1882 regarding the manner of 'transferring' actionable claims. Transfer of actionable claim can be with consideration or without consideration as per the Transfer of Property Act, 1882.

Actionable claim represents beneficial interest in movable property that is not in possession. It is an entitlement to a debt and the holder of the actionable claim enjoys the right to demand "action" against any person. Acknowledgement of liability by a creditor to honour a claim, when made, does not constitute actionable claim in the hands of such creditor. Mere right to sue is not an actionable claim. Entry ticket to a venue is actionable but that does not render it an actionable claim. Actionable claim is one which represents underlying interest in movable property though not yet in possession. Not every right is transferrable, refer section 6 of Transfer of Property Act. 'Assignment' of a right is not a 'transfer' because only benefits (from a contract) can be assigned and not obligations (under that contract). Novation is also not a transfer because it involves merely 'substitution' of one of the Parties with another to carry on the remainder of that contract on the same terms. Actionable claim has always been 'excluded' from the definition of goods under the earlier tax regime but in GST, it is 'included'.

The following aspects need to be noted:

- Assignment of actionable claim without permanently supplanting the holder of the claim would not be supply.
- Under the GST regime, actionable claim relating to lottery, betting and gambling alone will be regarded as 'goods' since the definition of goods includes actionable claim.

*(2) "address of delivery" means the address of the recipient of goods or services or both indicated on the tax invoice issued by a registered person for delivery of such goods or services or both;*

"Address of delivery" is relevant in the context of determining Place of Supply of goods (other than imports/ exports). Care must be taken to differentiate between 'delivery' and 'location' of

the addressee' being the recipient. Delivery is a question of law, which establishes based on the terms of contract, whether the supplier can be said to have completed obligations towards buyer. Reference may be had to some additional discussion in the context of section 10 of IGST Act where key terms such as delivery, movement, transportation and journey have been discussed. Reference may also be had to Sale of Goods Act, 1930 where section 19 states that 'property is to pass when it is intended to pass' and duties of seller and buyer are discussed in section 31 to 44 with specific reference to 'delivery' in section 33.

It is understood that the address of delivery would be a crucial pointer towards the location of goods at the time of delivery to the recipient. The place of supply of goods or services or both (other than imports/ exports) would primarily be the location of the goods or services or both at the time of delivery to the recipient.

(3) "address on record" means the address of the recipient as available in the records of the supplier;

'Address on record' is relevant to determine Place of Supply in case of supplies made by a registered person to an unregistered person in relation to services. In such cases, where the Place of Supply has not been specifically provided for under the law, the address available in the records of the supplier would be regarded as the Place of Supply. It is reasonable to expect that the 'last address' as reported by the said person would estop from claiming that, that address is no longer the correct address.

(4) "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the <sup>2</sup>[Central Board of Indirect Taxes and Customs], the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the <sup>3</sup>[National Appellate Authority for Advance Ruling, the <sup>4</sup>Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of section 171];

The following authorities are NOT permitted to pass an order/decision under the GST laws:

- (a) The Central Board of Indirect Taxes and Customs
- (b) Revisional Authority (although orders passed are appealable to Tribunal)
- (c) Authority for Advance Ruling
- (d) Appellate Authority for Advance Ruling (State and National)
- (e) Appellate Authority
- (f) Appellate Tribunal
- (g) Anti-Profiteering Authority

<sup>2</sup> Substituted vide The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f 01.02.2019

<sup>3</sup> Inserted vide The Finance Act, 2019 w.e.f. date yet to be notified

<sup>4</sup> Substituted vide The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f 01.02.2019

Under the Act, the Revisional Authority, Appellate Authority and the Appellate Tribunal are empowered to pass/ issue order as they think fit, after affording the parties a reasonable opportunity of being heard and even after conducting such inquiry as may be deemed necessary. However, such powers are limited to cases where an order has been passed by an authority of a lower rank, before it becomes a subject matter of revision/ appeal. Please note that administrative circulars issued under section 168 will ONLY apply to adjudicating authorities and authorities who are excluded from the scope of this definition will NOT be subject to those administrative circulars and are free (and expected too) to form their own opinion when matters that are already dealt with in those circulars, come up for consideration in any proceeding.

*(5) "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;*

This definition appears to illustrate the principle of agency defined in section 182 of the Indian Contract Act, 1872. Agency is a relationship that can be formed validly even without consideration in terms of section 185 of the Indian Contract Act, 1872. Agent can work purely on commission basis. Even e-commerce companies may be covered in some fact situations. But the relevance of being an agent is more pronounced while examining whether a transaction between a principal and agent is itself a supply under paragraph 3, schedule I. Very often, the word agent or agency is used without necessarily implying that the transaction is one of agency as understood under Indian Contract Act such as, recruitment agency, travel agency etc. Care must be taken to identify whether the parties intended to constitute an agency as understood in law and nothing less.

Agency may be actual or implied. *Circular 57/31-2018-GST dated 04.09.2018* issued with the authority under section 168(1) of CGST Act states that entire jurisprudence of agency under section 183 of the Indian Contract Act, 1872 will operate to determine any question on agency under GST law. Agency is characterized by 'delegated authority, detached from consequences'. Agents who 'hold out' to be acting 'on their own account' will themselves be liable to registration under section 24(vii) and payment of tax under paragraph 3, schedule I (discussed later under respective provisions).

Agency is (i) actual or (ii) implied. Actions of Agents brings the Principal into obligations towards Third Parties. Every relationship involving fiduciary duties DO NOT constitute agency. Trustee has fiduciary relationship over assets belonging to Beneficiaries but actions of Trustees do not create obligation onto Beneficiaries towards Third Parties. Trustees are themselves responsible to perform all obligations towards such Third Parties. Trustees are merely required to act in good faith in the discharge of their application of Trust-Assets.

*(6) "aggregate turnover" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;*

The phrase “aggregate turnover” is widely used under the GST laws. Aggregate Turnover is an all-encompassing term covering all the supplies effected by a person having the same PAN. It specifically excludes:

- Inward supplies effected by a person which are liable to tax under reverse charge mechanism; and
- Various taxes under the GST law and Compensation cess.

The different kinds of supplies covered are:

- (a) Taxable supplies;
- (b) Exempt Supplies:
  - supplies that have a ‘NIL’ rate of tax;
  - supplies that are wholly exempted from GST under section 11; and
  - supplies that are not taxable under the Act (alcoholic liquor for human consumption and articles listed in section 9(2)).
- (c) Export of goods or services or both, including zero-rated supplies. The following aspects among others need to be noted:
  - Aggregate turnover is relevant to a person to determine:
    - Threshold limit to opt for composition scheme: Rs.1.50 crores ( or Rs. 75 Lakhs in case of supplies effected from special category states) in a financial year;
    - Threshold limit to obtain registration under the Act: 20 Lakhs (or 10 Lakhs in case of supplies effected from Special Category States, as explained in our analysis in section 22) in a financial year and 40 lakhs for persons who are exclusively engaged in intra-supply of goods.
  - Inter-State supplies between units of a person with the same PAN will also form part of aggregate turnover.
  - For an agent, the supplies made by him on behalf of all his principals would have to be considered while analysing the threshold limits.
  - For a job-worker, the following supplies effected on completion of job work would not be included in his ‘aggregate turnover’ when working under section 143:
    - Goods returned to the principal
    - Goods sent to another job worker on the instruction of the principal
    - Goods directly supplied from the job worker’s premises (by the principal): It would be included in the ‘aggregate turnover’ of the principal.
  - ‘No supply’ will NOT be exempt supply but still liable to be included in ‘aggregate turnover’ except in cases where specifically some are considered exempt supply for purposes of



section 17(2). Please refer discussion under section 2(78) on non-taxable supply for a comparative study between 'exempt supply', 'non-taxable supply' and 'no supply'.

- Activities listed in schedule III MUST be included in the definition of 'aggregate turnover'. Please consider that:
  - If activities listed in schedule III are NOT supply, then the use of the word 'supply' while listing activities in this schedule would result in irreconcilable difference;
  - Schedule III contains activities to furnish a 'fiction' to overlook specified activities which are otherwise 'transactions of supply';
  - Finding an entry in schedule III only means the fiction of 'exclusion' from being admitted as a 'transaction of supply'. It would only be required when 'any treatment' is required to be afforded to the transaction; and
  - When no 'treatment' is warranted, there is no requirement to exclude even activities listed in schedule III from the definition of 'aggregate turnover'.

Although some experts have expressed reservation in including schedule III activities in the definition of 'aggregate turnover', there is no other satisfactory reconciliation for inclusion of supply transactions in schedule III, especially, entry 1, 7 and 8.

- There is an interesting observation that when exempt supply is first a taxable supply, then for aggregate turnover to include taxable and exempt supplies seems like a double inclusion of exempt supplies. Purposive construction leads to be understanding that no such double inclusion is required and it is to be understood as a 'specific inclusion' that aggregate turnover should not only include taxable supplies but should also include taxable supplies that are exempted.

(7) "agriculturist" means an individual or a Hindu Undivided Family who undertakes cultivation of land—

(a) by own labour, or

(b) by the labour of family, or

(c) by servants on wages payable in cash or kind or by hired labour under personal supervision or the personal supervision of any member of the family;

An individual or HUF undertaking cultivation of land, whether own or not, would be regarded as an agriculturist. The cultivation should be undertaken by own labour/ family labour/ servants on wages or hired labour.

It may be noted that the scope of the definition is restricted to an Individual or a Hindu Undivided Family. Any other "person" as defined in section 2(84), carrying on the activity of agriculture will not be considered as an Agriculturist and hence will not be exempted from registration provisions as provided in section 23(1)(b), of the Act.

Agriculturist providing taxable supplies need to confirm that the aggregate turnover is not exceeded when taking a decision not to register. Everyone who owns agricultural property will not *ipso facto* be eligible for exemption from registration because other taxable supplies may necessitate registration. It is possible that a person, while being an agriculturist may also be a trader or manufacturer of taxable goods.

Please note that an agriculturist is not immune from GST in all circumstances and not all agricultural products are exempt from GST or liable to payment of tax on reverse charge basis. Care must be taken to ensure that any person claiming to be an agriculturist and claiming the favourable treatment available must ensure that there are no other transactions that may deprive the treatment otherwise available to those who are purely or entirely agriculturists. Only favourable treatment allowed to 'agriculturist' is exemption from registration under section 23(1)(b) and not exemption from tax under section 11. If for any reason, a person who is otherwise an agriculturist, has already obtained registration, experts caution that such person cannot partially avail exemption *qua* supplies as an agriculturist and remain registered *qua* all other taxable supplies, although views are divided on this point due to the words 'to the extent of' appearing in section 23(1)(b) in view of the substantive requirements in section 25(3) and agricultural products that are NOT covered under *Notification No. 4/2017-CT(R) dated 28.06.2017* will still be liable to tax on 'forward charge basis' even in hands the such registered-agriculturist, notwithstanding the (now ineffective) exemption from registration.

(8) "Appellate Authority" means an authority appointed or authorised to hear appeals as referred to in section 107;

It refers to an authority before whom a person aggrieved by a decision/ order under the CGST/ SGST/ UTGST Act may appeal. An order passed by the Appellate Authority would be final and binding on all the parties. If a person is further aggrieved by the order passed by the Appellate Authority, he may prefer an appeal before the Appellate Tribunal or Courts.

Please note that vide *Notification No. 4/2019-CT dated 29 Jan, 2019*, the posts of 'Joint Commissioner Central Tax (Appeals)' and 'Additional Commissioner Central Tax (Appeals)' have been created which is a new post under Central laws. Corresponding to this, there is no post of 'Commissioner of State Tax (Appeals)' has been created. It would therefore be interesting to see how the division of appeals between JC-CT (A), ADC-CT (A) and C-CT (A) would be handled by JC-ST (A) without the post of C-ST (A) in State officers. Reference may be had to rule 109A also.

(9) "Appellate Tribunal" means the Goods and Services Tax Appellate Tribunal constituted under section 109;

It refers to an authority before whom a person aggrieved by a decision/ order under the CGST/ SGST/ UTGST Act passed by the Appellate Authority/ Revision Authority may appeal. An order passed by the Appellate Tribunal would be final and binding on all the parties. If a person is further aggrieved by the order passed by the Appellate Tribunal, he may prefer an appeal before the High Court.

*(10) "appointed day" means the date on which the provisions of this Act shall come into force;*

Most of the provisions of the CGST Act are implemented with effect from 1<sup>st</sup> July 2017 with powers vested to notify different dates for effective date of commencement of different provisions of the Act.

Registration provisions were before appointed date enable easy transition.

*(11) "assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;*

The types of assessment covered under the Act are:

- (a) Self-assessment (Section 59)
- (b) Provisional assessment (Section 60)
- (c) Summary assessment (Section 62) including best judgement assessment

The CGST Act also provides for determination of tax liability by:

- (a) Scrutiny of returns filed by registered persons (Section 61)
- (b) Assessment of non-filers of returns (Section 62)
- (c) Assessment of un-registered persons (Section 63)

It may, however, be noted that there is no provision permitting a Proper Officer to re-assess the tax liability of taxable person. As such, reference to such re-assessment in the definition may have to be suitably read down. As per section 59, GST law follows self-assessment approach. As such, returns filed will be admitted as assessed. Tax administration is free to scrutinize returns (section 61) or conduct inspection (section 67) and issue notice (section 73-74) but there is no provision for conducting assessment except where taxable person seeks provisional assessment (section 60) in specified circumstances. Authority to pass orders in case of non-filers (section 62) or in case of unregistered persons (section 63) or in certain special cases (section 64) does not dilute the 'self-assessment' approach in GST.

Please note that 'self-assessment' is not 'unsupervised authority' to taxpayer. Section 59 does not override section 54. So, any excess payment of tax cannot be *suo moto* recovered by adjustment with other tax liability simply because of the self-assessment authority under section 59. Care must be taken to identify the extent and limits to this authority of self-assessment.

At the same time, re-assessment is NOT provided in any specific section on assessment. Hence, Proper Officer must take care NOT to carry out roving exercise to redetermine liability except as provided in the law. Reference may be have to this aspect that is discussed in the context of section 61 to 64.

*(12) "associated enterprises" shall have the same meaning as assigned to it in section 92A of the Income-tax Act, 1961;*

'Associated enterprise' is referred only in the context of time of supply of services where the supplier is an associated enterprise (located outside India) of the recipient (reverse charge attracted under sec 9(3)).

- In such cases, the time of supply will be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier.
- This in turn means that provisional entries made at the time of closure of books of account for a year (on accrual basis) may trigger GST liability in the hands of the recipient, under section 7(1)(b).

It may be noted that in addition to associated enterprise, the Act also defines 'related person', the reference to which is made in the context of deemed supply (Schedule I) and valuation.

*(13) "audit" means the examination of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made thereunder or under any other law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of this Act or the rules made thereunder;*

The definition of 'audit' under the Act is a wide term covering the examination of records, returns and documents maintained/ furnished under this Act or Rules and under any other law in force. Any document, record maintained by a registered person under any law can thus be called upon and audited. It becomes critical for the person to maintain true documents/ records to ensure correctness and smooth conduct of audit.

However, it may be important to note that this is neither an investigation nor an exercise to prevent leakage of revenue and may lead to verification of benefits claimed as well as payment of taxes. Audit is NOT investigation but is certainly an 'inquiry' for purposes of section 70.. In other words, unlike section 66 or 67, there are no 'pre-conditions' to be shown to exist in order for selection of any taxpayer to be audited under section 65.

*(14) "authorised bank" shall mean a bank or a branch of a bank authorised by the Government to collect the tax or any other amount payable under this Act;*

The date of credit to the account of the Government (i.e., the Central Government in respect of CGST, IGST, UTGST and CESS or the relevant State Government in respect of SGST) in the authorized bank will be considered as the date of deposit in electronic cash ledger.

*(15) "authorised representative" means the representative as referred to in section 116;*

An authorized representative is a person authorized on one's behalf to appear before an Officer of the Act, Appellate Authority or Appellate Tribunal in connection to proceedings under the Act. Any of the following persons can act as authorized representatives:

- (a) His relative/regular employee;

- (b) Practicing advocate who is not debarred;
- (c) Practicing Chartered Accountant, Cost Accountant or Company Secretary who is not debarred;
- (d) Retired Officer of the Commercial Tax Department of any State/ Union Territory not below the post of Group-B Gazetted Officer of 2 years' service;
- (e) GST practitioner.

The following persons cannot act as authorized representatives:

- (a) Who is dismissed/ removed from Government service;
- (b) Who is convicted of an offence under any law dealing with imposition of taxes;
- (c) Who is guilty of misconduct by the prescribed authority;
- (d) Who is adjudged as an insolvent.

(16) "Board" means the <sup>5</sup>[Central Board of Indirect Taxes and Customs] constituted under the Central Boards of Revenue Act, 1963

(17) "business" includes—

- (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
- (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
- (c) any activity or transaction sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
- (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
- (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;
- (f) admission, for a consideration, of persons to any premises;
- (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
- (h) <sup>6</sup>[activities of a race club including by way of totalizator of a license to book maker or activities of a licensed book maker in such club]; and
- (i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

<sup>5</sup> Substituted for Central Board of Excise and Customs vide Finance Act, 2018 w.e.f. 29.03.2018

<sup>6</sup> Substituted vide The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. 01.02.2019

Excise / Service tax laws do not define the term 'business'. However, it is defined under the CST Act / State VAT laws. The definition in the GST law is a modified version of the definition under CST / VAT laws, in as much as to substantially expand the scope to include among others wager, profession and vocation. This definition is very wide and covers all the transactions that were subjected to various taxes that are being subsumed in the GST Laws.

This definition assumes significance as the proposed levy is on supplies undertaken in the course or furtherance of business. The definition may be understood in two parts, namely:

- (a) **General activity** - trade, commerce, etc., including incidental activities whether or not there is volume, frequency, continuity or regularity of such transactions. Principle of *ejusdem generis* provides that similar activity would be determined by the previous enumerated ones. Please consider that charitable activity would be includible in the definition of business depends on whether the 'source' of income is charitable or 'application' of income is charitable. If business-like sources are used to raise funds, such institutions may be liable to GST although these funds are not distributed to promoters but expended for purposes of the beneficiaries.
- (b) **Specific activity** – acquisition of goods including capital goods, supply by association/ club, admission of persons to a premises and services by a race club.

The following aspects need to be noted:

- Business is a 'business' only when it has achieved 'income generating capacity' and until then, business is a mere enterprise that is 'innovating or exploring' possibilities. This concept of 'setting-up' of a business has been contested since 1952 in Income-tax with decisions like *Western India Vegetable Products* and *Tuticorin Alkali* and contrasted in *Bongaigaon Railway* and *Karnal Co-op.* (discussed later under section 16(1)).
- 'Wager' is also included in the definition of business to impose GST on 'organizing' betting transactions. Refer section 30 of Indian Contract Act to understand some of the peculiarities involved in the jurisprudence on 'wager';
- Clause (d) is also interesting as the words used are 'commencement of business' included in the definition of business. This expression would be of great interest while examining the 'start date' from when input tax credit may be claimed – whether from the date of formation of the entity or from the date of commencement of business by the entity. There is a lot of judicial authority in the context of section 3 and 28 of Income-tax Act where this aspect has been examined. Refer additional discussion under section 16(1) about the relevance of 'commencement' of business;
- Educational services would be covered under profession or business and even though exemption is granted in respect of education, other non-composite transactions such as sale of uniforms, note books or mess facilities could be covered;
- Charitable or religious activities are not specifically covered however fund raising activities from commercial activities like letting out of hoardings, sale of books could be

considered as business. Exemption towards 'charitable activity' in Income-tax law attends to end-use of funds whereas GST enquires into 'source of funds' in the scope of 'charitable activities';

- Clause (e) may pose some difficulty as associations and its members enjoy immunity from taxation on transactions amongst themselves by the 'principle of mutuality'. Hon'ble SC in decision of *Calcutta Club & Ors v. State of WB* upheld this 'principle of mutuality' although that decision was delivered under the earlier laws. With the retrospective insertion of section 7(1)(aa) to the definition of 'supply', GST seeks to overcome the principle of mutuality.. In other words, contribution by members to their association is not taxable under Income-tax Act (where the said principle prevails) would still be taxable under GST although some experts opine that view expressed in Calcutta Club's decision has not successfully overcome the insertion of clause (aa) to section 7(1) of CGST Act. On the other hand, with the fiction of distinct person firmly embedded in GST law, continuation of 'mutuality' principle is doubted by other experts.
- Clause (g) may require understanding of employment as differentiated from profession. For instance, if a CA in practice provides services as Independent Director, the service provided by him may be treated as 'business' and not 'employment'.
- Clause (i) is also very important as 'any' activity or transaction by Government is included in the definition of business this will have far-reaching implications as the responsibility to pay tax in respect of services by Government is covered under reverse charge mechanism. Due to the expansive words used here, there is no room to differentiate payments made to any Government department on the ground that it is not 'business' activity.
- Section 2(17)(h) expanded definitions of business of a race club, this change ensures that all activities related to a race club are included in definition of business. Amendments are being made to ensure that all activities related to a race club are covered. Activities of a licensed book maker have been specifically included. (As per CGST Amendment Act , 2018). It is of great interest that Hon'ble SC in the case of *Calcutta Club & Ors v. State of WB & Ors* has held that principle of 'mutuality' has not been done away with by the 46<sup>th</sup> Amendment to our Constitution. Although this decision was rendered in the context of Sales Tax (*Calcutta Club appeal*) and Service Tax (*Ranchi Club appeal*), experts opine that the jurisprudence in this decision would apply in GST as well. With the insertion of section 7(1)(aa) read with clause 2(17)(e) and deletion of paragraph 7 in schedule II, the concept of 'mutuality' appears to be overcome for GST purposes, that too, with retrospective effect from 1 Jul 2017.
- Concept of effect of 'principal supply' in a 'composite supply' overriding the 'incidental supply' cannot be extended to definition of 'business'. That is, the argument that 'if the principal activity is NOT business, then all incidental activities (even if akin to business) will NOT be business' appears to be left behind by GST law. But Courts will still have a say in the matter and some experts cite *Sai Publication Trust (CA 9445 of 1996 (SC))* as

an authority in support that this jurisprudence will not be held back and will have its day in Court even in GST. Other experts express doubts over its relevance in GST as (i) amendment to definition of 'business' in Bombay Sales Tax Act, 1959 made in 1985 was taken up for consideration by SC and (ii) definition in 2(17) of CGST Act has been sufficiently covered keeping intent to overcome such authorities, is their anxious counter response.

- Once taxable person has obtained registration (after examining the applicability of definition of 'business') it does not avail for this distinct person to reapply the 'test of business' *qua* every new stream of income. As a result, all (streams of income) of them will be exposed to GST 'as if' each individual (and new streams of income) were also business activities of this distinct person even if it would not be so, had this been the sole source of income and the other taxable activity were not in existence.
- Sovereign functions are also included within this definition not so much with a plan to impose tax on Government services but to show that the bar is set so high that all other functionaries would NOT be allowed to claim exclusion from this definition when sovereign functions are also not excludable. Expanded scope of 'business' is unmistakable and if sovereign functions are admitted to fit in the definition of business all other business-like transactions cannot claim exclusion from coverage, at least not unequivocally. State is permitted to engage in commerce under Article 298.
- Overall examination of all the clauses in this section, throws some perspective as to what is the 'definition' that is being canvassed by GST law. And in this light of this insight that may be kept in mind while examining all other business-like activities of organizations that may not be organized as 'for-profit' and the title may be towards taxing transactions based on their 'business characteristics' and not the 'non business characteristics' of the form of any organization.

<sup>7</sup> ~~[(18) "business vertical" means a distinguishable component of an enterprise that is engaged in the supply of individual goods or services or a group of related goods or services which is subject to risks and returns that are different from those of the other business verticals.]~~

~~Explanation—For the purposes of this clause, factors that should be considered in determining whether goods or services are related include—~~

- ~~(a) the nature of the goods or services;~~
- ~~(b) the nature of the production processes;~~
- ~~(c) the type or class of customers for the goods or services;~~
- ~~(d) the methods used to distribute the goods or supply of services; and~~
- ~~(e) the nature of regulatory environment (wherever applicable), including banking, insurance, or public utilities;]~~

<sup>7</sup> Omitted vide The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. 01.02.2019



Note: This concept has been diluted now with any number of registration being permitted within a State. The need for it to be a business vertical has been done away with by the Central Goods and Services Tax (Amendment) Act, 2018, with effect from 1<sup>st</sup> February, 2019. Upon obtaining additional registration in the same State, credit reallocation is permitted vide rule 41A of CGST Rules.

*(19) "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;*

An attempt has been made to align the meaning of capital goods to the generally accepted standards of accounting of what is considered as revenue and what as capital.

Goods will be regarded as capital goods if the following conditions are satisfied:

- (a) The value of such goods is capitalised in the books of account of the person claiming input tax credit;
- (b) Such goods are used or intended to be used in the course or furtherance of business.

The following aspects need to be noted:

- (a) Assuming that the value of capital goods was not capitalised in the books of account, the person purchasing such capital goods would still be eligible to claim input tax credit on them since the definition of 'input tax' applies to goods that are not capitalized;
- (b) Capital goods lying at the job-workers premises would also be considered as 'capital goods' in the hands of the purchaser as long as the said capital goods are capitalized in his books of account.

Capitalized value of capital goods may include services as an incidental component of a composite supply. Expression 'capital goods' is the identity of what is capitalized although it may come into existence along with services. There is no basis to carve out service value embedded in the capitalized value if they are principally comprised only of capital goods. In case of turnkey works contract (necessarily an immovable property) it would be deemed to be a service. Please note that CWIP may involve credits which are available immediately on their receipt (of the goods and their invoice). Therefore, one may not have to defer credit until actual capitalization in the books in view of the time restriction for taking of credit being reckoned from 'date of invoice' and not from the 'date of capitalization'.

GST law does not introduce these fine distinctions between 'yet to be' capitalized goods and 'already' capitalized goods. Any delay in capitalization can prove costly due to the time limit for taking of credit. This may be true for long term contracts involving setting up of plants. Further, the expression 'capital goods' gives rise to some questions about 'capitalized services'. Here, it may help to note that 'input services' is not restricted to services that are revenue in nature. Capitalized services do not fail to satisfy the definition of input services. Care must be taken

while claiming credit in respect of capitalized services in case of use commonly for making taxable and exempt outward supplies.

*(20) "casual taxable person" means a person who occasionally undertakes transactions involving supply of goods or services or both in the course or furtherance of business, whether as principal, agent or in any other capacity, in a State or a Union territory where he has no fixed place of business;*

A person would be regarded as a casual taxable person if he undertakes supply of goods or services or both:

- (a) Occasionally, and not on a regular basis;
- (b) In the course or furtherance of a 'business' that exists;
- (c) Either as principal or agent or in any other capacity;
- (d) In a State/ Union Territory where he has no fixed place of business.

A trader, businessman, service provider, etc. in one State undertaking occasional transactions like supplies made in trade fairs in another State would be treated as a 'casual taxable person' in that other State and will have to obtain registration in that capacity and pay tax. E.g., A jeweller carrying on a business in Mumbai, who conducts an exhibition-cum-sale in Delhi where he has no fixed place of business, would be treated as a 'casual taxable person' in Delhi.

Question that comes up for consideration is whether a person who does not undertake business activity (assume this test is satisfied), would such a person be a CTP in home-State when business-like transactions are occasionally undertaken? This is not an easy question but proceeding on the basis that 'business' test is conducted and found that activity is not a business, then there is no question of registration and compliance as CTP. The next question is that in case business transactions are regularly undertaken but below threshold limit, would such a person be a CTP and if so, in the home-State or another State or both? The answer would be that due to threshold benefit, person would not be TP or CTP in home-State. And due to business activities in another State, CTP would be triggered in the other State subject due to fiction under section 24 leading to requirement of registration being attracted in home-State due to inter-State supplies. This leads us to a view that in order to be CTP in any State, person must already be in business in home-State, even if within threshold limit for registration, which may go away due to inter-State supplies being involved between the two branches.

The following aspects need to be noted:

- The threshold limits for registration would not apply and he would be required to obtain registration irrespective of his turnover;
- He is required to apply for registration at least 5 days prior to commencement of business;
- The registration would be valid for 90 days or such period as specified in the application, whichever is shorter;

- An advance deposit of the estimated tax liability is required to be made along with the application for registration. Although, the wordings are 'estimated tax liability', it is clarified vide Circular No. 71/45/2018-GST dated 26 October, 2018 that deposit must be made of estimated 'net' tax liability after reducing estimate of available input tax credit.

(21) *"Central tax" means the central goods and services tax levied under section 9;*

It refers to the tax charged under this Act on intra-State supply of goods or services or both (other than supply of alcoholic liquor for human consumption). The rate of tax is capped at 20% and thereafter, the rates for goods and services have been notified by the Central Government based on the recommendation of the Council.

(22) *"cess" shall have the same meaning as assigned to it in the Goods and Services Tax (Compensation to States) Act;*

It refers to the 'cess' levied on certain supplies (inter-State or intra-State) as notified, for the purposes of providing compensation to the States for loss of revenue arising on account of implementation of GST, for a period of five years (or extended period, as may be prescribed).

(23) *"chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949;*

(24) *"Commissioner" means the Commissioner of central tax and includes the Principal Commissioner of central tax appointed under section 3 and the Commissioner of integrated tax appointed under the Integrated Goods and Services Tax Act;*

(25) *"Commissioner in the Board" means the Commissioner referred to in section 168;*

It refers to the Commissioner or Joint Secretary posted in the Central Board of Indirect Taxes and Customs. Such a Commissioner or Joint Secretary is empowered to exercise the function of the Commissioner with the approval of the Board.

(26) *"common portal" means the common goods and services tax electronic portal referred to in section 146;*

The Common Goods and Services Tax Electronic Portal ("GST portal") is a common electronic portal set up by the Goods and Services Tax Network (GSTN) that facilitates among others registration, payment of tax, filing of returns, computation and settlement of IGST, electronic way-bill and other functions under the Act.

(27) *"common working days" in respect of a State or Union territory shall mean such days in succession which are not declared as gazetted holidays by the Central Government or the concerned State or Union territory Government;*

Common working days refer to such days *in succession* which are not a declared holiday for the Centre as well as State/ Union Territory.

The relevance of working days primarily arises in relation to registration provisions. Every person obtaining a registration under the Act is required to make an online application in the GST portal. The application for registration, along with the accompanying documents will be examined by the Proper Officer and if found in order, the registration will be granted within 3 working days. If the proper officer fails to take any action within 3 working days, the application is deemed approved.

Since the reference to 'common workings days' has been replaced by 'working days' as per Rule 9(1) of the CGST Rules, 2017, it remains to be seen whether the applicant will be granted a deemed registration after 3 working days in case of inaction by the Proper Officer even if the third day was a holiday for a State.

(28) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980;

(29) "competent authority" means such authority as may be notified by the Government;

In terms of Explanation to entry 5(b) of the Schedule II to the Act, "Competent Authority" in relation to construction of a complex, building, civil structure covers:

- (a) Authority authorised to issue completion certificate (local municipal authorities like BDA/BBMP in Bangalore, PMC in Pune)
- (b) Architect
- (c) Chartered Engineer
- (d) Licensed Surveyor

(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

*Illustration— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply.*

A supply will be regarded as a 'composite supply' if the following elements are present:

- (a) The supply should consist of two or more taxable supplies.;
- (b) The supplies may be of goods or services or both;
- (c) The supplies should be naturally bundled.;
- (d) They should be supplied in conjunction (event, time or contract) with each other in the ordinary course of business.;
- (e) One of the supplies being a principal supply (Principal supply means the predominant supply of goods or services of a composite supply and to which any other supply is ancillary).

The following aspects need to be noted:

- Please consider that reference to two or more 'taxable supplies' found in the definition appears as two or more 'supplies' in section 8(a). As section 8 guides the determination of tax liability based on that supply which enjoys the higher rate of tax, the definition must be read to main harmony with section 8.
- The way the supplies are bundled must be examined. Determining natural bundling must be done with caution such that two supplies occurring simultaneously ought not to be presented as naturally bundled. And any artificial bundling must be sought out with equal care as they could fall within mixed supply and not composite supply.
- Mere conjoint supply of two or more goods or services does not *ipso facto* constitute composite supply. Habitually supplied together by one firm in the industry may not be adequate to make the two supplies conjoint. Test is less about what one (or few) firms do but what is accepted in trade / expected by customers to be presently conjointly;
- The two (or more) supplies must appear natural when bundled and presented to the recipient. That is, one is the primary object of buyer but the others are for better enjoyment of that primary object and buyer never approaches supplier exclusively for this incidental supply. For example, no one goes to a super market to buy a carry bag nor will a carry bag be put up for sale but carry bag will be supplied (at extra charge or not) 'if and only if' some other articles are purchased which will be delivered in this carry bag;
- The ancillary supply becomes necessary only because of the acceptance of the predominant supply. Such predominance is neither guided by the predominant component in the total price of the supply nor guided by the predominant material involved. The test of predominance must be gathered from the 'predominant object' for which the recipient approached the supplier;
- The method of billing, assignment of separate prices etc. may not be relevant. In other words, whether separate prices are charged for each of the components of supply or a single consolidated price charged, the identity of each of the components of supply must be unmistakably distinct in the arrangement;
- The tax treatment of a composite supply would be as applicable to the principal supply; and
- It is not necessary that two (or more) supplies occurring simultaneously must be forcibly categorized as composite (or mixed) supplies. There may each be an independent supply.

Illustrations of composite supply are as follows:

- (a) Accommodation with breakfast;
- (b) Cocktail drink being a mixture of alcohol with a non-alcoholic pre-mix;
- (c) Supply of laptop and carry case of same company;
- (d) Supply of equipment and installation of the same;

- (e) Supply of repair services on computer along with requisite parts comprehensive AMC;
- (f) Supply of health care services along with in-patient medicaments.

It may be noted that 'buffet with alcohol' for a couple on New Year's eve for a single price could well be composite supply;

Not all supplies which are given together are composite supply merely because there are more than one taxable supplies simultaneously supplied. Unrelated, unconnected and independent taxable supplies that are supplied simultaneously for individual prices where each of them are intended to be the predominant object for which the recipient approached the supplier and may, to contrast with composite supply, be referred as non-composite supply. This is other than the mixed supply examined later.

Illustrations of non-composite supplies that are agreed under a single contract are:

- (a) Construction of road or structure and maintenance of said road or structure;
- (b) Sale of air-conditioner and installation;
- (c) Sale of automobile parts and labour for repair/replacement;
- (d) Sale of equipment of crane and operator training sessions;
- (e) Sale of fruits and chocolates to same customer;

(31) "consideration" in relation to the supply of goods or services or both includes—

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
- (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

*Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;*

The following aspects need to be noted:

- It refers to the payment received by the supplier in relation to the supply, whether from the recipient or any other person. Therefore, a third party to a contract can also contribute towards consideration;
- Consideration, therefore, is not the amount that the recipient pays but the total amount that the supplier collects (from all sources) whether from the recipient or any third party. This would be particularly relevant in dealing with complex arrangements in digital

economy and new-age business. It is permissible under Indian Contract Act, for a 'stranger' (to the contract) to contribute towards consideration;

- Consideration can be in the form of money or otherwise. 'Otherwise' may refer to consideration that is not 'money' as defined in section 2(75). E.g.: Under a JDA model, the flats handed by the developer to the landowner would be considered as 'consideration' for the development rights given to the developer by the landowner;
- Clause (b) appears to cast the net so wide as to leave nothing to escape its grasp or almost nothing. Reference may be had to the discussion under section 15 on valuation for the far-reaching implications of the expansive language used in this clause. Sufficient to state here that every act or abstinence that is a motivation to induce a person is already consideration and there is no requirement for it to be in monetary form. The Hindi expression for consideration is "Pratiphala" and inspiring in meaning. Further, the word 'uthprerna' used conveys remarkable meaning to 'inducement to supply' found in this definition;
- Unmotivated unilateral actions or gratuitous acts would not be consideration. Transactions that involve negative consideration or abstinence from doing anything are all examples of consideration due to the language in this clause. Consideration can therefore be – increase in cash or other assets, increase in debt or other liabilities or abstinence/ tolerance of any act;
- Payment of extra amount to carry out the same scope of work (already agreed for a price) is not valid and enforceable. It is well settled that there is no consideration to pay extra amount for doing what was already required to be performed. The situation would be different if the original contract were repudiated and replaced with a new contract for same scope of work but (comparatively more) consideration.
- 'No consideration, no contract; no contract, no supply' (except if specified in schedule I). Existence of consideration (whether in monetary or non-monetary form) is *sine qua non* of that contract. Lord Pollock is believed to have said that 'consideration is the price at which the promise is purchased'.
- Nominal consideration (like Re.1/- or Rs.10/-) is no consideration at all because consideration must be 'valuable', that is, what a reasonable person would consider reasonable 'by way of' consideration for the given transaction. This should not be confused with 'adequacy' of consideration because parties are free to decide if the consideration is adequate in the contract. Once consideration is found to be valuable by a Court then the rest is left to the Parties to agree upon.
- Unenforceable contract is no contract at all. Enforceability does not refer to right to sue under tort but right to sue under Contract law. If a mere promise is made to pay extra amount for same work or to pay after completion of work, these are examples of unenforceable arrangements. Once it is established under general laws that such arrangements are unenforceable, they will not attract levy of GST. If GST were to apply

on every transaction of flow of money, GST would be a 'turnover based tax' and not a 'supply based tax'.

- Deposits, as such, are not liable to tax. However, where such deposits have been applied as consideration for the supply it would tantamount to making of advances and in such cases, will be liable to tax. Merely altering the nomenclature of the payment as 'deposit' would not change the nature of the receipt. However, trade practices and the terms, used play an important role in identifying whether an amount is a 'deposit' or an 'advance' or any payment as consideration for the supply;
- Deposits would be considered to be consideration when the "supplier applies the deposit 'as' consideration". Had the proviso used the words "supplier applies the deposit 'towards' consideration", the meaning may have been limited to cases where consideration due is appropriated out of the amount held in deposit. But the usage of 'as' seems to enjoy intrinsic value in the 'eyes' of supplier in accepting the deposit. Comparative examination of transactions with / without deposit could throw some light on the 'effect' that the deposit has in the 'eyes' of supplier;
- The suppliers may have to place the deposits in a separate bank account in case of refundable deposits, to comply with this provision. However, whether the amount is refundable or not is not a criterion to determine whether such amount is a 'deposit';
- This is an inclusive definition. Please refer to any good commentary on Indian Contract Act and Special Relief Act to appreciate the depth of the words used in this definition.
- Consideration must be contrasted with 'motivation for action'. Eg., Person robs a bank to feed poor children. This is an example where the motive may be right but the action is certainly wrong. Similarly, undisclosed reasons for a persons' actions do not form consideration in a contract. That which is demanded, and its failure gives right of rescission to other party, will be the consideration in that contract, even if it is implied and not express contract.
- Compensation is not consideration. This view has been endorsed by CBIC in *Circular No. 178/10/2022-GST dated 3 Aug 2022* but it very briefly lays out the underlying principle and at times appears to miss that principle. If 'quid pro quo' is the appropriate test of consideration, payment made that (i) did not originate at the demand of the Promisor (Payee of compensation) and (ii) failure to make such payment by (or on behalf of) Promisee (Payer of compensation) would result in rescission and refusal to perform (if not already performed) the agreed obligations under the contract by such Payee, would form consideration. Merely calling the payment received as 'compensation' without satisfying the underlying principle would not make it compensation. Consideration, in the words of Lord Pollock is "*the price at which the promise is purchased*".
- Damages is another form of compensation which may be agreed within the contract and is known as 'liquidated damages' or awarded by a Court without the contract (for being terminated) and is known as 'unliquidated damages'. Where the amount agreed is in respect of a collateral object contained in the same contract document, would still be



consideration even if there is a low likelihood of occurrence of that collateral object. Entry 62 to *Notification 12/2017-Central Tax (Rate) dated 28 Jun 2017* where exemption is granted to liquidated damages payable under a Government contract is a good example of liquidated damages being consideration and not compensation when a collateral object is contemplated in the same contract document. Damages awarded outside of the contract in order to bring restitution to the affected Party is not compensation for the reason that the extent of injury-to-be-suffered in every eventuality, cannot be reliably measured beforehand and provided in the contract. Such pre-determined extent of liquidated damages requires more careful examination of the existence of a collateral object and not dismissed as compensation.

- While the purpose of entering into a contract is not to breach it, change of circumstances that renders its performance unviable would make breach (with payment of agreed damages) a better alternative. And entering and exiting contracts is common in business. And when business transactions form the centrepiece of GST law, common-sense understanding of 'breach' would be unreliable. Reasonable understanding of breach or any other expression must not be a layman's understanding but one that prevails in the opinion of persons involved in that trade. See Bolam's test of reasonableness.

*(32) "continuous supply of goods" means a supply of goods which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, whether or not by means of a wire, cable, pipeline or other conduit, and for which the supplier invoices the recipient on a regular or periodic basis and includes supply of such goods as the Government may, subject to such conditions, as it may, by notification, specify;*

It basically refers to supply of goods continuously or on recurrent basis under a contract, with periodic payment obligations.

*(33) "continuous supply of services" means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;*

It refers to supply of services continuously or on recurrent basis under a contract for a period exceeding 3 months, with periodic payment obligations.

The determination of stage of completion of services is an abstract one, unless specifically defined by contract, unlike in the case of goods where the volume of goods supplied can be easily tracked/ identified. Hence, a contract for supply of service spanning over a definite period has been treated as a continuous supply, so that the tax dues are collected periodically.

The law categorically provides for time limit to issue invoices as under:

- where due date of payment is ascertainable: On or before the due date of payment;
- where the due date of payment is not ascertainable: Before or at the time of receipt of payment;

- (c) where the payment is linked to the completion of an event (milestones): On or before the date of completion of that event.

The following aspects need to be noted:

- It should be a contract for supply on a recurrent basis and cannot be a one-time supply contract.
- The period of contract of supply should be more than 3 months - viz., services should be supplied on a recurring basis for at least 3 months;
- The contract should be a case of periodic billing and periodic payments - viz., the billing and receipts thereto should be on a periodic basis (say for e.g.: every fortnight; every Monday etc.) and not one-time. Further, the contract should specify this periodicity/frequency of billing/ payment;
- The Government is empowered to notify certain supplies as continuous supply of services.

Examples of continuous supply of services are:

- (a) Annual maintenance contracts because it comprises of supply of assurance of regular upkeep, supply of parts for repairs and supply of labour for such repairs. However, where invoice is issued at the start of this contract period, time of supply get determined based on the billing and does not get deferred based on the milestones in the contract;
- (b) Works contracts.

It may be noted that at times the accounting standard on revenue recognition may be at variance with the time of supply in GST and that incongruity does not imply error in either treatment.

(34) "conveyance" includes a vessel, an aircraft and a vehicle;

It can be understood as a means of transportation.

(35) "cost accountant" means a cost accountant as defined in ~~clause (c)~~<sup>8</sup> **clause (b)** of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959;

(36) "Council" means the Goods and Services Tax Council established under article 279A of the Constitution;

GST Council is an authority constituted under the Constitution of India and will be the governing body responsible for the administration of the GST across India. The administrative powers will be vested with this authority for taxing goods and services.

The Council will consist of the Union Finance Minister (as Chairman), the Union Minister of State in charge of Revenue or Finance, and the Minister in charge of Finance or Taxation, or any other nominated by each State government, thereby ensuring a proper blend of the Central and State ministry.

<sup>8</sup> Substituted vide The Central Goods and Services (Amendment) Act, 2018 w.e.f. 01.02.2019

The GST Council will be the body responsible for the following (primarily):

- (a) Administration of the GST laws
- (b) Specify the taxes to be levied and collected by the Centre, States and Union Territories under the GST regime
- (c) Specify the goods or services or both that will be subjected/ exempted under the GST regime
- (d) Specify the GST rates
- (e) Specify the threshold limits for registrations and payment of taxes
- (f) Apportionment of IGST between Centre and States/ Union Territories
- (g) Approval of compensation to be paid to the States (for loss on account of implementation of GST)
- (h) Levy of any special rate or rates of tax for a specified period, to raise additional resources during any natural calamity or disaster.
- (i) Resolution of disputes arising out of its recommendations
- (j) Imposition of additional taxes in times of calamities and disasters

*(37) "credit note" means a document issued by a registered person under sub-section (1) of section 34;*

A credit note can be issued by a supplier only in the following circumstances:

- (a) The taxable value shown in the invoice exceeds the taxable value of the supply;
- (b) The tax charged in the invoice exceeds the tax payable on the supply;
- (c) The goods supplied are returned by the recipient;
- (d) The goods/ services are found to be deficient.

The following aspects need to be noted:

- Where there is no change in the taxable value/ tax amount, a credit note must not be issued unlike normal existing business practices;
- A credit note has to be issued by the supplier only and no other person is permitted;
- A credit note issued by a recipient, say for accounting purposes, is not a relevant document for GST purposes; In business, at times the supplier may only issue a financial credit note i.e. only for the basic value without including the GST component. Such financial credit notes are recognized in *Circular 72/46/2018-GST dated 26 October, 2018* where it is stated that such credit notes 'need not' be uploaded on the portal. As such, the GST paid on the original supply will be not be available to be adjusted;
- Once a credit note is issued, the details of the credit note should be declared by the supplier in the return of the month of the issue of credit note. However, if not declared in

that month, it can be declared in any return prior to September of the year following the year in which the original tax invoice was issued (or filing of annual return, whichever is earlier);

- The supplier would not be permitted to claim reduction in the output tax liability if the incidence of tax and interest has been passed on to any person, or if the recipient fails to declare the details of the credit note in his returns;
- The issuance of credit note would not be relevant if the recipient treats the return of goods as an outward supply and raises a tax invoice in this regard;
- Issuance of credit note admits that original invoice was in error and begs a detailed enquiry. Of all things that may be done carelessly, it is least likely that invoice will be issued without due care. But after issuing invoice carefully, if a credit note (for base value of supply and not for error in tax charged) is necessitated, it casts a cloud of suspicion over the value of invoice. Reference may be had to the principle that after one person has performed contracted obligations and supplied goods or services, other party who is required to pay for the supplies cannot pay less than what was agreed. It gives rise to remedy of specific performance plus damages for attempting to pay less (as per Indian Contract Act read with Specific Relief Act). Please also note section 63 of Indian Contract Act where partial performance may be accepted. But GST does not entertain such overriding reduction because partial performance was after and not at the time of supply;
- Credit note that is issued in any other circumstance (not permitted by section 34) would not be permissible and make itself indicate a cross-supply in the opposite direction (requiring an invoice under section 31). Care should be taken while examining any practice of issuing financial or accounting credit note that is not in accordance with section 34. Also note that as per table 5J in GSTR 9C, such credit notes (not permitted by section 34) are to be separately reflected in the reconciliation and output tax must be shown to be paid on the original supply value.
- Financial or accounting credit note is an invention of accountants who need a document to give credit in the ledger account, when the amount billed will not be received and balance cannot be carried forward. Credit note that is NOT in conformity with section 34 is entitled 'financial or accounting credit note'. GST acknowledges no such document and references in circulars is only to state that such documents exist and are non-existent for purposes of section 34 and for treatment thereunder.

*(38) "debit note" means a document issued by a registered person under sub-section (3) of section 34;*

A debit note should be issued by a supplier in the following circumstances:

- (a) The taxable value shown in the invoice is lesser than the taxable value of the supply; or
- (b) The tax charged in the invoice is less than the tax payable on the supply.

The following aspects need to be noted:

- Where there is no change in the taxable value/ tax amount, a debit note must not be issued;
- A debit note has to be issued by the supplier. A debit note issued by a recipient, say for accounting purposes, is not a relevant document for GST purposes;
- The details of the debit note have to be declared by the supplier in the return of the month of the issue of debit note;
- Debit note includes a supplementary invoice.
- Debit note does not have its own 'time of supply' or 'HSN' classification.

*(39) "deemed exports" means such supplies of goods as may be notified under section 147;*

Deemed exports are those supplies of goods that are notified as 'deemed exports' where:

- (a) The goods supplied do not leave India;
- (b) Payment for such supplies is received in Indian Rupees/ Convertible Foreign Exchange; and
- (c) Such goods are manufactured in India.

The definition of 'deemed exports' under this Act is in line with the definition of 'Deemed Exports' under Chapter 07.01 of the Foreign Trade Policy 2015-20. 'Deemed Export' under the FTP 2015-20 covers supply of goods to EOU/STP/EHTP/BTP, supply of goods under advance authorisation etc. and hence provides for refund, drawback and advance authorisation to the supplier of goods. On the other hand, the relevance of 'deemed export' under the GST laws is limited to the grant of refund of taxes on supply of goods as 'deemed export'.

Therefore, a provision has been made under the Act to notify certain transactions as 'deemed export' to avoid situations where the persons might claim refund of taxes on 'deemed export' defined in the FTP 2015-20. While deemed exports may be notified under section 147, the nature of benefit available in respect of deemed exports requires a provision in the Act conferring such entitlement. Section 54 would be the machinery provision for disposal of refund applications. And deemed exports will not come within the scope of section 54(3).

*(40) "designated authority" means such authority as may be notified by the Board;*

Currently, the term does not find a reference in the Act and will be notified by the Board from time to time.

*(41) "document" includes written or printed record of any sort and electronic record as defined in clause (t) of section 2 of the Information Technology Act, 2000;*

An electronic record, in terms of section 2(t) of the Information Technology Act, 2000 means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. A document includes both manual and electronic forms of records. This is an important provision that can play a significant role going forward

bringing various electronic communications within the scope of admissible documentary proof of the underlying transaction. Digitally signed documents are also admissible but using words such as 'the season electronically generated document and does not require signature' do not enjoy the status of being an admissible document. Reference may also be had to section 145 of CGST Act which talks about admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence.

*(42) "drawback" in relation to any goods manufactured in India and exported, means the rebate of duty, tax or cess chargeable on any imported inputs or on any domestic inputs or input services used in the manufacture of such goods;*

This is relevant to understand the contours of refund under the GST laws. Refund of unutilized input tax credit is allowed in case of zero-rated supplies (including exports) and inverted tax rate structure. The law provides that refund of unutilized input tax credit will not be allowed if the supplier has availed drawback of such tax.

*(43) "electronic cash ledger" means the electronic cash ledger referred to in sub-section (1) of section 49;*

Electronic cash ledger means a cash ledger maintained in electronic form by each registered person. The amount deposited through various modes of payment (viz., internet banking, debit/ credit cards, NEFT/ RTGS or by any other mode), shall be credited to the electronic cash ledger. The amount available in this ledger can be used for the payment of:

- (a) Tax
- (b) Interest
- (c) Penalty
- (d) Fees or
- (e) Any other amount payable.

*(44) "electronic commerce" means the supply of goods or services or both, including digital products over digital or electronic network;*

Physical stores/ outlets that supply goods or services or both with the help of a digital network which is facilitated by a third party will fall within the scope of this definition. Electronic commerce is not to be understood as the activity of the operator of the digital network alone. Some experts believe that there is a certain amount of ambiguity as to whether a platform run by a person to supply own goods or services would also be covered in this definition.

Digital or electronic network does not always mean website on mobile app. A telephone network or a call centre using the fancy/easy number can also constitute digital or electronic network.

*(45) "electronic commerce operator" means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce;*

It includes every person who, directly or indirectly, owns, operates or manages a digital/ electronic facility or platform for supply of goods or services or both. There is a certain ambiguity as to whether persons engaged in supply of such goods or services on their own behalf would also be covered in this definition.

While an aggregator only connects the customer with the supplier/ service provider, an e-commerce operator facilitates the entire process of the supply of goods/ provision of services. Under the GST law, even aggregators would be covered under the definition of 'electronic commerce operator'. Where such operators fall within the operation of 'agent' under schedule I, then the fiction under section 7(1)(c) would prevail and operate. Care must be taken to identify which activities of the enterprise falls within section 9(5) or section 52 and which ones under the said fiction of schedule I.

Setting up a website by a supplier for 'own use' also comes within the scope of this definition, however the compliances that are triggered by being such an electronic commerce operator under section 52 cannot be attracted unless there are three distinct persons – customer, supplier and electronic commerce operator. A supplier creating an online channel for sale of product in addition to his off-line retail chain of stores is included in the definition of electronic commerce operator. The implications of being an electronic commerce operator will apply in such cases only if the distinct person who owns or manages the electronic or digital network and the distinct person who stores and distributes the product are independent of each other. Also, every internet-linked transaction would not be ecommerce as the website may merely be an information portal without concluding any specific transaction of supply.

It may be noted that the threshold limits for registration would not apply and he would be required to obtain registration irrespective of his turnover;

*(46) "electronic credit ledger" means the electronic credit ledger referred to in sub-section (2) of section 49;*

Electronic credit ledger means the input tax credit register required to be maintained in an electronic form by each registered person. As a process, based on details of outward supplies filed by the suppliers, the electronic credit ledger of the recipient of goods/ services would be auto populated in the GSTN under the categories matched, un-matched and provisional. The tax payer claiming input tax credits should review the same and accept the relevant ones for claiming input tax credit.

The electronic credit ledger will be debited with the amount of tax liability so adjusted against the input tax credit lying in the ledger, and will stand reduced to the extent of the claim of refund of unutilised input tax credit, if any.

The amount of CGST credit available in this ledger can be used only towards discharging the liability on account of output tax under CGST/ IGST/ UTGST law only. Similarly, the amount of credit of other GST taxes can be used only towards discharging the liability of taxes under the GST laws, and not towards payment of interest, penalty or other sums due.

It is relevant to note that since 'output tax' excludes tax payable under reverse charge basis, and tax payable under reverse charge basis must be discharged by cash only and credit cannot be utilized for discharging such a liability. This has been expressly stated in *Circular No. 172/4/2022-GST dated 6 Jul 2022* in paragraph 6(5).

(47) "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;

The meaning of exempt supply is like the meaning assigned to it under the UTGST law with the exception that supplies that are partly exempted from tax under this Act will not be considered as 'exempt supply'. On the contrary, partially exempted supplies would be considered as 'exempt supplies' under the UTGST Act.

Exempt supplies comprise the following 3 types of supplies:

- (a) Supplies taxable at a 'NIL' rate of tax;
- (b) Supplies that are wholly exempted from CGST or IGST, by way of a notification. Please note that supplies liable to concessional rate of tax under *Notification No. 11/2017-CT(R) dated 28.06.2017* wherein explanation 4(iv)(b) states that such supplies are to be treated 'as if' exempt supplies but only for purposes of credit reversal under section 17(2) of CGST Act. Therefore, care must be taken to include only those supplies that are wholly exempt from tax and not partly exempt as discussed *ibid*;
- (c) Non-taxable supplies as defined under section 2(78) – supplies that are not taxable under the Act (viz. alcoholic liquor for human consumption).

The activities covered under schedule III which are neither a supply of goods nor a supply of services would NOT be included in 'exempt supply'. When they are NOT SUPPLY then they cannot be 'exempt supply' except when they are specifically listed for purposes of treatment under section 17(2), namely, sale of land and sale of completed building, in-bond sales<sup>9</sup> but not in other cases, such as high-sea sales, and merchanting trade transactions.

However, please note the usage of the word 'supply' while stating they are 'not supply' means that the said transactions are firstly a 'supply' but when some 'treatment' is required to be given to those transactions, the fact that they are otherwise a supply is required to be ignored. For example, sale of land or high-sea sales would be included in aggregate turnover for purposes of examining registration or audit threshold but, excluded when giving 'treatment' under, say, section 17(2). Reference may be had to explanation (inserted by CGST (Amendment) Act, 2018) to section 17(3).

'Pure agent' transactions are NOT exempt supply (they are given the name 'no supply' in GSTR 9 in table 5). Subsidy received from Government is not includible in the transaction value as per

<sup>9</sup> Included in the definition of Exempt Supply for the purpose of section 17(2) vide *The Finance Act, 2023*, However, it is yet to be notified.



section 15(2)(e) and is also NOT an exempt supply as it is merely a valuation adjustment for computation of tax payable and not a supply on its own to be even taken for consideration whether it is an exempt supply or not. Also, the 1/3<sup>rd</sup> abatement towards value of land allowed in *Notification No. 11/2017-CT(R) dated 28.06.2017* was NOT part of exempt supply as such this was also a valuation adjustment until entry 16(ii) was inserted in *Notification No. 11/2017-CT(R)* to make this 1/3<sup>rd</sup> abatement of value to be a 'nil' rated supply. Also note that entry 24 is the only other 'nil' rated supply notified under section 9(1) and not under section 11(1) of CGST Act.

Note: The definition of exempt supply for the purpose of reversal of input tax credit is different. Refer detailed discussion under section 17(3), rule 42 and rule 45. The following aspects need to be noted:

- Zero-rated supplies such as exports would not be treated as supplies taxable at 'NIL' rate of tax;
- Input tax credit attributable to exempt supplies will not be available for utilisation/ set-off. But input tax credit attributable to schedule III transactions will not be barred as those transaction are not supply at all except those specified in paragraph 5 of the said schedule.
- Also, please note that 'sale of business as going concern' is treated as a supply of services (even though it involves goods like inventory or assets). This is an exempt supply under sl.no.2 to *Notification No. 12/2017-CT(R) dated 28.06.2017* but paragraph 4(c) to schedule II eclipses this specific transaction from being treated as one or other form of supply. With the credit being permitted to be transferred by section 18(3), it appears that this is one example of a supply, although expressly exempt, would 'not' require reversal of credit under section 17(2).

(48) "existing law" means any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation;

This covers all the erstwhile Central and State laws (along with the relevant notifications, orders, and regulations), relating to levy of tax on goods or services like Service Tax law, Central Excise law, State VAT laws, etc. Therefore, laws that do not levy tax or duty on goods or services, such as the Indian Stamp Act, 1899, would not be covered here.

(49) "family" means, —

- the spouse and children of the person, and
- the parents, grand-parents, brothers and sisters of the person if they are wholly or mainly dependent on the said person;

The relevance of the term 'family' is to:

- Understand whether two persons are related persons under the Act and the consequential valuation provisions applicable in case of related persons;
- Examine whether a person is an agriculturalist as defined under section 2(7) of the Act.

*(50) "fixed establishment" means a place (other than the registered place of business) which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs;*

The following three elements are critical to determine whether a place is a 'fixed establishment':

- (a) Having a sufficient degree of permanence;
- (b) Having a structure of human and technical resources; and
- (c) Other than a registered place of business.

The following aspects need to be noted:

- A fixed establishment refers to a place of business which is not registered;
- But one where the person undertakes supply of services or receives and uses services for own needs in such place;
- Care must be taken that fixed establishment should NOT be registered as ISD location;
- Not every temporary or interim location of a project site or transit-warehouse will become a fixed establishment of the taxable person.. Factors such as premises in occupation, staff locally employed for sufficient duration, administrative establishment to make nearly independent decisions to 'supply and receive' services and limited or specific extent of involvement from registered place of business are all relevant to make such determination;
- Temporary presence of staff in a place by way of a short visit to a place or so does not make that place a fixed establishment. Even extended duration of site camp may not meet the requirements to constitute FE by itself;

E.g.: A service provider in the business of renting of immovable property has his registered office at Bangalore (place of business) and the property for rent is located in Chennai (place of supply). In this case, the registered office will be the principal place of business but the property in Chennai will NOT be regarded as a fixed establishment of the service provider as the degree of permanence required in representing the interests of the supplier does not exist in Chennai.

E.g.: A contract is for supply and installation of equipment where the duration of installation work at the site is (say) 15 days at Indore and the fabrication of equipment undertaken at the factory at Jaipur. After the fabrication is completed, the material is transported to the site along with installation team. For the limited duration that the installation team will be present at the site (Indore), surely the supplier will not put in place all the resources – technical and human – so as to create at the site an establishment with sufficient degree of permanence 'to supply' or 'to

receive' services. In this case also, the factory will be the principal place of business (Jaipur) but the site (Indore) will NOT be regarded as a fixed establishment of the supplier.

E.g.: A project undertaken for construction of a highway (expansion, strengthening and resurfacing of two-lane carriageway into four-lane carriageway) is expected to be undertaken over a three-year duration in Gandhidham. As such, the supplier cannot practically manage to undertake the activities that the project site (entire length of the alignment) remotely from the registered office in Delhi. Although all decisions are authorized by the central team in Delhi, these decisions are effectively delegated to be carried out by its competent team located at the site with all necessary resources – technical and human – so as to create the site and establishment with sufficient degree of permanence 'to supply' or 'to receive' services. In this case, the site (Gandhidham) would be a fixed establishment of the supplier.

E.g.: Permanent Establishment (PE) admitted to be constituted under the DTAA of India with that country, will be a 'fixed establishment' due to admission of this fact made to another regulator *albeit* of a foreign jurisdiction. Read together with explanation 1 and 2 to section 8 of IGST Act, transactions of any distinct person in India with that PE-FE will entail 'deemed supplies' under section 7(1)(c) read with paragraph 2, schedule II. Constitutional limitation on extra-territoriality in article 245 will not impose GST on the PE-FE but the transactions of any distinct person with that PE-FE cannot be ignored merely because the financial results of that PE-FE will be consolidated with that of the distinct person when the Legal Entity reports its global results. Choice to constitute a PE and not establish a subsidiary in the foreign jurisdiction is taken by the Legal Entity in India and GST implications based on the legal fiction is an outcome of that choice and not an interpretation of GST law.

*(51) "Fund" means the Consumer Welfare Fund established under section 57;*

This refers to the Consumer Welfare Fund constituted by the Government where the unutilized input tax credits of a person will be credited if an application to that effect has been made. The amount will be credited to the Fund only upon an order being passed by the Proper Officer after being satisfied that the amount claimed as refund is refundable.

*(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;*

The following aspects need to be noted:

- Although various courts have held that the term 'goods' includes actionable claim under the VAT laws, as trade practice, actionable claims were kept outside the taxation net under the earlier laws. Now, the GST law seeks to change this understanding by including actionable claim in the definition of goods. Thus, under GST laws, actionable claims would be goods;
- The words 'but includes' is an exception to the "exclusion" of money and securities. In other words, if the actionable claim represents property that is money or securities, it can be held that such forms of actionable claims continue to be excluded;

- Actionable claim, other than lottery, betting and gambling will not be treated as supply of goods or services by virtue of Schedule III (Activities or transactions which shall be treated neither as a supply of goods nor a supply of services);
- Intangibles like MEIS/SEIS scrips, copyright and carbon credit would continue to be covered under 'goods'.
- An actionable claim which is excluded from definition of goods under Sale of Goods Act is specifically included in the definition of goods in CGST Act.
- Standing crop is goods but growing crops is not goods (and hence services). As to whether a contract for lease of forest land is one for sale of standing crop (goods) or for exploitation of benefits arising from that land (crops yet to grow), depends on the terms of contract especially the tenure of contract. But, care must be taken that contract similar in all respects except tenure and consideration may tilt from goods to services.
- The words "*which are agreed to be severed before supply or under a contract of supply*" will qualify. Rule of Last Antecedent (RLA) – a rule of interpretation of statutes states that words of qualification (WoQ) will apply to the last precedent unit (out of the entire population). If it is interpretation that these WoQ will apply (i) only to "*things attached to or forming part of the land*", then growing crops and grass will also be goods even though they are attached to the earth or (ii) to all the words in the definition, then there is no indication that these WoQ should exclude 'actionable claims'. It appears that interpretation based on RLA seems a reliable interpretation. Reference may be had to the use of 'oxford comma' in English grammar for forming sentences.
- Goods are first 'property', whether (i) tangible or intangible (ii) animate or inanimate (iii) incorporeal but vested indefeasible rights. Any article that is not 'property' cannot be goods, whether or not it is tangible. Property is that which is legal property. Eg., Pet animals are property but wild animals are no one's property, not even of the State. Lawful property must vest in someone, that is, the owner. Without an owner too, there cannot be property. Owner has Rights in respect of the Property. And these Rights are 'rights' only when they are 'enforceable' against the whole world. Unenforceable rights may be conveniences but, not rights. Unenforceability is not limited to illegal objects. Unenforceable conveniences even if accepted in society will be 'assets' under AS10 or IndAS16 but merely expenses (which cannot even be pre-paid due to uncertainty over their future realizable value). Crypto-articles are unenforceable because they are (i) not recognized as legal tender and (ii) infringement cannot be stopped with the assistance of the State machinery. Reference to crypto-articles in Income-tax Act as virtual digital 'assets' does not mean they are assets or goods because Income-tax Act is not the basis for classification of assets and liabilities.
- Refer also to a comparative discussion under section 2(102) of 'services'.

(53) "Government" means the Central Government;

While this definition does not seem to say much, but care must be taken to identify that Government includes all 'instrumentalities' of the Government in the form of Boards, Authorities and Departments. Entities formed by an Act of Parliament or under Companies Act will NOT be Government itself in GST although the jurisprudence under art.12 of our Constitution goes a long way in guiding our application of this definition in the context of understanding exclusions in schedule III or exemptions for Government services or identifying which supplies come with the scope of entries in schedule XI and XII in our Constitution. Refer discussion under 2(9) of IGST Act also defining 'Government'. A reasonable test to apply is to inquiry into the following four categories of criteria (also see discussion under section 2(69)):

<b>Financial dependence on State:</b> <ul style="list-style-type: none"> <li>➤ Entire capital owned by State</li> <li>➤ Losses are a charge to Consolidate Fund</li> <li>➤ Employees, servants of State</li> </ul>	<b>Entity is instrumentality of State:</b> <ul style="list-style-type: none"> <li>➤ Functions previously vested in Ministry</li> <li>➤ Public welfare is object of enterprise</li> <li>➤ Activities akin to schedule XI and XII</li> </ul>
<b>State enjoys plenary control over management:</b> <ul style="list-style-type: none"> <li>➤ Board appointed by State not by contract</li> <li>➤ Board compensation dictated by State</li> <li>➤ Veto power traceable to State-functionary</li> </ul>	<b>State monopoly over occupied field:</b> <ul style="list-style-type: none"> <li>➤ Custodian and user of public resources</li> <li>➤ Liquidation estate vests with State</li> <li>➤ Participation by private enterprise barred</li> </ul>

It is also important to refer to Article 298 where State is empowered to engage in 'trade or commerce'. And stock-in-trade of the State are the natural resources of the Nation which are employed gainfully by State Enterprises or licensed to Private Enterprise. Therefore, State does not engage exclusively in Sovereign functions. 'Sovereign functions' does not refer to 'all' functions by the Sovereign. Non-sovereign functions performed by the Sovereign will be exposed to incidence of GST.

Sovereign functions assigned to Panchayat and Municipality are listed in schedule XI and XII of the Constitution. And when even these instrumentalities engage in transactions that are NOT within the pith of these activities, they will be exposed to the incidence of GST.

<b>ELEVENTH SCHEDULE (Article 243G)</b>	<b>TWELFTH SCHEDULE (Article 243W)</b>
1. Agriculture, including agricultural extension.	1. Urban planning including town planning.
2. Land improvement, implementation of	2. Regulation of land-use and construction

land reforms, land consolidation and soil conservation.	of buildings.
3. Minor irrigation, water management and watershed development.	3. Planning for economic and social development.
4. Animal husbandry, dairying and poultry.	4. Roads and bridges.
5. Fisheries.	5. Water supply for domestic, industrial and commercial purposes.
6. Social forestry and farm forestry.	6. Public health, sanitation conservancy and solid waste management.
7. Minor forest produce.	7. Fire services.
8. Small scale industries, including food processing industries.	8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Khadi, village and cottage industries.	9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Rural housing.	10. Slum improvement and upgradation.
11. Drinking water.	11. Urban poverty alleviation.
12. Fuel and fodder.	12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Roads, culverts, bridges, ferries, waterways and other means of communication.	13. Promotion of cultural, educational and aesthetic aspects.
14. Rural electrification, including distribution of electricity.	14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.
15. Non-conventional energy sources.	15. Cattle pounds; prevention of cruelty to animals.
16. Poverty alleviation programme.	16. Vital statistics including registration of births and deaths.
17. Education, including primary and secondary schools.	17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Technical training and vocational education.	18. Regulation of slaughter houses and tanneries.
19. Adult and non-formal education.	

20. Libraries.	
21. Cultural activities.	
22. Markets and fairs.	
23. Health and sanitation, including hospitals, primary health centres and dispensaries.	
24. Family welfare.	
25. Women and child development.	
26. Social welfare, including welfare of the handicapped and mentally retarded.	
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.	
28. Public distribution system.	
29. Maintenance of community assets.	

(54) *“Goods and Services Tax (Compensation to States) Act” means the Goods and Services Tax (Compensation to States) Act, 2017;*

The Goods and Services Tax (Compensation to States) Act (for brevity “Compensation Act”) provides for compensation to the States for the loss of revenue arising due to implementation of GST for a period of 5 years from the said date of implementation. The cess paid on the supply of goods or services will be available as credit for utilization towards payment of said cess on outward supply of goods and services on which such cess is leviable.

The GST Council in its 45<sup>th</sup> meeting held on 17.09.2021 has decided that collections from Compensation Cess in the period beyond June 2022 till April 2026 would be exhausted in repayment of borrowings and debt servicing to bridge the gap made in 2020-21 and 2021-22 and its applicability for other purposes has been deferred till April 2026.

(55) *“goods and services tax practitioner” means any person who has been approved under section 48 to act as such practitioner;*

A goods and services tax practitioner (GST practitioner) is a person who can undertake the following activities on behalf of a registered person (if so authorized):

- (a) Furnish details of outward and inward supplies;
- (b) Furnish monthly, quarterly, annual or final return;
- (c) Make deposits in the Electronic Credit Ledger;
- (d) File a claim for refund;
- (e) File an application for amendment/ cancellation of registration.

The following aspects need to be noted:

- A person desirous of being enrolled as a GST Practitioner should make an application in Form GST PCT-1 and satisfy the conditions required;
- The GST practitioner is required to affix his digital signature on the statements prepared by him/ electronically verify using his credentials;
- The responsibility of correctness of the details furnished will lie on the registered person only.

*(56) "India" means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters;*

The definition of India extends not only to the landmass, but also to the territorial waters and the air space above the Indian territory and territorial waters. Hence, all the supplies made in such areas will be treated as supplies made in India. Unlike earlier laws, GST redraws the map of India as commonly understood to a map that extends beyond the land mass well into the sea all the way to the end of the maritime zone (200 nautical miles from baseline on the shore at high-tide) going down under the sea bed and sub soil under such waters and up in the air up to the air space (sovereign air space) above.

Therefore, 'India' is not a two dimensional space but a three-dimensional space extending to the territorial waters and beyond, going down below to the sea bed and extend above to the airspace above the horizontal expanse. But, 'India' excludes all areas that are 'excluded' such as special economic zone (see section 53A of SEZ Act) and Customs Areas (see section 2(11) of Customs Act) including bonded warehouses (see sections 57, 58 and 58A of Customs Act). Refer detailed discussion under IGST Act.

Sovereign air space is based on the jurisdiction of a nation's laws and there are 11 nations that have such laws. India is in the process of putting together its own air space legislation. Beyond the maritime zone or above sovereign air space is called 'high seas' in maritime law. Hence, we need to adjust our view of 'India' from what we see in a two-dimensional map to a three-dimensional area spreading beyond the land into the sea and the sub-soil and extending to the air-space above. And yet, this idea of India will exclude all those areas that are demarcated as 'lying beyond the customs boundaries' such as SEZ areas, Customs Area, Bonded areas, etc, which are not included here. GST treatment must then be applied keeping this new and adjusted view of 'India'.

*(57) "Integrated Goods and Services Tax Act" means the Integrated Goods and Services Tax Act, 2017;*

It refers to the Act which provides for principles to determine what is an inter-State or intra-State supply, and levy of tax on inter-State supply of goods or services or both (other than supply of alcoholic liquor for human consumption).



(58) *“integrated tax” means the integrated goods and services tax levied under the Integrated Goods and Services Tax Act;*

Tax levied under the IGST Act is referred to as “Integrated tax”. It refers to the tax charged under the IGST Act on inter-State supply of goods or services or both (other than supply of alcoholic liquor for human consumption). The rate of tax is capped at 40% and will be notified by the Central Government based on the recommendation of the Council.

It may be noted that ‘integrated tax’ is not the same as ‘integrated goods and services tax’. Former is tax levied under IGST Act and later is tax that is levied under Customs Tariff Act. Refer detailed discussion about the ‘two’ kinds of IGST in the context of section 5 of IGST Act.

(59) *“input” means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;*

The term “input” is NOT to be equated with the ‘goods’ on a plain and simple observation. The contrast can be explained that ‘input’ are ‘goods supplied as goods’ and not ‘goods (treated to be) supplied as services’. Goods supplied as services will be ‘input services’ (discussed later). Input, therefore, refers to goods (defined to include actionable claims, growing crops, grass and things attached but agreed to be severed) and excludes capital goods (goods received that are capitalized by recipient). Unlike definition of the “capital goods” in the erstwhile laws such as Central Excise, VAT, etc., it is given a very simple meaning in the GST law.

It is sufficient for any goods which are used or intended for use in the course or furtherance of business to be capitalised in the books of account, to be treated as capital goods under GST. Accordingly, if a person who is engaged in the sale of laptops capitalises one laptop in the books of account, and such laptop used for business, it will be treated as capital goods under GST law as well. As to ‘how’ capitalization be done is left to the prudence of accounting and the standards of ICAI on accounting for ‘property, plant and equipment’.

The second condition for goods to be treated as inputs, is that they must be used or intended to be used by the person who has received those goods *‘in the course or furtherance of business’*. This phrase encompasses a wide range of functions within the business.

- The term “business” as defined under the GST law includes any activity or transaction which may be connected, or incidental or ancillary to the trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity.
- There is neither a requirement of continuity nor frequency of such activities or transactions for them to be regarded as ‘business’.
- The law poses no restriction that the goods must be used on the shop floor, or that they must be supplied as such/ as part of other goods/ services. It would be sufficient if the goods are used in the course of business, or for furthering the business.
- The term ‘course of business’ is one that can be stretched beyond the boundaries consolidating activities that have direct nexus to outward supply. What is usually done in the ordinary routine of a business by its management is said to be done in the “course of business”. Moreover, the term “ordinary” is missing before “course” in the phrase.

- From the above, it can be inferred that the purchase/ inward supply of goods need not be a regular activity, and may even be a one-time procurement. This is further clarified with the other phrase “furtherance of business”, which has not been of use in the indirect taxes thus far.
- “Furtherance of business” is a new term, and an entirely new concept, that has been introduced in GST. Reference may be had to the detailed discussion about ‘commencement of business’ in the context of section 2(17) and again in section 16(1) to contrast with ‘commencement of business’.

Additionally, there is no other condition attached to the term “input”, especially in relation to the outward supply. Consequently, a person engaged in supplying services would also be entitled to treat the goods accepted inward as “inputs”, where the conditions of not being capital goods, and the usage in the course or furtherance of business are satisfied. Thus, stationery items procured by a supplier of pure services which are meant for use of the employees for business, will be eligible to be treated as “inputs” for such a person, and consequently, the taxes paid on such goods will be available as credit to the service provider, on meeting other conditions mandated for claiming credit.

Further, the law provides a flexibility for this purpose by inserting the words “or intended to be used” before “in the course...”. By this, the law secures the meaning of the term “input” even for cases where goods have been purchased but, are yet to be used in the business. Thus, the conditions of *ready-to-use* and *put-to-use* would not be relevant for considering goods as “inputs”, unless the condition takes route through rules/ other sections. However, no such conditions appear even for claiming input tax credit.

*(60) “input service” means any service used or intended to be used by a supplier in the course or furtherance of business;*

Any service that is used or intended to be used by a supplier of goods or services, or both, in the course or furtherance of business would be treated as “input service”.

The meaning of the term “service” under the GST law is very vast to include everything that is not goods, barring securities, and monies that do not amount to activity relating to the use of money or conversion of money. Therefore, anything received by a person who is a supplier, which is not goods, and is neither securities nor money as such, would be treated as ‘input service’, so long as it is used or meant to be used in the course or furtherance of business.

Unlike the erstwhile law, there is no requirement for it to have direct nexus with the outward supply. In other words, the service received may not be directly linked to the outward supply of the supplier receiving the service, and the outward supply may be goods or services. Regardless of the outward supply, the service received would qualify as “input service” to him, when the same is used in the course or furtherance of business. Therefore, a retailer who receives housekeeping services of the business premised will be eligible to treat the services as ‘input services’ given that such services are received in due course of business.

Further, while the erstwhile law required that the services must be received only up to the place of removal for them to qualify as “input services”, there is no such condition attached to the term

under GST, where such services are received in the course or furtherance of business. This means that goods transportation services availed by the supplier, would qualify as input services to him, even if the transportation is up to the place of delivery to the recipient, say the factory of the recipient, although the transportation does not add value to the goods itself, but adds value to the supply made by him.

Contrasting with the definition of capital goods (capitalized in books) and inputs (not capitalized in books or revenue expense), input service does not appear to be restricted to revenue expenditure only but may also be capitalized in books and still be 'input services'.

*(61) "Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;*

The concept of input service distributor existed even in the earlier service tax law. This has been borrowed into GST, entitling a person who is registered as an Input Service Distributor (ISD) to distribute the credit in respect of input services (and not inputs) received in its name. Given that services are intangible, it is not practicable to trace every service to the ultimate recipient of the service, as is distinguishable in case of goods, justifying the need for a distributor to services.

Please note that this definition does not refer to 'office of taxable person', it refers to 'office of the supplier'. This indicates that a supplier which is considered taxable person for purposes of section 9(1) obtains registration, then that supplier will remain a registered person and not an ISD. If a person is a registered person, then in respect of every office location of that person (in that State), he will remain registered person. To obtain ISD registration, the person must have an 'office' that is NOT a registered location from where taxable supplies are effected. Care must be taken not to have overlapping registration as both taxable person and ISD. This deliberate use of words 'office of supplier' indicates that there is no 'taxable supply' from that office.

The definition appears to indicate that the ISD-office cannot simultaneously be a place of business from where taxable supplies are made. In other words, if there is a place of business of a taxable person, that office cannot also be an office that 'receives tax invoices and issues document to distribute credit'. Although some experts do not find any apparent objection for coexistence of place of business and ISD, in view of the inter-branch supply of management and supervisory services by an office that has such capabilities, treating such an office as ISD would be misapplication of the facility of ISD to distribute credit.

Generally, the head office of the person, or the corporate office, by whatever name called, would be the location to which the services would be billed. However, there is no implication by law that an ISD must be the head office. It may be ensured that the office registered as ISD does not itself undertake any activity in the nature of outward supply, not receive inward supplies of its own or not attract RCM liability. Therefore, a single company may choose to have multiple regional offices based on its business requirements.

To distribute the credit of input services, the ISD would be required to follow the manner prescribed by the rules, including:

- Issue of an ISD invoice to each recipient of credit on every distribution.
- Recipients of credit are those taxable persons to whom it is attributable (whether or not they are registered), being persons having the same PAN (as issued under the Income Tax Law) as that of the ISD.
- The credit of integrated tax should be distributed as integrated tax irrespective of the location of the ISD, and so also:
  - Where the ISD is located in a State other than that of the recipient of credit, the aggregate of Central tax, State tax and Union territory tax, as integrated tax.
  - Where the ISD is located in the same State as that of the recipient, the Central tax and State tax (or Union territory tax) should be distributed as the Central tax and State tax (or Union territory tax), respectively.
- Each type of tax must be distributed through a separate ISD invoice. However, there is no requirement to issue ISD invoices at an invoice-level (received from the supplier of the service).

Note: The liability to cross charge for services provided between distinct persons (branches/ HO etc.) is independent from the function of the ISD.

Care must be taken not to substitute 'fixed establishment' with 'ISD'. If a location is a fixed establishment, then that location is liable to be registered as a 'place of business' and not as ISD. When there is 'sufficient degree of human and technical resources', it is inexcusable to register such location as ISD and seek to distribute credit. Reference may be had to the discussion under section 19 about FAQs issued for BFSI sector where HO of banks (even if registered as ISD under earlier laws) are stated to be a 'taxable person' for supplying 'management and oversight services' to various other distinct persons (branches) and liable to regular registration.

*(62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—*

- (a) the integrated goods and services tax charged on import of goods;*
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;*
- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;*
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or*
- (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,*

*but does not include the tax paid under the composition levy;*

From the opening of the definition, it can be understood that input tax can arise only in respect of registered persons, and the tax is only available on supplies **made to him**. Therefore, no tax paid on outward supplies can ever qualify as input tax to the person making the supply (who may or may not be registered) and shall only be treated as 'input tax' by the person receiving the supplies.

The law also makes it amply clear that input tax is linked to a specific registration and cannot be loosely associated with various GST registrations of the single legal person.

Further, for 'input tax', the law makes no distinction between Central tax, State tax, Union territory tax and integrated tax. Integrated tax is tax charged under IGST Act but integrated tax on goods and services on import of goods is charged under section 3(7) of Customs Tariff Act. This difference should not be missed while reading the law. IGST paid on import of goods is in the nature of customs duty and not GST. But still, credit is admissible on such Customs duty (paid as IGST on import of goods). Similarly, cess paid on import of goods is not a cess under Cess Act but under section 3(9) of Customs Tariff Act. Refer again to the discussion under section 5 of IGST Act of 'two' types of IGST that can be seen in clause (a) of this definition to be specifically included after the body of this definition covers 'integrated tax'.

The law specifically provides certain inclusions and an exclusion to clarify the scope of the term:

- The specific inclusions are of two types, i.e., the integrated tax applicable on import of goods (in lieu of the previously applicable CVD and SAD), and the taxes payable on reverse charge basis on account of supplies being those supplies that are notified in this regard, or on account of being inward supplies from unregistered persons. From the language used, it must be understood that these inclusions are not limited to those that have been discharged, on the premise that the law used the words "charged" or "taxable" and not "paid".
- While it is clear that composition suppliers will not be entitled to collect taxes, from this definition, it can be inferred that the amounts paid by composition in lieu of tax, cannot, in turn, be treated as input tax either for the composition supplier or for the recipient of the supplies.

Further, the GST Compensation law reserves right to levy cess on certain supplies. However, this cannot be treated as input tax for the purposes of GST. Although the GST Compensation law provides that the provisions of input tax would apply *mutatis mutandis* to cess, it categorically specifies that the input credit of cess can only be utilised for discharging the liability on such cess.

Input tax credit includes tax paid on reverse charge basis. Once tax is paid under section 9(3) of CGST Act (or 5(3) of IGST Act), character of the payment remains GST and by operation of law, be treated as 'input tax'.

(63) *“input tax credit” means the credit of input tax;*

For a tax to qualify as “input tax credit”, it must first be “input tax”. The law creates a separate terminology for this purpose as all input tax would not qualify as credit. Credit of input tax would be available subject to specific conditions and restrictions, and to persons being registered persons.

In view of the exhaustive listing of input taxes in section 2(62), transition credit is clearly NOT input tax credit. And treatment applicable to ‘input tax credit’, whether refund on zero-rated supplies or imposition of interest when found to be inadmissible, do not apply to ‘transition credit’. Utilization of balance in Electronic Credit Ledger (by crediting transition credits into the ledger) still does not render transition credit to be input tax credit. (64) *“intra-State supply of goods” shall have the same meaning as assigned to it in section 8 of the Integrated Goods and Services Tax Act;*

The principles for determining a supply as an intra-State supply are provided in the IGST law in terms of the exclusive power of Parliament under article 269A(5) of our Constitution. Drawing reference to the relevant section, every supply of goods, where the location of the supplier of the goods and the place of supply as determined under section 10 of the IGST Act, are in the same State (or same Union Territory), would be an intra-State supply of such goods. Accordingly, an import or export of goods can never be an intra-State supply.

Every taxable supply that is an intra-State supply shall be liable to both Central tax and the respective State tax (or Union territory tax), unless otherwise exempted.

The ‘place of supply’ referred to in this regard is a legal terminology and should not be understood for its usage in English language. Section 10 of the IGST Act provides situation-specific conditions for determining the ‘place of supply’. Refer detailed discussion under section 10 of IGST Act to determine whether ‘place of supply’ is a question of fact or question of law. (65) *“intra-State supply of services” shall have the same meaning as assigned to it in section 8 of the Integrated Goods and Services Tax Act;*

Determination of ‘place of supply’ is based on applicability of the criteria laid down in section 10, in case of supply of goods, and section 12 in cases of supply of services, intra-State supplies is very specific in section 8 of IGST Act. All supplies that are NOT intra-State supplies will fall within the scope of inter-State supplies i.e., supplies to SEZ located in the same State as the local Supplier or supplies whose place of supply is in the territorial waters, etc. Care must be taken to identify intra-State supplies based on (i) location of supplier and (ii) place of supply.

Now, ‘place of supply’ is a question of law as dictated in section 10 or 12 of IGST Act, as the case may be. Whereas ‘location of supplier’ is a question of fact. In case of supply of services, ‘location of supplier of services’ is defined in section 2(71) but ‘location of supplier of goods’ is NOT defined. Experts advise that this is NOT a legislative error of omission but a deliberate and thoughtful silence since ‘location of supplier of goods’ will be the ‘location of goods’ themselves. Definition of ‘place of business’ in section 2(85) brings this out that “*...place where taxable person stores his goods....*”.

As in case of goods, where the location of the supplier of the service and the place of supply as determined under section 12 of the IGST Act, are NOT in the same State (or same Union Territory), the supply would be an inter-State supply of such services. Import of goods under a cross-border lease arrangement attracts levy of customs duty (for the physical article brought into India) and also attracts levy of GST (for the treatment of lease as a supply of service under paragraph 1(b) or 5(f) of schedule II). When IGST is being paid on the lease rentals as 'import of services' (availing the corresponding exemption for IGST on imports), care must be taken NOT to assume all overseas payments of lease rentals to be inter-State supplies. For example, Leasing Company in Mumbai financing aircraft engine on lease from UK to an Indian Airline Company, which is also in Mumbai, will be an intra-State supply for payment of tax on lease rentals.

*(66) "invoice" or "tax invoice" means the tax invoice referred to in section 31;*

On a plain reading of the law, it appears that the terms "invoice" and "tax invoice" have been used inter-changeably to refer to that document that is prescribed by law, as a document that shall be issued by the registered person on making taxable supplies. The tax invoice should contain all the prescribed details such as the description of the goods, quantity, value and tax charged on the supply. The possibility of denial of credit due to prescribed details not being available even if not important is real unless law provided for condonation which was there in earlier laws.

- In respect of goods: A tax invoice can be issued at or before the time of removal of the goods for making the supply, where the supply involves movement of the goods (either by the supplier or by the recipient, or any other person).
  - However, where the supply to the recipient does not involve movement of the goods, the tax invoice would be due at the time of delivery or making the goods available to the recipient. It is not necessary that every supply requires movement of goods on the basis that all goods are movable in nature.
  - The time of removal would matter only in cases where the removal of goods and the movement of goods is by virtue of the supply.
  - Consider the case of sale on approval basis. Goods would be removed at a certain time, and may be delivered to the location of the recipient. However, it is not known at the time of removal, whether the transaction results in a supply. Therefore, the time of confirmation by the recipient that he wishes to retain the goods would be the due date for issuing the tax invoice.
  - The Government is also empowered to notify certain categories of supplies in respect of which it can prescribe a separate time limit for issuance of tax invoice.
- In respect of services: A tax invoice for supplying services should be issued within 30 days from the date of supply of the taxable service.
  - However, the Government is empowered to notify certain categories of services wherein any other document relatable to the supply would be treated as the tax invoice, or for which no tax invoice is required to be issued at all.

The provisions of Section 31 of the CGST Act also provides for invoices or other documents such as bill of supply, payment voucher, receipt voucher, etc. for specific situations.

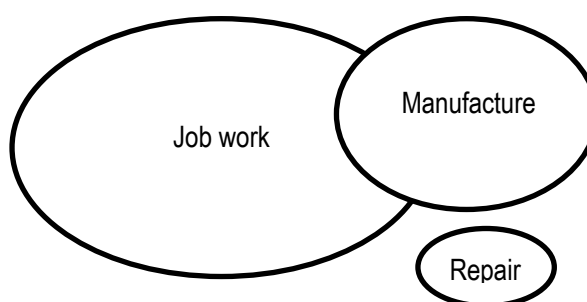
*(67) "inward supply" in relation to a person, shall mean receipt of goods or services or both whether by purchase, acquisition or any other means with or without consideration;*

Inward supplies may be of goods or of services, or of both. The key in this definition is to note that 'inward supply' is to be understood as the way supply will be looked at in the hands of the 'recipient' who represents 'receipt' of goods or services in any of the forms of supply stated here. Please note that reference to 'furtherance of business' is missing in this definition and is in harmony with the fact that import of service is included in definition of supply even without being in furtherance of business.

It may be questioned as to whether an inward supply is not particular to a registration, or whether an inward supply can be associated with any of the registered persons having the same PAN, on the premise that it is in relation to "a person". However, that would not be the intent of the law; it is to enable correlation with a person, whether or not he is a taxable person. In other words, reference to inward supply may be in relation to any person, whether he is registered, or unregistered taxable person, or person not liable to tax. Some drafting hygiene seems to be needed in this definition.

*(68) "job work" means any treatment or process undertaken by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly;*

To start with, the expression "job work" refers to a "treatment" or "process", which is undertaken by one person, who may or may not be registered, to another registered person. Key aspect to consider is job-work is the super-set of this 'treatment or process' which may or may not amount to manufacture. When the Principal for whom the 'treatment or process' is carried out is a 'registered person', only then would it be 'job work'. But even to an unregistered principal, treatment or process may be carried out and that may still amount to manufacture. Now, 'repair' seems to be a 'treatment or process' but will NOT be 'job work'. Principal component must be provided in order for the remainder of the components including conversion to amount to 'job work'. If nothing is provided except instructions to produce, it does not amount of job work.



While treatment and processing are commonly understood as services, there is no implication that job work is purely services, or that goods would not be used for such treatment or processing. However, schedule II of the CGST Act which specifies activities to be treated as supply of goods or supply of services, *inter alia* provides that any treatment or process which is applied to another person's goods is a supply of services. Such a deeming fiction in respect of job work is given effect to, based on the primary objective of any job work, which is to provide a service.



The following aspects need to be noted:

- Capital goods may be sent for job work, or for the purpose of carrying out the treatment or process.
- A job worker is free to effect inward supplies on his own account for carrying out the job work. The law does not require that goods applied for the treatment or process must also be sent by the registered person on whose goods the job work is undertaken.
- As regards the job worker *per se*, the law makes no demands that such person must be a registered person.
- The law requires that the treatment or process undertaken by the job worker must be on goods belonging to 'another "registered" person'.
  - From the usage of the term "another" before "registered person", it is clear that the law permits job work supplies for other legal persons or other distinct persons (sharing PAN with job worker) .
  - Job work carried out by one distinct person for another distinct person (Principal) is permitted.
  - But if both share a common GSTIN, it is not a supply at all.
  - The reference to the principal is made by using "another registered person" and not "another person".
  - It may safely be understood that, if one unit of a company supplies goods for further processing to another unit of the same company, having a different registration from that of the supplying unit, the unit undertaking the processing activity can be treated as a job worker.
- If the Principal is an unregistered person, then the job worker is not a job worker. Classification of the work undertaken may need to be examined whether it is manufacture or not to attract the appropriate rate of tax applicable to the goods so manufactured and not rate of tax applicable to services of job-work;
- Job work should not be interchanged with repair activity as both appear to involve 'treatment or process' on goods belonging to another. Job work brings into existence a functionality that was not in existence whereas repair restores functionality that was already in existence before the article became faulty (and needed repairs).
- It is important to note that the job worker is not an Agent of the Principal and the relationship inter se is that of Principal to Principal.
- Job work need not result in the emergence of a distinct new article. Manufacture is a sub-set of job work which is very wide covering 'treatment of process'.
- Also, important to note is that reference to 'another registered person' is missing in paragraph 3 to schedule II where treatment or process on goods belonging to 'another person' is treated as a supply of services.

(69) “local authority” means—

- (a) a “Panchayat” as defined in clause (d) of article 243 of the Constitution;
- (b) a “Municipality” as defined in clause (e) of article 243P of the Constitution;
- (c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;
- (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006;
- (e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;
- (f) a Development Board constituted under article 371 and <sup>10</sup>**article 371J** of the Constitution; or
- (g) a Regional Council constituted under article 371A of the Constitution;

A ‘local authority’ is also a ‘person’ for the GST law. A local authority would enjoy the same treatment as is received by a ‘Government’ such as in the case of supplies that shall be treated as neither a supply of goods nor a supply of services, requirement to deduct tax at source on supplies made to it, etc. Reference may be had to principles laid down in *Ajay Hasia vs. Khalid Mujib Sehravardi & Ors* 1981 AIR 487 in the context of article. 12 of our Constitution where the following ingredients were laid down while determining if any authority was ‘a State’ (also see discussion under section 2(53)):

Entire share capital is held by the Government or it's agencies or nominees	Financial assistance is accessible from the Government	Monopoly status is afforded to the authority in the area of activity or domain
Deep and pervasive State control exists over the functioning of the authority	Functioning of the authority is determined or subject to approval or override of State	Functions of any department of Government is now vested in the authority
<i>Additional considerations not laid down in SC decision:</i>		
<i>Employees of the authorities are servants of the President of India / Governor of State and their salary and emoluments are a charge against the consolidated fund of India / State</i>		<i>In the event of liquidation of the authority, the entire ‘liquidation estate’ (discharge all liabilities) vests with the State and flows into the consolidated fund of India / State</i>

Understanding Government, Government Agency, Government Entity and Local Authority assumes significance considering TDS obligations under section 51 (on payments by such entities) and RCM obligations (on recipient of services from such entities). Some considerations may be to examine schedule XI and XII of our Constitution about functions of sovereign. All

<sup>10</sup> Inserted vide *The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. 01.02.2019*

functions 'by' the sovereign are not functions 'of' the sovereign. Refer discussion under section 2(53) about 'Government'.

(70) *"location of the recipient of services" means, —*

- (a) *where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;*
- (b) *where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;*
- (c) *where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and*
- (d) *in absence of such places, the location of the usual place of residence of the recipient;*

Given that services need not be tangible, the determination of the location of the recipient of service could result in complications. For this reason, there is a statutory definition of 'location of the recipient of services' which is essential to determine whether the supply is an inter-State or an intra-State supply, as such location is the residuary clause for determining the place of supply of services.

Broadly, the meaning given to the phrase "location of the recipient of services" is oriented towards determining the place of supply of the services. The most relatable location of the recipient can be determined in the following order – if the place of supply of the service happens to be:

- (a) a 'place of business' which is a registered place of business, such place;
- (b) a 'place' which is a fixed establishment (i.e., a place of business not registered, but having a sufficient degree of permanence involving human and technical resources), such fixed establishment;
- (c) at multiple 'places' which may include places of business or fixed establishments, that one place to which the supply is most directly attributable;
- (d) a place that cannot be identified from the above three clause, the usual location of the recipient (address where the person is legally registered/ constituted in case of recipients other than individuals).

(71) *"location of the supplier of services" means, —*

- (a) *where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;*
- (b) *where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;*

- (c) *where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provisions of the supply; and*
- (d) *in absence of such places, the location of the usual place of residence of the supplier;*

The determination of the location of the supplier of services is equally complicated, as is in case of the recipient. The 'location of the supplier of services' is principally essential to determine whether the supply is an inter-State or an intra-State supply (i.e., where location of supplier and place of supply are in the same State or Union Territory, the supply would be an intra-State supply, and will be an inter-State supply in any other case).

Location of supplier 'of goods' is not defined in the CGST Act and does not seem to be a drafting oversight but a deliberate omission. Please refer to discussion in this regard in the context of section 7 and section 10 of IGST Act.

*(72) "manufacture" means processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term "manufacturer" shall be construed accordingly;*

The meaning of the term "manufacture" came with a great deal of significance in the erstwhile indirect tax regime, given that chargeability of excise duty relies solely on whether an activity results in manufacture. However, in the GST regime, the taxable event is a "supply" and tax is leviable whether or not the supply followed 'manufacture' of goods. Hence, the term loses its significance in the GST regime. However, a definition has been provided as references to this term are inadvertently essential even in the GST law, listed below:

- **Composition levy:** The composition tax rate in case of manufacturers and other suppliers not being manufacturers is 1%, (being the aggregate of central and State tax/ Union Territory tax). Further, manufacturers of certain notified goods would not be eligible to exercise the option to avail the benefit of composition scheme. Such a restriction is however, not placed on other classes of persons, say traders of the same notified goods.
- **Concept of deemed exports:** One of the pre-conditions for any such supply to qualify as deemed export is that the goods in question must be manufactured in India. Therefore, even where the goods are of the nature that are notified by the Government as goods that qualify as "deemed exports" on meeting certain conditions, if such goods are not manufactured in India (or, any processing performed on any imported goods does not result in manufacture), they cannot enjoy the benefit of the deeming fiction.
- **Maintenance of accounts:** A manufacturer shall be required to maintain a record of production/ manufacture of goods, in addition to recording the details of inward and outward supplies.

*(73) "market value" shall mean the full amount which a recipient of a supply is required to pay in order to obtain the goods or services or both of like kind and quality at or about the same time and at the same commercial level where the recipient and the supplier are not related;*

This term finds reference only in the provisions in relation to confiscation of goods or conveyance arising on account of contravention of the provisions of the law (say supplies made by a taxable person who has failed to obtain registration, etc.). The law provides that the owner of the goods will be given an option to pay a fine, not exceeding the market value of the goods in question, to safeguard his goods or conveyance from being confiscated.

Goods or services of like kind and quality means *any other* goods or services (“comparables”) made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and reputation of the goods or services in question, is the same as, or closely or substantially resembles, that of the comparable.

The meaning of the term ‘related’, must be understood from the definition provided in respect of ‘related persons’ under section 15.

This definition should not be confused with Open Market Value as this definition appears to be restricted to cases where there is confiscation where the value is from the recipients perspective.

*(74) “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.*

*Illustration: – A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;*

When two (or more) goods, or two or more services (need not be taxable), or a combination of goods and services, that each have individual identity and can be supplied separately, are deliberately supplied for a single consolidated price, the supply would be treated as a mixed supply.

Most importantly, such a supply should not qualify as a composite supply, for it to be treated as a mixed supply, i.e., in case of a mixed supply:

- The two or more supplies are not naturally bundled and supplied conjointly in the ordinary course of business. In other words, unnaturally supplied inseparably and for a single price is a hallmark of mixed supply;
- The principal supply cannot be identified – more than one of the supplies form the “predominant element” of the supply. In other words, individually present but inseparably presented for supply would also yield tax being applied as mixed supply;

Where the conjoint supply is neither a composite supply, nor supplied for a single price, the two or more supplies would be treated as individual supplies or non-composite supply, and not as a ‘mixed supply’.

Illustrations for consideration:

- (a) Supply of toothpaste, brush, plastic container for the two: The three goods can be said to be naturally bundled and supplied in the ordinary course of business. While the plastic

container is ancillary to the supply, both toothbrush and toothpaste could be the predominant elements of the supply. In a composite supply, there can be only one principal supply and therefore, this supply would be a mixed supply.

- (b) Supply of laptop and printer: Although a printer is used for the purpose of printing, the commands for which can be given through the laptop, the two goods are not naturally bundled and supplied conjointly in the ordinary course of business. Therefore, this supply is a mixed supply.
- (c) Supply of lectures in a coaching centre and monthly excursions such as trekking, etc.: The two services are not naturally bundled in the ordinary course of business. Therefore, this supply is a mixed supply as it is for a single price.
- (d) Supply of car, modular kitchen or whitegoods by Builder to some apartment buyers is a mixed supply.

The tax rates applicable in case of mixed supply would be the rate of tax attributable to that one supply (goods, or services) which suffers the highest rate of tax from amongst the supplies forming part of the mixed supply. Therefore, a mechanism for separating the supplies could be examined, in case of mixed supplies where tax rates are differing.

It is important to ensure that there is a single price assigned in respect of the various supplies that are involved. And the supplies so involved are unnaturally bundled together for such single price. If the price were not one single amount but the visible aggregation of individual prices then, even if supplied together, each of them may be regarded as an individual non-composite supply.

*(75) "money" means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value;*

The meaning attributed to this term in the GST law is a polished adoption of the definition provided under the Service Tax law. Additionally, money as defined in the GST law includes any foreign currency as well. The significance of this term is that it is out of the scope of taxation under GST. Money would neither be goods nor services under the GST law. However, there is no exemption given to activities relating to the use of money or its conversion. So also, sale of money, say a coin collection set of 100 coins, would be chargeable to tax, as such coins are held for their numismatic value. Crypto-articles are not 'money' since they are not "*instrument recognized by RBI*".

It is also interesting to note that this term is no longer relevant for understanding whether a transaction is for consideration, as the meaning assigned to the term 'consideration' under the GST law may be in money or in another form..

The words “...or any other instrument recognised by the Reserve Bank of India...” demands a mention of the Payments and Settlement Systems Act, 2007 which allows RBI to authorize the development and distribution of a system of settlement of payments in the form of prepaid instruments (PPIs) that are not Indian legal tender but are yet used as a consideration to settle an obligation because they are ‘recognized’ by RBI such as e-wallets. Such PPIs are often confused with voucher (defined in section 2(119) below). This form of interchangeable usage would be an error. Since the PPI is included in the definition of money it cannot also be included in the definition of voucher. PPIs are not vouchers but money. Tax treatment applicable on the receipt of money must be applied even when receipt is through PPI’s.

(76) “motor vehicle” shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988;

Section 2(28) of the Motor Vehicles Act, 1988 reads as under:

*“motor vehicle” or “vehicle” means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres.*

From this, it can be understood that all vehicles such as cars, trucks, buses, tempo-travellers, etc., that are meant for usage on roads will be covered within the meaning of ‘motor vehicles’. The implication of this definition is that input tax credit is not available in respect of inward supply of motor vehicles, unless they are used for specific purposes (being transportation of goods, or for making taxable supplies of further supply of such vehicles or supplying passenger transportation services or for imparting training in relation to such vehicles). The denial of rent a cab (less than 12 persons) credit means that there is a need to examine the applicability of permits and its harmonious understanding with the Motor Vehicles Act.

When motor vehicle has been defined by reference to another Act, all interpretation that is allowed under that Act would equally apply under GST. Motor vehicles such as its excavators, wheel loaders, back hoe, road rollers, etc. will also come within the same restrictions applicable to motor vehicles under GST law. Merely because these articles are used more in the nature of plant and machinery and less in the form of motor vehicles is of no avail. Refer detailed discussion under section 17(5) for ‘what is and what is not’ a motor vehicle.

(77) “non-resident taxable person” means any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India;

The meaning of the term ‘non-resident taxable person’ covers all person who undertake transactions involving supply of goods or services or both, whether or not such supplies are taxable, so long as such person neither has a fixed place of business nor residence in India.

Every such person who intends to affect any taxable supplies under the GST law, should compulsorily obtain registration under the GST law before commencing business, irrespective of the turnover during the year. The application for registration shall be made at least 5 days prior to the commencement of business.

However, a person who does not undertake transactions involving any supplies “occasionally”, he would not be treated as a non-resident taxable person. The law does not define the frequency implied by the expression “occasionally”. Therefore, where there is a reasonable frequency of occurrence of supplies in India, it must be construed as transactions occurring occasionally.

Due to applicability of higher rate of withholding under the Income-tax Act on remittances made from India, non-residents who have no active business presence in India are also found to have secured PAN numbers and for this purpose, has designated a representative with an address being either admitted premises of operations or simply for correspondence. Care must be taken to determine whether such designated representative and address would ‘fixed place of business’ (and not to be equated with fixed establishment).

*(78) “non-taxable supply” means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;*

A transaction must be a ‘supply’ as defined under the GST law, to qualify as a non-taxable supply under the GST law.

The following aspects need to be noted:

- Stock transfers to unit within the State for which no separate registration is obtained, which does not qualify as a ‘supply’ as defined under section 7 of the CGST Act, cannot be said to be a non-taxable supply.
- Receipts that satisfy exclusion from valuation as ‘pure agent’ (rule 33) would also be no supply and not to be treated as non-taxable supply. GSTR 9 calls such amounts received as ‘no supply’ (which is an expression that is not found in the law).
- Supplies that enjoy the benefit of being wholly exempted from taxes, nil-rated supplies and zero-rated supplies are also not covered under the umbrella of ‘non-taxable supplies’ given that the goods or services are in fact liable to tax, and such tax is exempted by virtue of an exemption notification, or the tax rate is nil (refer discussion under 2(47) for some interesting examples of ‘nil’ rates supplies).
- Only those supplies that are excluded from the scope of taxation under GST are covered by this definition – i.e., alcoholic liquor for human consumption, articles listed in section 9(2) or in schedule III.
- But, please note that supplies listed in schedule III will NOT be included as non-taxable supplies (or exempt supplies) as they are, by express legislation, declared to be ‘treated’ neither as a supply of goods nor a supply of services. However, for the limited purposes of section 17(2), by a fiction, certain transactions appearing in schedule III are ‘treated’ as exempt supplies which will be so only to that limited extent.



- Another instance of 'merchanting trade' and 'in-bond' sales. Merchant Trade transactions are those transactions where the trader in one country A, purchases goods from country B and supply the goods to a second buyer in country C, directly, without goods entering country A. Since, goods never cross the Customs frontier of the country of trader. In case country A is India then, GST law cannot apply when supply takes place 'outside taxable territory' even though said person (trader) is located in India. GST is tax on supply and not on supplier. It will form part of revenue (turnover) of person (legal entity) but as a 'no supply' transaction. Experts have indicated that since it is not 'exempt supply', such transactions will NOT attract credit reversal. To this end, explanation inserted to section 17(3) vide CGST (Amendment) Act, 2018 may be referred. Similarly, in-bond sales are actually made not only by the person (legal entity) but also by one or the other distinct person (belonging to same person). In such cases, turnover will be includible in the returns of such distinct person (although there is no space for such transactions in GSTR 3B) who has initiated these transactions. It is not advisable to exclude these totally from reporting (at least in GSTR 9 until suitable tables are available for monthly reporting) and these are not to appear for the first time as a reconciliation item in GSTR 9C.
- An interesting recent development is the levy of GST in respect of 'holding of securities' services under HSN 997171 on Parent Companies on forward charge basis or Subsidiary Companies on reverse charge basis in terms of section 7(1)(c) read with paragraph 4, schedule I. It is important to note that existence of entry in tariff classification does not imply existence of levy. Only when levy is demonstrated, will tariff classification be required to compute the tax. While WTOs UCP Guidelines have been adopted to arrive at HSN 997171, exclusion of 'securities' from definition of 'goods' as well as 'services' cannot be ignored. HSN 997171 will come in handy when securities are brought within the scope of levy.

*(79) "non-taxable territory" means the territory which is outside the taxable territory;*

A taxable territory means the territory to which the provision of the GST law applies. Accordingly, in case of CGST law, the taxable territory would cover all locations covered under the extent of the law – i.e., whole of India.

- Accordingly, locations outside India would be considered as non-taxable territory, being the territory outside the taxable territory.
- Similarly, for the State GST law, non-taxable territory would cover all those locations where the provisions of the particular State GST law would not apply. For instance, for the purpose of the State GST law of Maharashtra, all other States and Union Territories of India, and locations outside India, would be non-taxable territory.

In this regard, it would be relevant to understand the geographical extent covered within the meaning of the term 'India' – *refer analysis of Section 2(56)*.

Supply taking place in a 'non-taxable territory' would be outside the jurisdiction for imposing any GST. High sea sales (first supply) are not liable to GST because goods that involve movement are located outside the taxable territory even though the recipient may be inside. Another example is Merchandising Trade (eg., Buy from Singapore and Ship to Germany, directly by an Indian entity). GST is a tax on supply and not a tax on supplier. Supply that does not occur within taxable territory would be a non-taxable supply in the returns of this Indian entity.

*(80) "notification" means a notification published in the Official Gazette and the expressions "notify" and "notified" shall be construed accordingly;*

The Central Government and the State Governments are empowered to issue notifications to give effect to certain provisions such as goods and services that would be liable to tax on reverse charge basis, supplies that are exempted from tax, supply of goods that shall be treated as supply of services, etc. For a notification to be valid under GST, it must be published in the Official Gazette of India, as published by the Government of India's Department of Publication, Ministry of Urban Development.

Every notification published in the Official Gazette will come into force from the date of such publication, unless another date is specified for this purpose, in the notification.

*(81) "other territory" includes territories other than those comprising in a State and those referred to in sub-clauses (a) to (e) of clause (114);*

By definition, the expression 'other territory' is inclusive of all territories that do not form part of any State (including the two Union Territories with Legislature being Delhi and Puducherry), and excludes the Union Territories (i.e., the Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu, and Chandigarh).

All territories that fall into the ambit of 'other territory' as defined above would also form part of the meaning of the term 'Union territory' as defined under section 2(114), to leave no territory that is claimed by any of the States or Union Territories, outside the scope of taxation under GST, so long as such territory is in India. Although there is no specific explanation that the extent of the term should be limited to the territory of India, we should not consider locations outside India to also fall into the scope of 'other territory' defined above, as it would defeat the purpose of law.

*(82) "output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;*

The output tax chargeable on intra-State taxable supply of goods or services can be summarised as under:

Type of Supply	Output tax	Reference
Supplies within a State (or UT with Legislature)	CGST + Specific SGST (intra-State supply)	Section 8(1) and 8(2) of the IGST Act

Supplies within a UT without Legislature	CGST + UTGST (intra-State supply)	Section 8(1) and 8(2) of the IGST Act
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The following aspects need to be noted:

- While input tax is in relation to a registered person, output tax is in relation to a taxable person. Evidently, the law excludes persons who are not registered under the law from being associated with any input tax. However, where there is a liability due to the Government, the law paves the way to cover those persons who are liable to tax, but who have failed to obtain registration.
- The amount covered under this term is the amount of tax that is 'chargeable', and not the amount that is 'charged'. Therefore, in case a person wrongly charges tax, or charges an excess rate of tax, as compared to the applicable tax rate, such excess would not qualify as output tax.
- Some experts are of the view that taxes payable by recipient of supply, on account of making inward supplies of such categories of supply as are notified for the purpose of reverse chargeability of tax, or making inward supplies from unregistered persons, would also be out of the scope of 'output tax'.
- The implication of the exclusions mentioned above is that the input tax credit cannot be utilised for making payment of any amount that does not qualify as output tax. Discharge of liability in such cases has to be by way of cash payments (i.e., through the electronic cash ledger, on depositing money by means of cash, cheque, etc.).
- The law makes a specific inclusion in respect of supplies made by an agent on behalf of the supplier, to treat the tax paid on such supplies as output tax in the hands of the supplier.
- 'Tax under this Act' referred in section 32 clearly refers to output tax, based on this definition. Accordingly, any person collecting output tax will be liable to deposit it with the Government under section 76. Collecting output tax (or tax under this Act) higher than the prescribed, such person will be liable to deposit the entire amount collected with the Government. However, in case outward supplies are exempted (goods or services are themselves exempted or recipient is allowed some exemption), supplier is free to collect 'input tax credit reversed' on account of this exemption on the outward supply. Such amounts collected NOT being in the nature of 'tax under this Act' or 'output tax', will not be affected by the bar in section 32 or their obligation imposed by section 76. Tribunal has examined a similar question in the context of section 11D of Central Excise Act and the Larger Bench has held that collecting 'input tax credit reversed' is not prohibited in law in *Unison Metals Ltd. v. CCE-Ahd-I* (2006) 204 ELT 323 (LB-Tri.). There is no direct decision on this aspect under GST as it has only been four years since its introduction.

*(83) “outward supply” in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;*

For any transaction or activity to qualify as an outward supply, it must first be a ‘supply’ in terms of the GST law, unlike inward supplies, which could merely be receipts, not amounting to supply. Further, an outward supply is closely associated with a ‘taxable person’ being, a unit of a person that has, or is required to have, a separate registration.

The phrase ‘outward supply’ can be applied to a supply only when such supply is made in the course or furtherance of business. Say, for instance, business assets are put to personal use. In such a case, even if the transaction is deemed to be a supply (made without consideration), it cannot be treated as an ‘outward supply’, since the application of the business asset for personal use was neither in the course nor furtherance of business.

The following aspects need to be noted:

- Supplies not qualifying as outward supplies would also be included for the purpose of computing the ‘aggregate turnover’;
- In case of a composition supplier, where he engages with a recipient outside the State, and if the transaction does not result in an ‘outward supply’, (say, sending goods for job work outside the State), the conditions imposed on him as a composition supplier would not be violated (i.e., making inter-State outward supplies);
- Details of supplies on which tax is payable, but which do not amount to ‘outward supplies’ would also have to be declared in the return for outward supplies (GSTR-1);
- By treating goods or services “agreed” to be supplied as ‘outward supply’, the law authorises imposition of GST on advance payments;
- Reimbursement against goods or services purchased by employees of a taxable person would not be in furtherance of business of such employees to attract any tax.

*(84) “person” includes—*

- (a) an individual;*
- (b) a Hindu Undivided Family;*
- (c) a company;*
- (d) a firm;*
- (e) a Limited Liability Partnership;*
- (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;*
- (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;*

- (h) *any body corporate incorporated by or under the laws of a country outside India;*
- (i) *a co-operative society registered under any law relating to co-operative societies;*
- (j) *a local authority;*
- (k) *Central Government or a State Government;*
- (l) *society as defined under the Societies Registration Act, 1860;*
- (m) *trust; and*
- (n) *every artificial juridical person, not falling within any of the above;*

This definition is to be read along with the fiction in section 2(107) where a 'taxable person' is understood to be sub-units of a person such that transactions between two taxable persons is also a taxable supply. Every 'person' is understood to have a separate identity, under the GST law.

For instance, a trust set up by a company will be treated as a separate person from the company, or a limited liability partnership holding all the shares of a company will be treated as a separate person from the company.

It is common to see entities who contribute assets and have a basket of different interests which are in the nature of partnerships. The sharing of risks could indicate such associates or joint venture. On the other hand, one sided contract of revenue sharing maybe considered different. Please note that it has been held in the case of *CIT v. RM Chidambaram Pillai (1977) 106 ITR 292 (SC)* that 'firm' is a collective noun of the partners and not a legal person. Therefore, a contract with a firm is legally, multiple-simultaneous-identical contracts with each partner. Again, in *CIT, Bihar v. Ramniklal Kothari (1969) 74 ITR 57 (SC)*, it has been held that business of the firm is the business of the partner. Therefore, from GST perspective, there is no supply between the partners and their firm or *vice versa* and the flow of remuneration (in all the various forms that is permitted by Income-tax law) would not be taxable in the absence of any supply *inter se*, as long as the Partners act in their capacity as such in their transactions with the Firm

(85) "place of business" includes—

- (a) *a place from where the business is ordinarily carried on, and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or both; or*
- (b) *a place where a taxable person maintains his books of account; or*
- (c) *a place where a taxable person is engaged in business through an agent, by whatever name called;*

The inclusive nature of the definition indicates that the places or locations listed in the definition are illustrative and not exhaustive. From the three clauses of such illustrative locations, each clause makes a reference to 'taxable person'. Therefore, place of business should be understood as a term that is specific to each taxable person, having (or requiring) distinct

registrations. Say, in the case of a company having operations across 10 cities in two States, the set of cities being the places of business for one State would be mutually exclusive from that of the other.

Place of business therefore is not only any place where business is ordinarily carried on but it would also be a place where goods are located and kept ready for supply. Ex-works supplies, to a registered person from another State, without the goods immediately being transported out to that State, would also come within the definition of place of business. Therefore, there is no need to be concerned that location of supplier of goods is not defined in the law because unlike services, there is sufficient trail available in transactions involving supply of goods.

Below are other implications in relation to place of business:

- Registration of such places as additional place of business – although there is no explicit requirement under law to declare all places of business as additional places of business. This would facilitate transportation of goods between places of business, or from the job worker's premises to any of the places of business, which can be supported with the delivery challan, the details of which would form part of e-way bill;
- Maintenance of separate accounts in relation to each place of business such as details of production or manufacture of goods, inward and outward supply, stock records of goods, input tax credit availed, output tax payable and paid;
- Departmental audit can be carried out in respect of registered persons at any of its places of business; this apart, authorised officers can demand access to any such places to inspect books, documents, computers, etc.;
- Place of Business is not the same as Place of Supply and registration is required at the POB and not at POS. Eg., Renting service is business which is 'ordinarily carried out' from the POB of the Landlord and not from the POS where the Property is situated. Installation activity is carried out at the project site which is not POB of the Supplier and the site may or may not be its POS. Construction activity carried out at the site could be the LOS (location of supplier of service) because it satisfies the definition of FE (fixed establishment) but both these would not be POB of the contractor.

*(86) "place of supply" means the place of supply as referred to in Chapter V of the Integrated Goods and Services Tax Act;*

Chapter V of the IGST Act provides for determination of the 'place of supply' in respect of any supply of goods or supply of services. This expression has the utmost significance in determining the nature of tax payable on a supply. Simply put, a supply shall be intra-State (liable to CGST, SGST/UTGST) where the location of the supplier and place of supply as determined under the said Chapter are in the same State (or Union Territory), and neither the supplier nor the recipient are SEZ units/ developers. In any other case, the supply would be treated as an inter-State supply, liable to IGST.

While it is commonly stated that GST is 'a destination based consumption tax', barring this declaration of 'destination' there is nothing in the GST law to affirm this (so called) principle of GST. And on a careful study of the 'place of supply' provisions, there is no confirmation of the existence of this principle in the enacted statutory provisions.

Place of supply is therefore the destination of supply attracting tax under this law. Place of supply is not left out as a question of fact that each supplier has to determine but is a question of law that is left to only be discovered by an application of the law. Refer earlier discussion on the exclusive power of Parliament to determine the destination of consumption in terms of article 269A(5).

Chapter V deals with determination of 'place of supply' under the following brackets:

- (a) Goods, other than supply of goods imported into, or exported from India.
- (b) Goods imported into or exported from India.
- (c) Services where location of supplier and recipient is in India.
- (d) Services where location of supplier or location of recipient is outside India.
- (e) Online information and database access or retrieval services (OIDAR) provided by a person located in a non-taxable territory to a non-taxable online recipient (i.e., Government, governmental or local authorities, individuals, other persons receiving such services for purpose other than commerce, industry, business, profession, but located in taxable territory).

*(87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council;*

The law empowers the Government to issue rules to facilitate the implementation of the provisions of the Act, or to carry out the objects of the law. Whenever the term 'prescribed' is used in the Act, one must draw reference to the relevant rules that may be issued in respect thereof. Although various provisions states that something will be 'prescribed', there is no requirement that without being prescribed it will not be operational. That is, enabling provisions to 'prescribe' may not be required to be acted upon as the general understanding of procedure may suffice. And in case something specific is to be done, then specific rule is to be 'prescribed'. For eg., section 50(2) states that the manner of computing interest will be prescribed does not mean that there 'must' be a rule as to 'how to multiply' the rate of interest with the amount of unpaid tax to arrive at the amount of interest.

Further, 'prescribed' does not mean all rules must be prescribed at 'all in one place'. It may well be 'prescribed' in any one or more of the rules to further the object of the section. For eg., restrictions and conditions of credit 'to be' prescribed stated in section 16(1) does not mean that all the 'prescriptions' must reside in one rule. As can be seen, 'prescriptions' are in several rules like return under rule 61(5), payment under rule 37 and reversal under rule 42, etc. Experts

caution that looking to fault the rules for 'failing to prescribe' may not be very meritorious approach to interpretation of every section that states something 'may be' prescribed.

*(88) "principal" means a person on whose behalf an agent carries on the business of supply or receipt of goods or services or both;*

The law uses the term 'principal' in the context of two relationships – one in case of the principal and job worker, and the other in case of principal and agent. However, in the provisions relating to job work, the term has a separate meaning, the reference of which is separately provided for. Therefore, one must understand the meaning of the term 'principal' wherever else the term finds a mention, as a reference to the principal-agent relationship.

Agent of the principal is one who carries on the business of supply or receipt of goods or services or both on behalf of another person, being the principal. The agent functions as an extended arm of the principal and therefore, supplies (inward and outward) effected by an agent on behalf of the principal will be treated as supplies effected by the principal. Reference may be had to Circular no. 57/31/2018-GST dated 4 Sept 2018 read with corrigendum dated 5 Nov 2018 where illustrations have been provided as to when a supply *via* agent would be a supply by agent and when it would remain a supply by principal. Entire jurisprudence from Indian Contract Act is borrowed by this circular by making reference to section 182 of Contract law while referencing 'agent'. Refer detailed discussion in relation to 'intermediary' under section 2(13) of IGST Act and illustrations in circular 159/15/2021-GST dated 20 Sept 2021. The challenge now is to examine if the facts of a particular case fit the facts considered in the illustrations provided in this circular.

*(89) "principal place of business" means the place of business specified as the principal place of business in the certificate of registration;*

The principal place of business could be any of the places of business of a person, which is located in the same State in which the registration is intended to be obtained. Generally, this location would be the head office or the corporate office or the billing address of the person, or the address registered under a statute such as the Companies Act, or as specified in the partnership deed. Once a location is chosen, it would be used for correspondence by the GST officers and should therefore be mentioned on the certificate of registration. For multi- locational tax payers, they would have 1 principal place per State.

The law requires that the books of account shall be maintained at the principal place of business, or may be maintained electronically, on fulfilling the conditions prescribed by the rules.

*(90) "principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;*

The concept of 'a principal supply' emerges only for determining whether a supply is a composite supply or not, and where it is a composite supply, the rate of tax applicable to the composite supply.



Principal supply recognises two or more supplies and arranges them in a two-step hierarchy – a single predominant supply and the ancillary supply(ies).

- (a) Supply of laptop and a carry case – In this case, the case only adds value to the supply of laptop and therefore, the case would be ancillary while the laptop comprises the predominant element of the supply. Even where the brand of the case is not the same as that of the laptop, and the supplier can establish that the case is naturally bundled with the laptop in the ordinary course of his business, the supply can be treated as a composite supply.
- (b) Supply of equipment and installation/ commissioning of the same – While the recipient actually purchases the equipment, making the equipment the principal supply, the installation makes the equipment usable by the recipient. Even if there is a separate charge for the installation of the equipment, since the service is naturally bundled and provided in the ordinary course of business, the supply would be a composite supply.
- (c) Supply of repair services of laptop with parts – As such, it is the skill and expertise of the supplier that makes the laptop function as desired. Whether replacement is necessary or a mere resetting of the existing parts restores the functionality of the laptop is not known to the customer. Where the object of the contract is unknown to the customer, that object cannot be the purpose of the contract. The only object that is known to the customer is the 'repair service' which makes it the predominant object of supply. This would be the position even if the cost of the parts replaced is higher than the cost of service. *However, this theory can apply only where such a replacement is done in the ordinary course of the business of repairing laptops, and such a replacement is naturally bundled with the repair service.*

Neither the cost of each component nor the importance of each component relevant to determine the 'principal' supply. It is the object that is primary in the opinion and knowledge of recipient that helps make this determination. That is, a recipient cannot buy that which he has no knowledge of and whatever it is that recipient has knowledge of, is the principal supply even if that does not comprise substantial part of the total value. Principal supply is that for which the recipient approached the supplier.

*(91) "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;*

The Government would appoint persons to act as officers of specified classes. However, all such officers would not be 'proper officers' under the GST law. It may be understood that the term 'proper officer' is to a case or a category of cases. Therefore, a Commissioner having jurisdiction in respect of a taxable person, may authorise certain officers of the GST law to act as proper officer in respect of such taxable person.

Further, the officers appointed under the SGST and UTGST laws are authorised to be the proper officers for the purposes of the CGST law. Please examine carefully 'who' is the Proper Officer authorized to take steps under each section. For example, authority to whom a registered person is assigned or linked (State or Central) is the Proper Officer for section 61. No other officer can take steps to scrutinize returns of the registered person. Similarly, audit under section 65 can be conducted by officers specifically authorized and hence, proper Officer to whom registered person is assigned or linked cannot carry out audit under section 65. But where a taxpayer is assigned or linked to State jurisdiction, only State audit officers can undertake audit under section 65 and vice versa. However, State Enforcement or Central Intelligence officers can conduct inspection under section 67 regardless of the assignment or linking of GSTIN of each taxpayer.

*(92) "quarter" shall mean a period comprising three consecutive calendar months, ending on the last day of March, June, September and December of a calendar year;*

In terms of the definition provided above, we can understand that the following would be the four quarters for the purposes of GST:

- (a) January, February and March;
- (b) April, May and June;
- (c) July, August and September; and
- (d) October, November and December.

For any reason, whatsoever, the term 'quarter' cannot be associated with three consecutive months other than those mentioned above. For instance, a composition supplier is required to furnish returns on a quarterly basis – this does not entitle him to furnish a return for the periods June, July and August, even if he obtained registration only on 29<sup>th</sup> June.

*(93) "recipient" of supply of goods or services or both, means—*

- (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;*
- (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and*
- (c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,*

*and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;*

In transactions involving more than 2 persons, it could result in an ambiguity as to who should be treated as the 'recipient' for filing the return of inward supplies, paying tax on reverse charge

basis, determining whether the relationship with the supplier will impact valuation, etc. In this regard, the definition specified the following:

- Where consideration payable: The recipient of supply and place of supply do not affect one another where a consideration is payable for the supply. Irrespective of the place of supply, the person who is liable for payment of consideration would be the recipient. This would hold good even in the case where the supply is made to person on the instruction of another – i.e., even if the goods are received by a person, if the person on whose instruction the goods are delivered is the person liable to pay consideration, such person giving the instruction would be the recipient.
- Where no consideration payable:
  - Goods: The actual receiver of the goods would be the recipient. Say, for instance, a supplier keeps a counter in the premises of another company for issuing free samples to the employees of the company. The recipients would be the employees, and not the company permitting the use of its premises.
  - Services: The actual receiver of the services would be the recipient.
- The definition of 'consideration' in section 2(31) clearly provides that the consideration can be from the recipient or by any other person. However, the law provides that the person paying the consideration shall be treated as the 'recipient'. It appears that the term 'recipient' referred to in section 2(31) should be read as 'receiver of the supply', and not 'recipient' as defined above.
- In case an agent is appointed by the principal, such agent may also be treated as the recipient of the goods or services or both.
- Recipient is NOT the same as the beneficiary of the supply. Care must be taken to differentiate between these two expressions as understood in commerce. For eg., education is provided to student but education services is supplied to parent (who pays consideration for supply of education to student).

*(94) "registered person" means a person who is registered under section 25 but does not include a person having a Unique Identity Number;*

The law makes several references to this term. The most significant implication of this reference is that it is confined to a registration of a person, who may have (or is required to have) more than one registration. Person liable to register is 'taxable person' but not 'registered person'. Refer discussion under section 2(107) for comparative study.

Every person/ unit of a person requiring registration, i.e., every taxable person, will be treated as a registered person the moment registration is granted to it, excluding cases where a Unique Identity Number (UIN) is granted.

A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries and any other persons who are notified by the

Commissioner shall be granted a UIN for certain purposes – such as for refund of taxes on the notified supplies of goods or services or both received by them.

*(95) “regulations” means the regulations made by the Board under this Act on the recommendations of the Council;*

The Central Board of Indirect Tax and Customs\* constituted under the Central Boards of Revenue Act, 1963 (Board) is empowered to make regulations consistent with the Act and the rules made under the Act, to carry out the provisions of the Act.

Every regulation made by the Board under the Act would be laid after it is made or issued, before each House of Parliament, while it is in session, at the earliest. Where both Houses agree in making any modification, or that the regulation should not be made, the regulation shall have effect only in such modified form or be of no effect from such date (i.e., no retrospective effect of the modifications/ rejection by the Houses of the Parliament).

*(96) “removal” in relation to goods, means—*

- (a) despatch of the goods for delivery by the supplier thereof or by any other person acting on behalf of such supplier; or*
- (b) collection of the goods by the recipient thereof or by any other person acting on behalf of such recipient;*

The term “removal” is relevant in the case of supply of goods. Under the Central Excise Rules, 2002, the term 'removal' also included the act of issue of the goods for captive consumption. However, under the GST law, there must be a supplier, and a recipient who is distinct person. Therefore, removal of goods used within the factory would not constitute an outward supply (while input tax credit restriction implications could arise).

Under the GST law, the significance of this term arises for raising invoice, which in turn, is an element essential to determine the time of supply. The law clearly specifies that the removal need not be effected by the supplier himself, but could also be a result of collection of the goods by the recipient or a person acting on his behalf like job worker, agent. Further, this term would be relevant only to the extent of supplies requiring movement of goods.

Please take note that in GST, ‘removal’, ‘movement’ and ‘delivery’ have been used and each have their independent meanings and are not to be understood to be synonyms. General understanding of these terms and their differences are that Removal is handling over or collecting of goods to be taken away or carried away, by supplier or recipient, even without commencement of actual transportation of the goods to the destination. Movement is the physical transportation by the person taking the responsibility of transportation which may be supplier, recipient or other carrier. Delivery is a legal concept of completion of appropriation in favour of recipient so as to complete supplier’s obligations in respect of the supply. Removal is a decisive first step towards commencement of supply. Delivery is the decisive last step towards completion of supply. Movement is all the observable activity occurring in between.

*(97) “return” means any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder;*

The term 'return' is used in this law, as under other taxation laws, refer to a document by which details of transactions are furnished to the relevant tax department. This term is also used under the GST law, to refer to returning-back goods after they have been delivered to customers (commonly known as purchase returns, sale returns). However, term does not refer to any 'one' specific document that is filed. It includes 'any' document titled 'return' which may be prescribed or required to be furnished by CGST Act or CGST Rules. Reference may be had to section 61 and 62 to understand which 'returns' attract those provisions and then compare with what may be understood as 'return' in each context.

*(98) "reverse charge" means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub-section (4) of section 5 of the Integrated Goods and Services Tax Act;*

The scheme of payment of tax under reverse charge mechanism would prevail under the GST Law, as is existent in specific cases of services, and in case purchases from unregistered dealers under the VAT law. However, in the GST law, the scope of reverse charge is expanded to include:

- (a) Goods (in addition to services) that may be notified, even if the supplier is registered;
- (b) Services (in addition to goods), for taxation on reverse charge basis where the supplier is unregistered and supplied to specified classes of recipients who are registered.

The following aspects need to be noted:

- The scheme of partial reverse charge or joint charge, previously prevailing under the Service tax laws does not continue in GST;
- Persons required to pay tax under reverse charge are required to obtain registration under the GST whether or not they make any outward supplies, and without having regard to the threshold limits for registration – in case of notified goods and services;
- Composition suppliers being recipients of supplies on which tax is payable on reverse charge basis, will have to remit tax at the applicable rates, and not the concessional composition tax rates;
- The recipient paying tax on reverse charge basis, should issue a 'payment voucher' at the time of making payment to the supplier;
- The recipient paying tax on reverse charge basis on account of effecting inward supplies from unregistered persons, should issue an invoice in respect of the goods or services inwarded, at the time of receipt of such goods or services.

*(99) "Revisional Authority" means an authority appointed or authorised for revision of decision or orders as referred to in section 108;*

The Revisional Authority is empowered to pass an order to enhance or modify or annul a decision/ order under CGST/ SGST/ UTGST Acts as is passed by an officer sub-ordinate to him, where he finds it to be prejudicial to the interest of revenue if it is erroneous, illegal, improper or

has not considered material facts (whether or not available at the time of the original decision/order). However, such powers are not available to him in case of non-appealable orders.

Refer section 108 and the discussion ensuing to understand the overstretched authority of an administrative authority being permitted to interfere with an order of the First Appellate Authority which is, for all practical purposes, a judicial function being discharged. *Notification No. 5/2020-CT dated 13.01.2020* has notified 'Revisionary Authorities' under Central Tax.

(100) "*Schedule*" means a *Schedule* appended to this Act;

The following three schedules are provided under the CGST Act to describe the extent/ limitation of the meaning of the term 'supply':

- (a) **Schedule I:** Activities to be treated as supply even if made without consideration
- Permanent transfer or disposal of business assets on which input tax credit is availed. Please note that the condition of 'on which input tax credit is availed' whether it applies only to disposal of business assets or also to the previous expression of permanent transfer is interesting to analyse due to the disjunctive 'or' present separating the two transaction. Also, when credit is reversed on business assets disposed (under section 17(5)(h)) then those transactions of disposal of business assets will not come within the fiction of schedule I. But permanent transfer (not being the same as disposal) of any business asset attracts the fiction of schedule I.
  - supplies between related persons or persons having the same PAN. Please note that the transaction must be a supply except for their relationship requiring a re-examination (between related persons) or when transaction is missing an ingredient of two-persons to the transaction (distinct persons by fiction in section 25)
  - supply of goods by a principal to his agent and vice versa. Please note that the transaction must already be a 'supply' and schedule I only furnishes a remarkably different treatment by this fiction.
  - import of services for business purpose, by a person from a related person.
- (b) **Schedule II:** Activities or Transactions (as per CGST Amendment Act) to be treated as supply of goods or supply of services
1. *Transfer*

(a) *any transfer of the title in goods is a supply of goods.* Please refer to the difference between 'transfer' and 'sale' in the discussion under section 7 and recognize that all cases where title 'gets' transferred, it is required to be treated by the fiction in schedule II as a supply of goods and not as services. Please also note that transfer is not the same as extinguishment or consumption. Extinguished is when goods are consumed in the course of performance of a contract and this, not being transfer, may be open to treatment as supply of services. For eg., Job-work involving consumption of catalyst or welding rods, etc;

- (b) *any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services.* Although goods are involved in such a transaction and their movement requires use of e-way bill, transaction will continue to be treated as supply of services and not as supply of goods;
- (c) *any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods.* Here, title may pass after all instalments are paid like hire purchase, but the treatment required due to schedule II is that it will be supply of goods and not services. Please differentiate 1(b) and 1(c). There is enough guidance in ICAI material on AS/ IndAS to make this differentiation by examining the contract terms of each of these arrangements.

## 2. *Land and Building*

- (a) *any lease, tenancy, easement, licence to occupy land is a supply of services.* Please note that these four expressions are not synonyms but need careful study based on the definition and authorities under Transfer of Property Act, 1882 Indian Easement Act, 1882, Limitation Act, 1963 and Indian Contract Act, 1872. So there is much to be discussed but better understood by reference to any good material under each of these laws to be able to correctly identify the nature of the transaction for GST purposes. For eg., If a CA owned rubber trees and gave a contract for extraction of latex, would it be a contract for services of extraction benefits arising from land or contract for sale of goods (latex)?;
- (b) *any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.* Use of words like 'letting out' requires identification of the presence of underlying arrangement.

## 3. *Treatment or process*

*Any treatment or process which is applied to another person's goods is a supply of services.* Please note that reference to expression 'treatment or process' is deliberate use of words and covers larger area than 'manufacture'. In other words, even if the said treatment or process does not amount to manufacture, that is, emergence of a new and distinct commodity, it would remain an activity that will be treated as supply of services. And this would apply even when the person carrying out the treatment or process adds or incorporates goods of his own to the output brought out from the treatment or process. And the person for whom this treatment or process is carried out may or may not be registered, yet it will be treated as supply of services. Compare the scope of this paragraph with the definition of job work in section 2(68). Treatment or process includes repair activity (as it is not limited to job-work) and all repair activities will be a service.

4. *Transfer of business assets*

- (a) *where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person.* This clause deals with goods (inventory and assets) that exit the business without being retained for continued use in any transferred business will be treated as a supply of goods. Paragraph 4(a) may be related to paragraph 1 in schedule I referring to 'permanent transfer or disposal of business assets'. The treatment of such supply will now be liable to 'treatment' prescribed in this paragraph 4(a). It is important to note that such transfer or disposal must be 'by or under' directions of person carrying on the business. This paragraph applies to (i) 'taking assets out of use in business' and (ii) 'by way of a transfer or disposal', that would first be a supply under schedule I and then suffer the treatment under schedule II;
- (b) *where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services.* This treatment may also be examined along with paragraph 1 of schedule I. Special care is needed when there is 'change of use' of assets that were once entered into business at the time of their receipt. This paragraph applies to (i) 'taking assets out of use in business' and (ii) 'not by way of a transfer or disposal' but merely 'change of use', that would first be a supply under schedule I and then suffer the treatment under schedule II;
- (c) *where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless— (i) the business is transferred as a going concern to another person; or (ii) the business is carried on by a personal representative who is deemed to be a taxable person.* Please note that this clause does not provide the 'treatment' (as supply of goods or supply of services) but merely declares that deregistration will occasion a supply by fiction in schedule II. Also, reference may be had to discussions under sections 2(17)(d), 18(6) and 29(5) of CGST Act. Please also note that 'assets of a business' must be understood not merely as capital goods or inputs in stock but all assets in the business – tangible and intangible – that will be treated as supply of goods in all these cases when the transfer occurs in any arrangement for 'transfer of business'. Transfer of business is evidenced not by itemized sale but sale as going concern. It is be recognized that transfer of business may be by way of demerger, slump sale or other recognized modes under other



substantive laws. Also, 'deemed to be supplied' appearing in this paragraph does not attempt to usurp authority to define what is supply but merely to state that the factum of supply having been established will be saved in the circumstances listed in the sub-paras.

5. *Supply of services*

- (a) *renting of immovable property.* Please note that 'renting' is an expression that is popular but not explicit either as lease or license as understood under Transfer of Property Act. Care is needed to identify the nature of arrangements involving immovable property. Also please note that immovable property includes land, building and intangible interests in such land or building as well as benefits arising from land and building;
- (b) *construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.* Please note that this clause is explicit, even if overlapping with other paras in this schedule II. But the remarkable aspect here is that incomplete building is expressly made taxable even though Courts have held that construction for self ought not to be taxed in the absence of a contract to sell (or supply in GST);
- (c) *temporary transfer or permitting the use or enjoyment of any intellectual property right.* It may be noted that permanent transfers are excluded as IP are also goods. IP may form part of an overall arrangement and suitable treatment may be given in such comprehensive arrangements based on the principle of composite or mixed supply;
- (d) *development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software.* Software is goods (4907 or 8523) but where supply involves software services that are not goods (which are like shrink wrapped software), only those transactions are treated as supply of services (falling under 9973 or any other suitable entry);
- (e) *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.* Please note that supply is not only a 'positive' transaction but also 'negative' transaction or 'inaction'. For this reason, CGST Amendment Act has even edited the title of schedule II; it is very interesting to note the placement of 'commas' in this paragraph. Not every occasion where there is a deduction of payment can be attributed to a supply under this paragraph. There must be an agreement to perform an obligation that involves (a) refraining from an act or (b) tolerate an act or a situation or (c) to do an act. It is very important to satisfy these ingredients and not

assume these ingredients are present before liability can arise under this paragraph. There is no necessity that to be liable to tax as 'agreeing to obligation' there must be a separate and distinct agreement for the same. Such an agreement can be collateral aspect within an agreement for supply for something else. As long as the payment of consideration is on account of 'agreement' to either (i) perform an obligation to refrain from an act or (ii) tolerate an act or situation or (iii) to do an act, the same will be treated as a 'service'; and

- (f) *transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Refer also paragraph 1(b) to identify consistency in treatment whether goods are leased or licensed.*

6. *Composite supply*

- (a) works contract as defined in clause (119) of section 2; and
- (b) *supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration. Please note that this fiction requires goods in packed condition when including in the supply as described in this paragraph will continue to be treated as supply of services. As service is not a verb but a noun, once the supply comes within the mischief of this paragraph, then it will always be treated as a supply of services. There is no occasion to search for goods within this supply and vivisection contrary to the fiction in this paragraph.*

~~7. Supply of Goods~~

~~Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration. Please note that supply of goods 'to' members will be treated as supply of goods. Reference may be had to the section 2(17) (e) above. Deleted in view of retrospective amendment to section 7(1) by insertion of clause (aa) with retrospective effect from 1<sup>st</sup> Jul 2017<sup>11</sup>.~~

- (c) **Schedule III:** Activities or transactions which shall be treated neither as a supply of goods nor a supply of services
1. Services by employee to employer in the course/ relation to employment. Please note that 'in relation to employment' does not grant immunity from all matters listed in the terms and condition in employment letter. Only those emoluments flowing from employer to employee for the services performed by employee are not treated

<sup>11</sup> Deleted vide Finance Act, 2021 w.r.e.f. 01.07.2017.

as supply. Service by employer to employee are however not free from this incidence. Assertion made under income-tax in respect of payment 'as' salary will hold sway with regard to this exclusion from supply.

2. Services by any Court or Tribunal
3. Functions performed by the Members of Parliament, etc., duties by persons holding Constitutional office or duties performed in a body of the Government
4. Services of funeral, burial, crematorium or mortuary, etc.
5. Sale of land and sale of completed buildings. Care must be taken NOT to assume every transaction involving immovable property is without this exclusion. Also 'sale' means 'absolute sale' and not sales via GPA or other instrument.
6. Actionable claims (other than lottery, betting and gambling)
7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.
8. (a) Supply of warehoused goods to any person before clearance for home consumption;  
(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.

Notice that while laying down that certain 'activities or transactions' will be treated neither as supply of goods nor supply of services, the word 'supply' is used. If these activities or transactions WILL NOT be supply, it is a wonder that the word supply is used in listing them. Resolution of this drafting approach would imply that (a) these transactions would be a supply in the normal course of the definition of supply but for this exclusion and (b) while any TREATMENT is to be given under section 9 or 17 or other provision, value of these activities or transactions will be EXCLUDED from such TREATMENT.

When is it so understood, transactions listed in schedule III would also be liable for disclosure and reporting in GST returns. For eg., Table 5 in GSTR-9 clearly requires disclosure of activities or transactions that are 'no supply' for scrutiny of compliance by tax administration.

(101) "securities" shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956;

Section 2(h) of the Securities Contracts (Regulation) Act, 1956 provides an inclusive definition to the term "securities", listing the following—

- (i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

- (ia) derivative;
- (ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;
- (ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (id) units or any other such instrument issued to the investors under any mutual fund scheme;
- (ii) Government securities;
  - (iia) such other instruments as may be declared by the Central Government to be securities; and
  - (iib) rights or interest in securities.

Securities have a very expansive definition and must be differentiated from financial contractual arrangement. Please consider examples of commodity futures, interest swaps, etc. Securities are neither treated as goods nor as services, by way of a specific exclusion in the respective definitions. Contracts where there is 'no intention to deliver' may also come within the definition of securities but not when they are private arrangements where the question of 'intention to deliver' is not reliably documented may be liable to GST on the advance and on settlement, as applicable.

For this reason, 'securities' would not be included in the meaning of 'non-taxable supplies' which are in turn included within the meaning of 'exempt supplies'. Therefore, for the limited purpose of restricting input tax credits, the meaning of exempt supplies would include 'securities', and therefore, input tax credit attributable to transactions in securities would be liable for reversal.

Please also note, securities is dynamic as can be seen from the definition borrowed from SCRA where any instrument is recognized by SEBI would become securities where the intention is not to supply the underlying article. For eg., Forward contract in commodities.

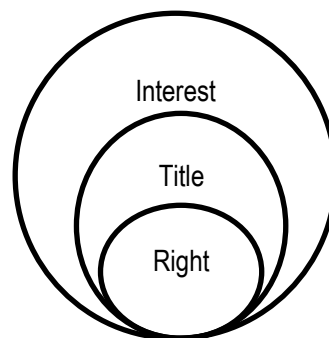
Crypto-articles are NOT included as 'securities' under SCR Act even though they are 'traded' similar to securities and even on an online platform that is referred as 'exchange'. Without recognition in law, mere use of popular expressions does not include them within the legal understanding of those expressions.

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

<sup>12</sup>[Explanation.—For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities]

<sup>12</sup> Inserted vide The Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. 01.02.2019

Express exclusion of 'goods' implies its inclusion within the definition of 'services'. Therefore, understanding the exact scope and boundaries of the definition of goods is required to recognize all those transactions or activities that would fall under the meaning of 'services', for being left out of the definition of 'goods'. Transactions in money (other than its conversion) are excluded both from the definition of goods and from the definition of services. 'Anything' includes everything and leaves nothing – services includes goods and for this reason 'other than goods' appears in the definition. But for such exclusion it would have been included. And services include immovable property as well. Transactions involving immovable property to the extent excluded by paragraph 5, schedule III only. All other transactions involving immovable property comes squarely within the scope of expression 'services'.



Service charges such as processing fees, documentation fees, broking charges or any other fees or charges are charged in relation to transactions in securities; the same would be a consideration for provision of service and hence chargeable to GST. Services is therefore not a verb but a noun. As such, there is no need to search for the activity performed in a transaction involving services but sufficient to note that it is not goods then it will be services. If this manner of drafting the definition that allows tax to be imposed on transactions of tolerating an act or abstaining from an act as found in paragraph 5(e), schedule II.

The following aspects need to be noted:

- The word "anything" appears to convey something very vast like "everything", i.e., services means everything that is not goods, and is not specifically excluded (such as money, securities, transactions specified in Schedule III, etc.)
- Schedule II of the CGST Act lists down matters which shall be regarded as a supply of goods, or supply of services.
- The GST law empowers the Government to require treatment of supply of notified goods as supply of services, and *vice versa*.

It would be appropriate to briefly discuss certain concepts of 'immovable property' as application of these concepts is relied upon in various other places:

- Immovable property is not defined in Transfer of Property Act, 1882. Reference must be had to section 3(26) of General Clauses Act, 1897 and to section 2(6) of Indian Registration Act, 1908 to understand the definitions. Hon'ble Madras High Court stated in *Mohammed Ibrahim v. Northern Circars Fibre Trading* (AIR 1944 Mad 492) that these two statutes are in *pari materia* with TP Act and ignoring the definitions in these statutes will be wrong in the absence of a clear bar in doing so.

- Immovable property may seem to be well understood, but consider this – do we understand what ‘intangible immovable properties’. Land and building is a common image that comes to mind when we think about immovable properties but that is not all. Rights, title and interests ‘in’ immovable properties are also immovable properties themselves. Consider the following diagram where (i) ‘right’ is a sub-set of ‘title’ and titleholder will definitely have all the rights but one who has one or other right need not have title over the property (ii) interest lies outside these spheres where it traverses ‘title’ and ‘rights’ and still not both such that one who has ‘interest’ in immovable property may still not have ‘title’ and therefore his ‘rights’ may be limited and not identifiable with specific rights and (iii) understanding rights is important due to the implication a contract conferring rights such as easement rights or mining rights or forest lease or excavation rights or rights to take forest produce or rights to draw water or development rights or agency coupled with interest or other such rights that are created by contract and taxable as supply of goods or as services. But all these may still be inferior to ‘absolute sale’ (of land or of completed building) and not be saved by schedule III.
- It is important to understand the nature of ‘rights’. There are ‘rights’ and ‘rights to rights’. Rights are comprised of four components (i) one who has the right (ii) one against whom those rights exist (one person or world at large) (iii) object over which those rights exist and (iv) the title giving the extent or limits of those rights.
- Rights are (a) acquired (b) derived and (c) extinguished. It is important to trace back every right to the point when it came to be vested. Rights may exist but only when they come to irrevocably reside as a ‘right’ (with all four components listed above) will they be indefeasible rights as discussed in *Eicher Motors Ltd. v. UoI* (1999) 106 ELT 3 (SC). Rights ‘not yet vested’ can be taken away by (i) operation of law or (ii) lapse of time being inaction during the time prescribed. Perfection of rights is called ‘vesting of rights’. Vesting conditions may be (a) actions by party or (b) events specified in law. Failure of these vesting conditions vitiates those rights and the benefit underlying those rights that do not flow to the party will flow back to the Government, who was allowing this benefit.
- Not all time limits are to be understood as ‘limitation’, some time limits operate as ‘prescription’. Limitation is where the right to enforce something (say, claim of export refund within 2 years) will be lost although the right itself will remain (input tax credit on exports will remain and be available for utilization). Prescription is whether the right itself will be lost. When a valuable right is lost, it is called ‘extinctive prescription’ and it results in the underlying value flow to the person against whom such right would be exercisable, that is, the Government. And when the right is lost, Government now acquires the right; it is called ‘acquisitive prescription’. These are two sides to one event that operates as a prescription.
- Please consider the definition of ‘immovable property’ from various statutes arranged in a tabular manner for understanding the different groups of properties in each definition:

<b>Registration Act, 1908</b> S.2(6) "immovable property" includes: <ul style="list-style-type: none"> <li>➤ Land</li> <li>➤ Buildings</li> <li>➤ Hereditary allowances</li> <li>➤ Rights to ways</li> <li>➤ Rights to lights</li> <li>➤ Rights to ferries</li> <li>➤ Rights to fisheries or</li> <li>➤ Rights to any other benefit to arise out of land</li> </ul>	<ul style="list-style-type: none"> <li>➤ Things attached to the earth or</li> <li>➤ Things permanently fastened to anything which is attached to the earth</li> </ul> <p><b>But Not:</b></p> <ul style="list-style-type: none"> <li>➤ Standing timber</li> <li>➤ Growing crops nor</li> <li>➤ Grass</li> </ul>
<b>General Clauses Act, 1897</b> S.3(26) "immovable property" includes: <ul style="list-style-type: none"> <li>➤ Land</li> </ul> <p>➤ Benefits to arise out of land</p>	<ul style="list-style-type: none"> <li>➤ Things attached to the earth or</li> <li>➤ Things permanently fastened to anything which is attached to the earth</li> </ul>
<b>Transfer of Property Act, 1882</b> S.3 "immovable property" does not include:	<ul style="list-style-type: none"> <li>➤ Standing timber</li> <li>➤ Growing crops</li> <li>➤ Grass</li> </ul>
<b>Central GST Act, 2017</b> S.2(52) "goods" means <ul style="list-style-type: none"> <li>➤ Every kind of movable property</li> </ul> <p>Other than:</p> <ul style="list-style-type: none"> <li>➤ Money</li> <li>➤ Securities</li> </ul>	<p><b>But includes:</b></p> <ul style="list-style-type: none"> <li>➤ Actionable claim</li> <li>➤ Growing crops</li> <li>➤ Grass</li> <li>➤ Things attached to or</li> <li>➤ Things forming part of the land which is <ul style="list-style-type: none"> <li>○ agreed to be severed before supply or</li> <li>○ under a contract of supply</li> </ul> </li> </ul>

- Now examine the extent of change brought to these definitions by the inclusion of "....growing crops, grass and things attached to or forming part of the land...." In the definition of 'goods' in CGST Act. There will be some realignment required (shown by arrow marks) in the way we apply the definitions from these time-tested statutes in the context of GST law. In the light of these 'realigned definitions' from substantive laws, consider the discussion below with regard to various forms that 'immovable property' takes.

- Land is one of the examples of immovable property. There are many other examples that comprise the entire universe that makes up immovable property. Land is not the same as immovable property.
- When land is sold along with fruit-trees on it, it is to be seen if the trees are to be severed from the land or not. If not, the land will include the trees and the Sale Deed will be made for the land along with all things attached to it. But if the trees have to be severed and sold, then it is not a deed for sale of land but sale of timber from those trees. And this would be supply of goods and not sale of land (covered by schedule III);
- Land and benefits arising from land are not one and the same because while retaining the land, benefits arising from land can be transferred and conveyed. So, it is important to understand land and these 'benefits arising' from land as two different species of immovable property. For eg., fruit tree is immovable property and fruits from that tree are 'benefits arising' from that immovable property..
- 'Benefits arising' can be past or future. That is, benefits 'to' arise out of land is different from benefits 'already' arisen on the land. So, if the benefits have 'already' arisen on the land, then they are goods due to the specific definition in section 2(52) of CSGT Act. And if they are benefit 'to' arise out of land, then they are not goods hence, they are services due to definition in section 2(102) of CGST Act. Please note that in respect of crops, definition in CGST will prevail over Transfer of Property Act due to express inclusion.
- 'Benefits arising' can be other than crops also. Any benefit that is 'inextricably' due to land will be such kind of 'benefits arising' from land. For eg., iron ore, sand, diamonds, etc. Reserves in mother Earth is also 'benefits arising' from land because they have to be 'extracted'. It is also called 'winning of minerals'. Though mineral deposits must already be existing in the earth, it is still referred in future tense because it cannot be known until they are actually mined. Such 'benefits arising' from land are 'to' arise and hence immovable property (or services) not 'already' arisen to be called movable property (or goods). This interpretation flows from *State of Orissa v. Titagarh Paper Mills Co. Ltd* AIR 1985 SC 1293.
- Equipment installed and erected at site may or may not be immovable property. Under Central Excise, the test has been 'purpose of affixation' and under Sales tax, the test has been 'dismantling without substantial damage'. Based on the three limbs to the definition of 'attached to the earth' in section 3 of TP Act, it appears that if the attachment (of equipment) is for beneficial enjoyment of the land (or building), then equipment becomes immovable property itself. But, if the attachment is for the beneficial enjoyment of the equipment then, equipment remains movable property. These principles were expounded in *Subramaniam Chettiar v. Chidambaram Servai* AIR 1940 Mad 527 which were reiterated in *CCE v. Solid and Correct Engineering Works* 2010 (252) ELT 481 (SC).
- All immovable properties are not tangible. There are intangible immovable property too. A certain immovable property may itself be tangible but certain rights or interest 'in' such



immovable property may be intangible. For eg., where a tenant has right to let-out the property to a sub-tenant, that right or interest that the tenant has 'in' the property is an intangible immovable property.

- Standing timber, growing crops or grass are EXCLUDED from the interpretation clause in Transfer of Property Act from the scope of 'immovable property'. But, section 2(52) of CGST Act includes *'growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply'* within the definition of 'goods'. This needs to be reconciled as follows:
  - Landowner selling fruits grown in his own land is selling fruits. Landowner allowing a fruit-seller to enter and extract fruits grown by the landowner is also a case of sale of 'benefits arising' from land which is goods (fruits) in this case. Landowner who allows this fruit-seller for the next 5 years to enter and extract fruits that would be grown is a case of sale of 'rights to BAOL' which is service (fruits-in-future) in this case.
  - Fruit-seller can retain the 5 year contract and make annual payments towards supply of services by landowner. Or, the fruit-seller may sub-license or transfer the 'rights to those benefits' that have not yet arisen from land and are agreed (by Parties) to arise in future years (refer earlier discussion about 'rights' and 'rights to rights'). Please note, goods (fruits being 'benefits to arise') are exempt from GST but services (fruits-in-future being "rights to BAOL") are not exempt from GST.
  - Growing crops is included in definition of 'goods' but the key phrase in this definition is *"which are agreed to be severed"*. Where there is an agreement to 'sever' the benefits that have arisen in the process, fully from land, then even though it is still growing, it is goods that are 'agreed to be supplied' which is taxable (*Shantabai v. State of Bombay AIR 1958 SC 532*).
  - Standing crop is crop that is no longer growing and is now fit for harvesting. So, growing crop is clearly goods if it is included in any transaction. For eg., a 100 acre land with silver oak trees is given on 5-year lease, it is a case of lease of land if the condition is to return that land 'in original condition' with all those trees. But, if that lease is given for 6-months with the condition to return of land only, then obviously it is a case of sale of trees and the consideration is paid for felling those trees and taking them away (*Mahabir Prasad v. Enayat Elahi AIR 1951 All 608*).
- Given that 'benefits that have already arisen' from land may be movable property (taxable as goods) or immovable property (taxable as services), 'rights to Benefits arising out of Land' will always be immovable property (taxable as services). Sufficient to mention concept of 'profit a prendre' that is understood under Indian Easements Act, 1882 which is also called 'right of taking' something from the land. Please note that fruits are 'benefits arising' from land but the 'right to future benefits' (yet to arise from land) with the permission to continuously take away fruits-in-future (*Anand Behara v. State of Orissa AIR 1956 SC 17*).

- Hereditary allowances, rights to ways, lights, ferries and fisheries are also listed in section 2(6) of Indian Registration Act, 1908 which requires more careful study of these immovable properties and contrast all of them with the limited exclusion in paragraph 5 of schedule III of CGST Act for a better appreciation of the scope of 'services' in CGST Act.

*(103) "State" includes a Union territory with Legislature;*

Each State derives its respective meaning provided in the First Schedule in the Constitution of India. There are 28 States and 8 Union Territories in India. Of the 8 Union Territories, Delhi and Puducherry have Legislatures of their own. Therefore, for the GST law, by the expression 'State', Delhi and Puducherry, though Union Territories, will be included.

*(104) "State tax" means the tax levied under any State Goods and Services Tax Act;*

Tax levied under the State GST laws is referred to as "State tax". State tax is that component of GST that levied on intra-State supplies by the State Governments (or the Legislatures of Delhi and Puducherry), under the respective State-specific GST laws.

*(105) "supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;*

The reference to whom the meaning of the term 'supplier' is fitted is 'person', as against 'taxable person' or 'registered person'. This is because the law does not keep persons who are not liable to tax under GST, outside the scope of this term. For instance, in case of purchases from unregistered persons, who are not liable for registration, would also be treated as suppliers, while the recipient of the supply is liable to pay tax on reverse charge basis if such recipient is registered.

Agents supplying on behalf of the supplier are also included within the meaning of 'supplier'. This is to ensure that invoices raised by the agent on behalf of the supplier for effecting sales on his behalf qualify as valid invoices, as if they were issued by the supplier himself.

*(106) "tax period" means the period for which the return is required to be furnished;*

Given that the term 'return' is not limited to any particular return, the term tax period can also vary for each return prescribed under the law. A 'tax period' would ordinarily be the calendar months (or quarters ending on the last dates of March, June, September and December in case of composition suppliers).

This definition assumes great significance in the context of tax compliance. Please consider if tax arrears of a certain month can be paid out of credits in a future month by delaying the reporting of outward supply until the time when credits become available. Tax compliance cannot be viewed on an annualized basis but for each tax period.

Taxpayers assume that taxes need to be collected and paid for the 'financial year' such that set-on and set-off adjustment is carried out within the months in the given financial year. But GST law is very clear in section 59 for 'each' tax period the liability must be discharged.

Further, when appeals are to be filed, appeal in respect of each 'tax period' would be required. Clue can be taken from the adjudication order numbering which will clearly indicate that each 'tax period' is adjudicated individually.

While notice can be issued for multiple tax periods at a time but self-assessment must be carried out strictly for 'each' tax period. Merging multiple tax periods in discharging liability of earlier tax periods out of credits accruing in later tax periods can be perilous. Clarification in *Circular 172/4/2022-GST dated 6<sup>th</sup> Jul 2022* (para 6) permitting payment of 'any tax' out of balance in credit ledger does not mean payment of 'any tax periods' tax liability. Tax so discharged, experts caution, can attract demand for tax period to which the liability pertains which cannot be satisfied out of credit accruing in later tax period (and discharge liability of earlier tax period).

Concept of one-to-one correlation does not exist in GST but, that refers to utilization of credit belonging to one line of business to discharge liability of another line of business.

Care must be taken that wrongly utilized credit (belonging to later tax period) will require a refund application to be filed which may be rejected and credit restored via PMT-03 under rule 93, but this approach is circumscribed by limitation of 2 years. But output tax liability (belonging to earlier tax period) may still be demanded. Experts opine that intervention by Government alone will overcome this impasse due to inapplicability of section 77 of CGST Act (or section 19 of IGST Act) in these situations where the wrong tax and right tax are both under the same statute.

*(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;*

Every 'supplier' shall be liable to be registered under the GST law 'in the State' (or Union territory) 'from where' he makes any taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds the specified limit (Rs. 20 Lacs or Rs. 10 Lacs / Rs.40 lacs in case of persons dealing only in goods – refer section 22 for details). A person will become a taxable person if he attracts section 9(1) or 9(5). But a non-taxable person will become liable to registration even if he attracts 9(3) or 9(4) and on default under section 79(1)(vi).

The following persons (amongst others) are also compulsorily required to obtain registration, whether or not their turnover exceeds the threshold limit:

- Non-resident taxable persons, casual taxable persons making any taxable supply
- Persons making any inter-State taxable supply;
- Recipients of supplies of goods or services that are notified for tax on reverse charge basis;
- Persons such as agents who make taxable supplies on behalf of other taxable persons;

- Electronic commerce operator and persons effecting supplies through them;
- Person supplying OIDAR services from a place outside India to an unregistered person in India.

Care must be taken not to interchange 'taxable person' with 'business entity'. Business entity is an expression that is very commonly found in GST notifications, especially, in *Notification 13/2017-CT(R) dated 28.06.2017* on RCM. Here, it must be noted that any inquiry must be limited to whether or not the person (legal entity) is engaged in 'business' as defined in section 2(17) with all its expansions and fictions. There is a definition that we can find in clause 2(n) but under *Notification 12/2017-CT(R) dated 28.06.2017* "(n) 'business entity' means any person carrying out business;" which throws some light. It is not to be examined whether or not the person is registered but the activities must come within definition of business even if person is not registered which may be due to threshold limit in section 22. A person who is not engaged in business but registered for payment of GST under section 9(3) may scarcely be able to stay out of being considered to be a 'business entity'. And tax payment under 9(3) is itself required when the specified inward supplies are to be 'business entity'. So, fact that person is registered for discharging tax under section 9(3) itself operates as a presumption about being a business entity. Registration for purposes of section 9(4) is altogether required by a person who is registered, therefore, the question of examining whether such a person is a business entity or not may be only academic.

Attention must be paid to the fact that 'taxable person' is not same as 'registered person' [2(94)] as every taxable person is made liable to pay tax under section 9(1) but only a registered person is eligible to claim input tax credit under section 16(1). Unless taxable person obtains registration, output tax liability will remain but without benefit of input tax credit. Registered person in one State will be unregistered person in other States where no such registration is held by the business entity.

(108) "taxable supply" means a supply of goods or services or both which is leviable to tax under this Act;

For a transaction to qualify as a taxable supply, the following components are compulsory:

- The transaction must involve either goods or services, or both of them;
- Such goods or services should not be specified under Schedule III (neither a supply of goods nor a supply of services);
- The transaction should fall within the meaning of 'supply' in terms of section 7 of the CGST Act;
- The supply should be leviable to GST – i.e., it should not be covered within the meaning of 'non-taxable supply' as defined under section 2(78) – i.e., alcoholic liquor for human consumption. This implies that supplies enjoying a full exemption from tax by way of an exemption notification would also be treated as taxable supplies.

Please note the expression 'taxable supply' must be distinguished from 'taxable goods or services'. Please see its usage in section 51 versus section 52. When expression used is 'taxable supply', then even when exempt, it would come within the said definition. But not so, when the expression used is 'taxable goods or services'. Care must be taken not to view these seemingly similar expressions as synonymous. Section 51 uses the expression 'taxable goods or services or both' whereas section 52 uses the expression 'taxable supplies'.

*(109) "taxable territory" means the territory to which the provisions of this Act apply;*

The scope of taxable territory extends to the whole of India. As such, high sea sales and merchanting trade transactions (eg., buy from China and directly ship to Germany) are transactions of any one 'taxable person' (of the same legal entity) but occurring outside taxable territory. As the words of section 7(5)(a) are 'supplier located in India' and not 'location of supplier is in India', such transactions occurring beyond the taxable territory of India would also be inter-State supplies but non-taxable as the levy is not attracted. Any taxable person would fit the expression 'supplier located in India' meaning the 'person who supplies' and not the Consignor (in China). Care may be taken to note this subtle difference in the words in section 7 of IGST Act

*(110) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means;*

The scope of the term 'telecommunication service' is so vast that it covers services starting from the landline facility for making calls, text messages, voice messages, communication through media such as WhatsApp, Skype, etc., to services provided by Gmail, yahoo, etc.

*(111) "the State Goods and Services Tax Act" means the respective State Goods and Services Tax Act, 2017;*

The SGST Act means that SGST Act of the relevant State (or Delhi or Puducherry or Jammu & Kashmir), as the case may be, which provides for levy and collection of tax on all intra-State supplies of goods or services or both (except alcoholic liquor for human consumption), i.e., the supply of goods or services or both where the location of the supplier and the place of supply as determined under Chapter V of the IGST Act are located within the same State. Upon passing of the GST law in each of the "States", there would be 28 SGST Acts in India and 3 Union territories with legislature acting as a State.

*(112) "turnover in State" or "turnover in Union territory" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a State or Union territory by a taxable person, exports of goods or services or both and inter-State supplies of goods or services or both made from the State or Union territory by the said taxable person but excludes central tax, State tax, Union territory tax, integrated tax and cess;*

The expression 'turnover in State' (or UT) is a replica of the expression 'aggregate turnover', but for the fact that 'turnover in State' is restricted to the turnover of a taxable person, as opposed to aggregate turnover which is PAN-based (i.e., all taxable persons having the same PAN, across States). The following references are made in the phrase in the Act:

- Payment of tax under composition scheme: The tax rate will be applicable on the 'turnover in State' particular to a taxable person, which should be paid by him in the State in which he has obtained registration;
- Distribution of input tax credit by an ISD: In case of the distribution of credit that is attributable to two or more units of the person, the credit shall be distributed amongst such units on a pro rata basis (i.e., ratio of their respective 'turnover in State' to the aggregate of the 'turnover in State' of all such units).
- Turnover in State includes 'all' taxable supplies which includes exempt supplies. When tax is being paid under section 10 on 'turnover in State', the composition rate will need to be applied not on the supplies in respect of which composition is allowed but also other supplies included as 'all taxable supplies' in the State of the each distinct person.

(113) *"usual place of residence" means—*

- (a) *in case of an individual, the place where he ordinarily resides;*
- (b) *in other cases, the place where the person is incorporated or otherwise legally constituted;*

The expression 'usual place of residence' comes of use to determine the location of supplier/recipient of services where no other location is relatable to the supply/ receipt of service.

(114) *"Union territory" means the territory of—*

- (a) *the Andaman and Nicobar Islands;*
- (b) *Lakshadweep;*
- <sup>13</sup>[(c) *Dadra and Nagar Haveli and Daman and Diu;*
- (d) *[Ladakh]<sup>11</sup>;*
- (e) *Chandigarh; and*
- (f) *other territory.*

*Explanation. —For the purposes of this Act, each of the territories specified in sub-clauses (a) to (f) shall be considered to be a separate Union territory;*

All the Union Territories and "other territory" (as defined in section 2(81) supra) in India will be governed under the UTGST Act, except Delhi and Puducherry. Given that the said two UTs have a Legislature, they will be regarded as 'States' for the purpose of GST, and will be governed by their respective SGST laws, instead of the UTGST law. Please consider UT of Ladakh after the

<sup>13</sup> Substituted vide The Finance Act, 2020 w.e.f. 30<sup>th</sup> June, 2020.

J&K Reorganization Act, 2019 has come into force from 31 Oct 2019. UT Of Jammu will have its own legislature therefore, UTGST Act would not apply to UT of Jammu but will apply to UT of Ladakh. However, Jammu and Ladakh will both be UTs and not a State for purposes of this clause.

*(115) "Union territory tax" means the Union territory goods and services tax levied under the Union Territory Goods and Services Tax Act;*

It refers to the tax charged under the UTGST Act on intra-State supply of goods or services or both (i.e., supplies effected within a Union Territory not having a Legislature), in addition to the tax levied under the CGST law. The rate of UT tax is capped at 20%, and will be notified by the Central Government based on the recommendation of the Council.

*(116) "Union Territory Goods and Services Tax Act" means the Union Territory Goods and Services Tax Act, 2017;*

The UTGST Act provides for levy and collection of tax on all intra-State supplies of goods or services or both (except alcoholic liquor for human consumption), i.e., the supply of goods or services or both where the location of the supplier and the place of supply as determined under Chapter V of the IGST Act are located within the same UT.

*(117) "valid return" means a return furnished under sub-section (1) of section 39 on which self-assessed tax has been paid in full;*

The term 'valid return' is attributable only to the monthly return in Form GSTR-3B or quarterly return in case of QRMP scheme, to be filed by every registered person (except a composition supplier, non-resident taxable person, ISD, person liable to deduct tax at source and person liable to collect tax at source). The return will be treated as a valid return only where the tax liability determined in the return is fully remitted. Please also refer to discussion under section 61 regarding 'elements' of a valid return.

The following aspects need to be noted:

- The law mandates that the liability determined in the returns of previous months' must be discharged prior to discharging the liability determined in the returns of current month;
- Input tax credit will become available to the recipient only if the return furnished by the supplier is a 'valid return'.

Belated return filed along with admitted tax, interest and late fee cannot be treated as 'invalid' for any reason. Acceptance of late fee levied under section 47 does not permit such return to be treated as invalid for any reason whatsoever.

*(118) "voucher" means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;*

'Voucher', for the purposes of GST, necessarily means that instrument which should be accepted as consideration (wholly or partly) for a supply. Therefore, a voucher is an asset (money's worth) for the recipient, and without a recipient, a 'voucher' would lose its meaning. Therefore, in a case of a supplier issuing a voucher to a recipient of goods, on his making a purchase from the supplier, the voucher is not being viewed as an additional outcome of the supply made to the recipient. Rather, it is an instrument that can be used in place of money (or other consideration) which can be used on effecting yet another inward supply. E.g., coupons, tokens, promo-codes, etc. These are very commonly used synonyms and most of them are incorrectly used. By merely referring to any article as 'voucher' without showing that it satisfies the ingredients in the statutory definition does not attract the treatment applicable or the benefits available, in law. Crypto-articles are not 'vouchers'.

However, where the supply can be identifiable at the time of issue of voucher, the tax should be remitted for the month in which the voucher is issued, as if it were an advance received for a supply to be made at a future date.

Reference maybe had to the discussion in the context of money under section 2(75) about Payments and Settlement Systems Act, 2007 where RBI is authorized to issue pre-paid instruments (PPIs) apart from Indian legal tender to be used to settle obligations to pay consideration. All vouchers are not money if they are not so recognized by RBI. And if the vouchers are recognized by RBI then they will take the character of money.

Reference may be had to the detailed discussion in the context of time of supply under section 12(4)/13(4) for a detailed discussion on the types of vouchers and implications in GST.

*(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;*

The expression 'works contract' is limited to contracts to do with immovable property, unlike the erstwhile understanding of the phrase which also extends to moveable property. A contract will amount to a 'works contract' only where the resultant is immovable property. Transactions resulting in movable property, however, would be treated as a 'composite supply' of goods or services depending on the principal supply. Refer analysis under section 8.

The 14 adjectives used in the definition of works contract are neither exhaustive nor limiting the scope of works contract. Conspicuous by their absence are adjectives like manufacture, assembly, printing and so on. As stated earlier the presence of certain objectives of the absence of certain others limit the scope of what works contract is under GST. If the resultant is bringing into existence of immovable property, then the supply is a works contract. Obviously, pre-existing immovable property being involved in a transaction will be saved to the extent of paragraph 5, schedule III. Refer detailed discuss about concept of immovable property along with services under section 2(102).



For GST law, works contract as defined above will be treated as a supply of service, thereby bringing debate to a close on the methodology of segregating the works contract between goods and services. Due to treatment as a supply of services, transactions such as sales returns, cancellation, non-approval of work done, carrying forward of work-in-progress, etc. are faced with restrictions in GST as no provision appears to be made to accommodate such transactions which are akin to goods even when works contracts are treated as supply of services.

Indivisible works cannot be artificially be divided into supply of goods and supply of services, *simplicitor*. And unless the resultant installation constitutes 'immovable property', the supply cannot be treated as 'works contracts'. Use of cement concrete is not a necessary condition for the supply to be treated as 'works contracts' because wood or steel can also be used with suitable finishing works to erect a building or a structure. Supply that does not pass the test of 'immovable property' will not be works contracts and their categorization tested for being 'composite supply'.

*(120) words and expressions used and not defined in this Act but defined in the Integrated Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act shall have the same meaning as assigned to them in those Acts;*

Certain words and expressions like exports, import, etc. defined in the IGST/ UTGST/ Compensation laws as are used under the CGST law will have the same meaning as assigned in such laws.

~~*<sup>14</sup>(121) any reference in this Act to a law which is not in force in the State of Jammu and Kashmir, shall, in relation to that State be construed as a reference to the corresponding law, if any, in force in that State.*~~

### Extract of the CGST Rules, 2017

#### 2. Definitions

In these rules, unless the context otherwise requires, -

- (a) "Act" means the Central Goods and Services Tax Act, 2017 (12 of 2017);
- (b) "FORM" means a Form appended to these rules;
- (c) "Section" means a section of the Act;
- (d) "Special Economic Zone" shall have the same meaning as assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);
- (e) words and expressions used herein but not defined and defined in the Act shall have the meanings respectively assigned to them in the Act.

<sup>14</sup> Omitted vide (w.e.f. 18-3-2020) by the Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020.