

Scope of Section 9(4) of the CGST Act, 2017 specifying reverse charge mechanism for unregistered persons

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Introduction

The provision that has gathered maximum attention for its ability to create significant stress and nuisance would clearly be Section 9(4) of the CGST Act, 2017. Broadly speaking, it talks of a reverse charge mechanism where purchases are made from unregistered persons by a registered person. This article will analyse the scope of this section as well as point out what, in the author's view, this would entail.

Analysis of Section 9(4)

Before we go to that, we should understand that Section 9 of the CGST Act, 2017 is the charging section, more specifically Section 9(1). Section 9 is however titled as "Levy and collection" therefore it covers both levy and collection. In this sense, the term levy is wide enough to cover assessment but does not cover collection as the same is specified separately – see judgement of the Supreme Court in *N.B.Sanjanna vs Elphinstone Spinning and Weaving Mills co.Ltd 1978 (2) ELT J 399*.

The difference between levy and collection is best explained in the words of the Supreme Court in *CCE vs Vazir Sultan Co.Ltd 1996 (83) ELT 3* thus:

We are of the opinion that Section 3 cannot be read as shifting the levy from the stage of manufacture or production of goods to the stage of removal. The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal. Once this is so, the fact that the provisions of the Central Excise Act are applied in the matter of levy and collection of special excise duty cannot and does not mean that wherever the Central Excise duty is payable, the special excise duty is also payable automatically. That is so as an ordinary rule. But insofar as the goods manufactured or produced prior to March 1, 1978 are concerned, the said rule cannot apply for the reason that there was no levy of special excise duty on such goods at the stage and at the time of their manufacture/production. The removal of goods is not the taxable event. Taxable event is the manufacture or production of goods.

Section 9 is set out in its entirety as that would be extremely useful for us to analyse:

9. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and

collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

If we carefully look at the scheme, the same can be summarised hereunder:

- a. Section 9(1) is the principal section which deals with the levy of GST. It clearly lays out that the central goods and services tax shall be levied on intra state supply and paid by the taxable person. Taxable person means a person who is liable to be registered under Section 22 or Section 24 as per Section 2(107) of the CGST Act, 2017.
- b. Section 9(2) is not important for us as it talks of levy on certain goods which are to be brought in at a later date.
- c. Section 9(3) talks of reverse charge mechanism on goods /services as may be notified by the Government. Here we see GTA, advocates, etc.
- d. Section 9(5) talks of a reverse charge mechanism on e-commerce operators who supply services (not goods).

Section 9(4) was not present in the draft laws and made its way all of a sudden. The salient features of Section 9(4) are as under:

- a. There should be a supply of goods or services or both by a supplier.
- b. Supplier should not be registered.
- c. The supply should be to a registered person.

- d. The tax shall be paid by the person on reverse charge basis by the recipient
- e. All provisions of the act will apply to such recipient as if he is the person liable for paying the tax in relation to such a supply.

Is supply essential?

We must first realise that unless there is a supply of goods or services or both by a supplier, this section cannot be brought into force. We have, therefore, to answer this question as yes. If supply is essential, then necessarily Section 7 of the CGST Act, 2017 comes into play which defines what is a supply. If the supply does not fall within Schedule I, II or III, it would encompass all forms of supply made for a consideration by a person in the course or furtherance of business.

Whose point of view?

Is the supply to be taken from the point of view of the supplier or the receiver? Section 9(4) clearly uses the phraseology “supply of taxable goods or services or both by a supplier” and therefore, the point of view is clearly that of a supplier. At this point of time, we should clearly understand a few principles that are important and that is the levy remains on the supplier but the liability is shifted to the recipient. If you carefully see the wordings, the recipient is only made liable for the tax. While levy is the subject matter of the tax, liability is a function of assessment. What is the rate and who will pay are all functions of assessment and not the subject matter of levy. In *Wallace Flour Mills Company Ltd vs CCE 1989 (44) ELT 598*, the Supreme Court, analysing Central excise legislation, held as under:

The scheme of the said Act read with the relevant rules framed under the Act particularly Rule 9A of the said rules, reveals that the taxable event is the fact of manufacture or production of an excisable article, the payment of duty is related to the date of removal of such article from the factory

The taxable event in GST remains supply of goods/services but the liability is fastened on the recipient. Therefore, the point of view should always be seen from the levy and not the liability. So seen, if the supply is not at all a supply in the course or furtherance of business and is not included in other schedules, the question of employing the reverse charge under Section 9(4) should never arise. For example, when a lady surrenders her gold ornaments to a jewellery shop, the question of attracting GST under Section 9(4) does not and simply cannot arise, as the supply is not in the course or furtherance of business for her.

Difference between language of Section 9(4) and 9(5)

Tax shift mechanism is quite common in the world and is done for administrative convenience especially on imports where the authorities cannot go after the supplier of services who will not

be amenable to their jurisdictions. But we must carefully look at the mechanism under Section 9(5) relevant portions of which are set out once over with highlights.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the **provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax** in relation to the supply of such services:

The highlighted portions clearly show that the e-commerce operator is the person who is deemed to be the supplier and all the provisions of the Act would apply as if **he is the supplier liable for paying the tax. In Section 9(4), the recipient is not termed as a supplier but is only made liable for tax. In this sub section, however, the e-commerce operator is made the supplier and further made liable to tax.**

This is the reason why in the reverse charge mechanism under Section 9(5), the charge itself is shifted to the e-commerce operators and therefore, for example, the drivers who supply services to Ola are neither chargeable nor liable but Ola becomes chargeable and liable.

Implications of our discussions

The above discussion would clearly show that under Section 9(4), the charge remains on the supplier, that is the unregistered person, but the liability is shifted to the registered person. Therefore, it follows that:

- a. If the charge itself is not there, the question of liability does not arise. See the decision in Vazir Sultan Tobacco which was set out earlier.
- b. If the person who supplies is not chargeable at all, the question of collecting the liability under reverse charge simply cannot arise under Section 9(4). This is why the government itself has endorsed the view of the author taken at several seminars that in the case of the lady surrendering gold to the jewelers, the question of reverse charge does not apply as there is no supply in the course or furtherance of business.
- c. We come to the most important part of the discussion and that is the position of those who are not required to be registered at all. If we carefully look at Section 22, 23 and 24, a threshold limit has been prescribed. Those whose supplies are below 20 lakhs are no doubt suppliers of goods/services, but they are not taxable persons as they are not required to be registered. If they are not taxable persons, they cannot pay tax as Section 9(1) only requires the taxable persons to pay taxes. Since, they are not taxable persons, they do not become liable to tax and therefore need not be registered under Sec.23 which uses the terminology “shall”. It is clearly a case where those below threshold limits of Rs.20 lakhs are neither taxable persons nor are they liable to tax.
- d. Therefore, the Act itself states that those below threshold limits are not taxable persons and not liable to tax, the question of shifting the liability does not arise as such persons are neither chargeable nor liable. **Levy in the case of GST is inextricably linked with the concept of taxable person where the requirement of law is registration.** If these persons

were chargeable, then liability could be shifted but, in the author's humble opinion, if the person is not a taxable person, levy and payment are not there. The scheme of the GST Act is such that a taxable person is defined as one requiring registration even if he supplies goods or services in the course or furtherance of business and once he does not cross Rs.20 lakhs threshold limits, the question of the levy applying does not arise due to the phraseology of Section 9(1) which says that the tax shall be paid by the taxable person.

- e. If the tax cannot be paid by the taxable person because he is not in the threshold and does not require registration, then the question of its collection from registered persons would amount to doing something indirectly which cannot be done directly, which would clearly go against the dictates of the law itself, leaving Section 9(4) open to serious challenge.

Some objections

Some would say that the government has issued a notification exempting an amount not exceeding Rs.5000 in the aggregate in a day and therefore their intention is to tax all supplies from unregistered persons. But we would like to remind that a notification cannot be used to construe an act and therefore, this objection may not hold good in a court of law. Some would say that the plain reading shows that if you take goods from an unregistered person, you as a registered person should pay the tax. Even plain words will have to be read in the context of the setting in which it appears, especially, as we have pointed out the differences between Section 9(4) and Section 9(5). The third objection would be that after all credit is available, why make such an analysis. It must be noted that while credit can be availed 100%, its utilization may be restricted if the recipient has exempted supplies or non business supplies. Therefore, this could be a significant cost to the recipient.

Conclusion

Therefore, what we conclude from the above analysis is this:

- a. Section 9(4) of the CGST Act, 2017 only shifts the liability to pay taxes to the recipient while the charge remains with the supplier quite unlike the provisions of Section 9(5) which shifts both the charge and the liability;**
- b. Supply has to be therefore seen from the point of view of the supplier and not receiver under Section 9(4).**
- c. Those who supply, like house ladies, which are not in the course or furtherance of business cannot be said to be suppliers and therefore the reverse charge mechanism under Section 9(4) cannot apply to the registered persons;**
- d. Those under the threshold limits, for example, CA's billing below Rs.20 lakhs and having no other supplies, are neither chargeable nor liable and therefore, the registered person need not pay taxes under Section 9(4).**
- e. Credit availability may not cushion the impact fully, especially, where the recipient has exempted and non-business supplies where the credit taken has to be reversed.**

The author is well aware of different views on this subject matter but in the development of law, this could well be the starting point.

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