

Time and Place of Supply in GST regime Based on Model GST Law



With the passage of the 122nd Constitution Amendment Bill, the Model GST Law that has been in public domain since June 2016 has come to receive closer attention of all readers. To kindle readers' interest in examining the provisions of the Model GST Law, this analysis is presented, of two aspects of the Model GST Law – Time and Place of Supply. Without delving into the statutory provisions, this article seeks to identify some significant issues that readers are urged to consider particularly with regard to the extent of variance the Goods and Services Tax (GST) regime will have with the current law with regard to 'time' and 'place' of the incidence of tax. Owing to the complex nature of the issues involved, this article deliberately avoids any discussion on the provisions themselves. With the confidence that the provisions have been repeatedly read and one is 'ready to recite', this article attempts to enthuse those readers with some issues that seem to lay low somewhere in those pages.



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Article 265 of the Constitution prohibits levy or collection of tax except by the authority of law and Article 300A prohibits deprivation of the property of any person (for collection of this tax) save by authority of law. The two legs upon which the levy of GST stands are 'Time of Supply' and 'Place of Supply'. It is interesting to note that each of these concepts

are actually provided in two different statutes and a combined reading will be mandatory to ensure that the GST is properly levied.

Time of Supply which determines the exact time at which the liability to pay taxes arise is provided in the CGST Act and Place of Supply which determines the which tax—IGST or CGST/SGST—that is applicable is traceable to the IGST Act. It is commonly understood that, SGST Act will only seek to remain in perfect alignment in these areas with the CGST Act. Legislation by reference, has no better example than the Model GST Law. With a brief background on nature of levy of tax, an analysis is presented on the issues arising from provisions of time and place of supply in the Model GST Law.

Time of Supply

Tax is levied under section 7 of CGST Act and the language appears clear and unambiguous. Section 12 of CGST Act employs very interesting words. For instance Section 12(1): *The liability to pay CGST/SGST of the goods shall arise at the time of supply as determined in terms of the provisions of this section*".

These words are very interesting because they signify that the tax levied by section 7 actually arises at the time determined by sections 12 and 13. In other words, until the events stated in section 12 occur the tax levied by section 7 remains suspended.

By way of reconciliation of this language, one may refer to the phrase '**.....and collected in such manner as may be prescribed**' appearing in section 7(1) and offer as an explanation that – the tax is levied by section 7 but its collection is at the time when the events of sections 12 or 13 occur.

One may wonder as to whether the levy of tax arises before its quantification. The answer to question of 'when' levy is attracted is binary, that is, 'yes' or 'no'. Hon'ble Supreme Court has very succinctly laid down in *CCE v. Vazir Sultan Tobacco 1996 (83) ELT 3 (SC)* that if the levy is not attracted at the time of manufacture it cannot be levied at the time of removal. Though authority of this judicial interpretation is admittedly not for purposes of GST, it provides sound guidance on our understanding of the nature of 'levy' and its 'quantification'.

Levy of tax occurs when the taxing ingredients prescribed in the law converge with the facts

of a transaction. Quantification is a matter of administrative freedom. Tax on manufacture can even be quantified on its MRP and this is perfectly fine in law. Levy of tax is not *over a period of time but at a point in time* when the 'taxable event' occurs. Ambiguity in the description of this event makes room for equally ambiguous explanations that may emerge. Courts have not supported strained interpretation of the plain language in the provisions levying tax. Provisions levying tax need not reside in one section and certainly not in the case of GST because GST need to properly prescribe the 'taxing ingredients' in respect of the thing supplied—goods and services. Goods and services are not amenable to uniform rules of supply due to their characteristically dissimilar nature.

If one were to hold that the time of supply is a provision for quantification of the tax, then the language does not augur well with the structure of the provisions prescribing the levy of tax and in this context we will try to explain why.

The language of sections 12(1) or 13(1) do not claim to be quantifying the tax levied by section 7 but (dare we say) appears to even usurp the role of section 7. Surely, readers would agree that the plain meaning of '*...shall arise at the time of supply...*' does more than just quantify the levy.

If liability to tax already 'arose' in terms of section 7, it cannot 'arise' again in terms of sections 12 or 13. And if it does 'arise' only in sections 12 or 13, it could not have 'arisen' before in terms of section 7. This is just to state that the attempted reconciliation pales in the backdrop of the potent language used in sections 12 and 13.

Alternatively, sections 7 and 12 form a continuum of the provision in levying tax on supply of goods under the CGST Act. As also sections 7 and 13 with respect to tax on supply of services. The tax levied in terms of section 7 is inchoate (meaning - unfinished, imperfect, incomplete or not fully formed), until fully and firmly established by sections 12 or 13, respectively. Except by reference to sections 12 or 13, it is impossible to determine the levy of CGST under section 7.

This is not to diminish the role of section 7 which lays down the essence of the incidence—on all intra-State supplies of goods and/or services—and this is the full extent of the role of this section with the rest residing in section 12 (and 13). This makes for a fascinating exercise of construction of this statute to those who see the need. Still, the levy of CGST/

SGST resides on intra-State supplies determined not by this Act, but by section 3A of IGST Act. Tax levied is on 'intra-State supply' and not on the 'supplier'. The supplier is appointed to discharge the levy and in some cases this responsibility is placed on the recipient. The tax however, continues to remain on supply.

On a careful examination of sections 12 and 13, it can be seen that instances covered by each sub-section takes every transaction of supply and deftly prescribes a precise 'time' of its occurrence like threading a needle while riding a horse.

So, readers may give careful consideration to the implications of the language in section 12 (and section 13). Time of supply therefore, is actually the time of levy of CGST/SGST (and for that matter even IGST).

Sections 12 and 13 of CGST Act lay down some very fundamental principles of the GST. Going back to the analogy of threading a needle while riding a horse; supplies that require **goods** to be removed have one 'time' specified, those that require to be installed have another 'time' specified and when neither is required, they have yet another 'time' specified. Being mindful of the uneven terrain that prevails in trade, the legislature has elegantly prescribed the time(s) that best describes completion of supply in each situation of supply.

Time of supply prescribed appears to follow a fundamental principle that lies at the heart of GST—destination based tax. On a careful consideration of each of the four circumstances in sub-sections 2(a), 3 and 7 to section 12, the above principle stands out. Other circumstances where we find a fiat of law prescribing the time of supply are really due to the necessity to overcome tax avoidance in sub-section 2(b) to 2(d) of section 12.

Destination based tax is the opposite of origin based tax. Origin based tax is one which 'comes to be levied at the time and place where its unequivocal application or appropriation commences'. By this reasoning, destination based tax would receive the explanation that "*it is one where the levy must await*

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the discovery of completion of such unequivocal application or appropriation". Discovery may either be by facts that are visible and verifiable or by legislative will.

Similarly, section 13 lays down four circumstances in sub-sections 2(a & b), 3 and 7 where legislative will appear more evident, but closer examination reveals the impost tethered to the time of its unequivocal application or appropriation to the recipient.

It is also of interest to note that section 13 indicates that a 'prescribed period' would be notified for issuance of invoice for services.

Time of supply with respect to levy of IGST is required by section 27 of that Act to also be determined by reference to section 12 (and section 13) of CGST Act.

Place of Supply

Principles for determining 'Place of supply' are traceable to sections 5 and 6 of the IGST Act. A general rule (more on this later) for determining 'place of supply' would be when:

- the 'place of supply' of goods or services; and
- location of recipient of those goods or services are found to be present in two different States, the transaction would then be an inter-State supply and if not, the transaction would be an intra-State supply.

Even for purposes of inquiring into the applicability of CGST/SGST Acts, it is imperative to go to the IGST Act and make this clear determination by tests found in sections 3 and 3A as to whether it is an inter-State or intra-State supply.

Intra-State supply is not defined in section 7 of the CGST Act and in the absence of any definition in section 2; recourse to IGST Act is inevitable (drafting anomaly notwithstanding).

Unlike in the case of services, the location of supplier of goods and location of recipient of goods are not defined in CGST Act. These terms are to be understood certainly not as the location of their registered office but as the place where the supplier holds control over the goods ready to deliver. In

other words, location of supplier may be understood as the location of goods ready for supply.

From a careful reading of sections 5 and 6 of the IGST Act, various matters of interest emerge and they are discussed here.

‘Place of supply’ is not a commonly understood expression but a legal phrase. Section 5 of the IGST Act, lays down five situations from sub-section 2 to 5 and appoints or pin-points certain express places to be the place of supply. Each of these appointed places show commonality of purpose and consistency in application of such common purpose. And this commonality of purpose appears to be in perfect alignment with the principle of ‘destination based tax’ that underlies GST. And to address instances that are not expressly covered, rule making power of Parliament is enabled in sub-section 6 of Section 5 of the IGST Act.

Place of supply of goods is therefore a geo spatial point on a map where the goods are ready to ‘pass’ from supplier to recipient to complete delivery. Delivery is when recipient acknowledges satisfactory performance by the supplier. Delivery is a question of fact and not a matter of contract. The ‘thing’ supplied dictates the necessity and manner of its delivery – ready mix concrete demands delivery by discharge at site but the excitement of a ‘Bollywood Release’ is delivered in the cinema theatre. Delivery is that act that discharges the supplier from further responsibility towards the recipient qua the thing supplied. And it is this unambiguous location that is appointed emphatically to be its place of supply. Understanding this concept is extremely important, for it underpins the tax to be levied.

Section 6 of the IGST Act relating to Place of supply of services, lays down fifteen situations from sub-sections 4 to 15 apart from two situations in sub-sections 2 and 3 wherein specific places are appointed to be the place of supply of services. Here too, the same commonality of purpose can be seen—GST is a destination based tax. Place of supply of services is therefore the place appointed by law following this common purpose.

This elaborate exposition of ‘place of supply’ in Section 5 and 6 of the IGST Act, underlines the fact that ‘place of supply’ is not a phrase of common understanding but a legal expression. And as in the case of legal expressions that have an express meaning, every other popular understanding must

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be given a go-by while understanding place of supply. Further, place of supply ought not to be called a legal fiction because it aligns well with the principle of GST as a destination based tax.

Conclusion

Any error in determining the ‘time of supply’ will mean non-payment of taxes at the time when it ought to be paid whereas error in determining the ‘place of supply’ will most certainly lead to payment of wrong type of tax. Time and Place of Supply may come to occupy such a significant place in deciding the imposition of CGST/SGST or IGST that some of the issues called out here, may seem elementary or obvious even. But this journey towards GST that India has embarked has gained a new impetus with the passing of the 122nd Constitution Amendment Bill on 3rd August 2016. This initiative begs us to get ourselves ready to disseminate plain and purposeful understanding of the GST based on the Model Law. Though the Government is forthcoming in receiving suggestions on amendments needed, we can be quite certain not to have ver. 2.0 of the Model GST Law because November 2016 is right around the corner. Come November when a Bill, assuredly, as Finance Bill will be introduced in Parliament ushering the new era of trade taxation in India.

We are at the cusp of this major overhaul in our tax system and ‘time’ and ‘place’ of supply perhaps occupies center stage in this change. A good grasp on these two pillars of law will hold us in good stead as we welcome GST in 2017. ■

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