

TREATMENT OF CROSS-BORDER SERVICES, INTANGIBLES AND GOODS UNDER THE GST REGIME

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[Abstract: Online supply of digital services and intangibles is increasingly taking place from across the border despite non-payment of countervailing duties, which has adversely impacted domestic suppliers of similar services and intangibles. Besides, the states are losing revenues: an issue that will have to be addressed with the twin objective of increasing revenue efficiency and providing a level playing field to domestic suppliers. Many nation states, implementing GST regimes, are developing guidelines for addressing the issues involved. This Discussion Note advocates that while India works to join the GST regime, it may address this emerging concern as well.]

The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, pending for consideration and passage in the *Rajya Sabha*, seeks to amend the Constitution of India to facilitate the introduction of Goods and Services Tax (GST) in the country. The amendments proposed in the Constitution are towards conferring powers on the Parliament and State legislatures to make laws for levying GST on the supply of goods and services on the same tax event, i.e. on the same transaction.

The Constitution, as it stands before the proposed amendment, empowers the Central Government to levy excise duty on manufacturing and service tax on the supply of services, whereas the states have been authorised to levy sale tax or value added tax (VAT) on the sale of goods. Besides, the Central Sales Tax (CST) is leviable on interstate sales; it is levied by the Centre but is collected and retained by the exporting state. There are also enabling provisions for levying taxes on entry of goods into the local areas of the states, e.g. octroi and/or entry tax.

The existing Constitutional provision of imposition of indirect taxes by the states and the Centre has led to “multiplicity of taxes” with varying rates among states and given rise to hidden costs on trade and industry by building tax on tax.

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The proposed amendments would alter the scheme of distribution of fiscal powers currently provided in the Constitution. In the altered scheme, the dual GST will be leviable on the same taxable event of supply of goods and services, simultaneously by both the Centre and the states. Thus, from manufacturing to consumption, both the Centre and the states will be empowered to levy GST. At each stage of value addition, the credit of GST paid on inputs will be available for the discharge of GST liability on the output. This will ensure that GST is charged only on the component of value addition at each stage, thus discontinuing the practice of tax on tax. It will bring down the cost of production, making the Indian trade and industry competitive. More importantly, it will help establish a single market across the country.¹ It is expected that GST will: (i) broaden the tax base and encourage better compliance owing to a robust IT infrastructure, and (ii) facilitate seamless transfer of input tax credit from one stage to another along the value addition chain, wherein a built-in mechanism in the design of GST will encourage tax compliance by traders.

GST will be applicable to all supplies of goods and services, except on alcoholic liquor for human consumption. CGST (Central GST) will subsume all central levies in the nature of exercise duty, additional excise duty, service tax, additional/special customs duty, related cesses and surcharges. SGST (State GST) will subsume sale tax, central sale tax, entertainment tax, octroi and entry tax, purchase tax, luxury tax, related cesses, etc.²

India, as and when it implements the GST regime, will be joining the club of more than 160 countries already implementing GST for decades, beginning 1960. Many of these countries introduced the GST regime in the era when international trade and business were yet to be truly globalised and the online business model was yet to be developed. With the onset of internet technology, the practice of conducting cross-border trade and business has undergone a sea change. A significant portion of cross-border trade takes place in the form of intangibles and

¹ Government of India (2015), "Concept Note on GST," Ministry of Finance, Department of Revenue, GOI. Available at: <http://dor.gov.in/Gstintro>

² *Ibid.*

services, which may prove to be a potential threat to local suppliers, rendering them uncompetitive. It is so because suppliers are subject to local levies, whereas cross-border intangibles and services are, traditionally, not subject to local taxation. Besides, the importing states cannot let go of a significant portion of their revenues, the quantum of which is likely to grow with technology boosting the online mode of transactions and further incentivising with the non-levy of countervailing duties.³ Sensing the importance of issues involved, OECD (Organisation for Economic Co-operation and Development) has placed in public domain international VAT/GST guidelines for taxation for business-to-consumer supplies of services and intangibles.⁴ Governments of New Zealand and Australia have circulated discussion notes for wider consultations with stakeholders and the public to address issues with the twin objective of creating a level playing field for domestic suppliers and collecting resources being foregone.⁵ Like other aspects of GST, this particular aspect is also awaiting discussion in the Indian Parliament.

With the passage of the Constitution (122nd Amendment) (GST) Bill pending in *Rajya Sabha*, exercises will be taken up for finalising legislations pertaining to CGST and SGST and IGST. While the contemplated legislations are being drafted, concerns regarding imposition of countervailing duties on imported tangibles and services will be addressed from the drafting stage itself so that all stakeholders are on board when the final legislations are arrived at.

Non-collection of GST on cross-border services and intangibles is an international issue faced by countries that have implemented the GST system or the Value Added Tax (VAT) system. The draft guidelines focus on establishing an international set of principles for determining when countries should have the right

³ Datar, A.P. and K. Vaitheeswaran (2015), "GST's Seven Deadly Defects," *The Indian Express*, September 19.

⁴ OECD (2014), "International VAT/GST Guidelines: Guidelines on Place of Taxation for Business to Consumer Supplies of Services and Intangibles," Discussion Draft for Public Consultation, December 18. Available at:
<http://www.oecd.org/general/searchresults/?q=International%20VAT/GST%20Guidelines&cx=012432601748511391518:xzeadub0b0a&cof=FORID:11&ie=UTF-8>

⁵ Hon Todd McClay (2015), "GST: Cross-border Services, Intangibles and Goods," Policy and Strategy Group, Inland Revenue, August.

to tax these supplies. The OECD guidelines and also the draft guidelines proposed in New Zealand's discussion note suggest that for the remotely provided services and intangibles, the consumer's usual place of residence is the predominant test for determining which country has the right to tax. These guidelines also suggest that offshore suppliers should register and return the GST on remote supplies. Similar model has been adopted by the European Union and a number of other countries including Norway, South Korea, Switzerland and South Africa. Japan, New Zealand and Australia also propose to follow a similar model.⁶

Thus, the remote supplier (supplying offshore) will be treated as "performing from within" and therefore be subjected to GST. Such suppliers shall be required to register with a view to return the GST if collections are above the notified threshold.

In the context of supplies of remote services and intangibles, the definition constitutes electronically delivered digital services (such as digital downloads, online music and video streaming services, online gaming and other digital services) as well as more traditional cross-border services supplied remotely by a person offshore (such as professional advice like legal and accountancy services). For the purpose of taxation, a broader definition will be more appropriate in order to avoid creating artificial distinction between, say, an advice rendered through e-mail and a postal communication. A broader definition will ensure uniform treatment under the GST regime.

⁶ *Ibid.*