

Tax Deduction at Source (TDS) under GST

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Tax Deduction at Source (TDS), a long-standing provision under Income tax is now the newest facet of GST law.

Notification No. 50/ 2018-Central Tax, dated 13th September, 2018 is issued to bring into force provisions of TDS under GST with effect from October 01, 2018.

So, w.e.f. 1st October, 2018, notified class of assesses have to undertake TDS deduction under GST, file GST-TDS returns, issue GST-TDS certificates and take-up all other entailing compliances.

As the provisions are novel, we have put forth this real quick alert, to update you on the key issues as this would require host of things to be undertaken by organisations such as –

- Registration as a Tax Deductor
- Customisations in the ERP systems
- Trainings to concerned personnel
- Communication to the suppliers (by deductors)/ recipients (by deductees)

Applicability of provisions - Who shall be liable to deduct?

Under section 51 of the CGST Act, 2017 read with Notification No. 50/ 2018-Central Tax, dated 13th September, 2018 the following are the categories of the persons who are mandated to undertake TDS deduction:

- a) a department or establishment of the Central Government or State Government;
or
- b) local authority; or
- c) Governmental agencies; or
- d) such persons or category of persons as may be notified by the Government on the recommendations of the Council.

The Central Government vide Notification No. 33/ 2017-Central Tax, dated 15th September, 2017 notified the persons under clause (d) of section 51(1) namely: -

- (i) an authority or a board or any other body, -
 - (a) set up by an Act of Parliament or a State Legislature; or
 - (b) established by any Government,
with 51% or more participation by way of equity or control, to carry out any function;
- (ii) society established by the Central Government or the State Government or a Local Authority under the Societies Registration Act, 1860 (21 of 1860);
- (iii) public sector undertakings;

The aforementioned category of persons are required to undertake TDS deduction as per section 51 of the CGST Act, 2017 and similar provisions contained in the IGST Act from 1st October, 2018.

In terms of the categories of persons who are mandated as per the provisions, clause (a) is self-explanatory, clause (b) - Local authority has been defined under section 2(69) of the CGST Act, 2017, clause (c) - Governmental agencies has not been defined under the Act or any other notifications. However, the following link provides indicative list of agencies [<https://asti.cgiar.org/india/agencies>], clause (d (i)) is self-explanatory. However, it is important to note that there is difference between Government authority and Government entity defined in the Central Tax (Rate) notifications for services as those clauses require minimum 90% equity shareholding or control and it

is necessary for them to carry out functions entrusted under Article 243G or 243W of Constitution, clause - (d(ii)) - self-explanatory and clause (d(iii)) - public sector undertakings refer to undertakings where the direct shareholding by the Government is at least 51% or more.

It is to be noted that some of the experts relying on Shapoorji Paloonji & Company (P) Ltd. v. CCCEX. & ST, Patna [2016 (42) S.T.R. 681 (Pat.)] is of the view that the condition of "51% or more participation by way of equity or control, to carry out any function" is related to sub-clause (b) alone. The clause (a) is followed by ";" and the word "or". Therefore, each of the sub-clause is an independent provision.

Applicable rate of GST-TDS deduction

TDS has to be deducted at the following rates:

<i>Nature of Supply</i>	<i>Rate of TDS</i>
<i>Intra-State supply</i>	(1% CGST + 1% SGST)
<i>Inter-State supply</i>	2% (IGST)

Threshold limit for TDS deduction

TDS is required to be deducted by the aforementioned persons at the aforementioned rates if the value of a contract exceeds Rs. 2,50,000/-.

A common question that now arises is whether for the purpose of TDS deduction, value of the whole contract is to be considered or individual invoices even if each such invoice is raised for < Rs. 2,50,000/-.

Section 51 of the Act uses the *verbatim* "a contract". Meaning, the value of the whole contract for the supply of goods or services has to be considered.

Thus, once the value of the underlying contract exceeds Rs. 2,50,000/-, TDS is required to be deducted with respect to payment for each invoice even if the value of the stand-alone invoice is < Rs. 2,50,000/-.

Value for the purpose of determining the trigger of TDS deduction shall be value of supplies excluding CGST/ SGST/ UTGST/ IGST and cess.

In many cases, it is a business practise with Government related entities that whole consideration is not immediately disbursed to the vendors. A portion of the consideration is withheld in the form of "Retention Money".

A common question that arises again is whether GST-TDS has to be deducted on the value including such retention money given the fact that same is not immediately paid.

GST-TDS has to be deducted on the value including any retention monies withheld as even though the payment to the vendor is not made immediately, the liability towards the same is credited to the supplier in books of accounts of the deductor.

Various scenarios are better explained illustratively as under:-

Illustration	Implication
Contract Value: Rs. 2,20,000/- (including GST of Rs. 20,000/-)	No TDS is required to be deducted as the value of contract is less than Rs. 2,50,000/-
Contract value: Rs. 2,95,000/- (including GST of Rs. 45,000/-)	No TDS is required to be deducted as the value of contract is equal to Rs.2,50,000/- (Rs. 2,95,000 - Rs. 45,000/-)
Contract value: Rs. 3,50,000/- (including GST of Rs. 60,000/-)	TDS is required to be deducted as the value of contract exceeds Rs. 2,50,000/- (Rs. 3,50,000 - Rs. 60,000/-)
Contract Value: Rs.3,54,000/- (including GST of Rs. 54,000/-) but individual Bill value is Rs. 1,50,000/- (including GST of Rs. 27,000/-)	TDS is required to be deducted as the value of whole contract exceeds Rs. 2,50,000/- (Rs. 3,54,000 - Rs. 54,000/-) even though the value of individual bills is less than Rs. 2,50,000/-

TDS deducted is part of Cash Ledger or Credit Ledger of deductee?

In terms of section 51(5) of the CGST Act, the tax deducted by the deductor would be claimed by the deductee as a credit in their electronic cash ledger.

However, the rules and forms notified for returns seem to have a contrary mechanism to route the TDS credit through Part C of FORM GSTR-2A of the deductee.

Rationally, otherwise also, it should flow as part of cash ledger. If such TDS flows as part of credit ledger then the deductee would have no option but to accumulate such credits and not go for refund as refund is allowable only in two instances i.e. zero-rated supplies and inverted duty structure.

TDS to be deducted on accrual or cash basis

TDS is to be deducted by all of the aforementioned persons when payment is:

- (a) Made to the supplier; or
- (b) Credited to the supplier.

Per the reading of section 51, it implies that GST-TDS (similar to TDS deduction under Income Tax Act, 1961) has to be deducted at the time of either making actual payment to the supplier or even if the liability to the supplier is recognised in books of accounts by way of a credit to the account of the supplier.

Though the provisions of GST do not explicitly use the *verbatim* “whichever is earlier” the intent of the law here is to impose TDS deduction at the occurrence of any one of the stated events.

Therefore, if any advance payments are made to vendors on the basis of proforma invoices without having accrued any liability in books, even then the liability to make GST-TDS deduction is triggered.

Transitional provisions

TDS is to be deducted as discussed on payment or accrual basis. Merely by the reason of making payment to the vendors after 1st October, 2018 in respect of liabilities

created prior to 1st October, 2018, provisions of GST- TDS cannot be said to have been attracted.

In any case, the levy of TDS cannot be retrospective and has to be prospective only. Thus, with respect to liabilities already credited to the account of the supplier prior to 1st October, 2018 and payments made after 1st October, 2018 there shall arise no requirement to make a GST-TDS deduction.

However, what appears that the TDS provisions shall also apply in respect of those liabilities which are freshly for the first time created on or after 1st October, 2018 irrespective of the fact that the supply was made prior or invoice was issued prior to 1st October, 2018.

Illustrations:

- 1) A PSU entered into a contract worth Rs. 20 lakhs with a supplier ABC prior to 1st October, 2018 and made payment of Rs. 5 lakhs in respect of invoice dated 15th October, 2018. In this case, TDS is to be deducted since payment is made after effective date.
- 2) If in the above illustration, PSU had made payment of Rs. 5 lakhs prior to 1st October, 2018 and made the payment of balance amount of Rs. 15 lakhs on 15th October, 2018, then in this case, TDS will be deducted only in respect of Rs.15 lakhs, provided the invoice for Rs. 15 lakhs is raised after 1st October, 2018.

Applicability or non-applicability of TDS levy

TDS is required to be deducted on both inter-State as well as intra-State levies.

However, TDS is not to be deducted in instances where the location of supplier (deductee) and the place of supply are in a State which is different from the State of GST registration of the recipient (deductor).

The following scenarios explain illustratively:

- a. **Location of supplier, place of supply and location of recipient are in the same State.** It would be intra-State supply and TDS (CGST + SGST) shall be deducted. It would be possible for the supplier (i.e., the deductee) to take credit of TDS in his electronic cash ledger.

- b. **Location of supplier and location of recipient are in the same State but the Place of supply is in different State.** In such case, IGST would be levied. TDS to be deducted would be TDS (Integrated tax) and it would be possible for the supplier to take credit of TDS in his electronic cash ledger.

- c. **Location of supplier as well as place of supply is in same State and the recipient is registered in a different State.** The supply would be intra-State supply and CGST + SGST would be levied. In such case, transfer of TDS (CGST + SGST) of deductor State) to the cash ledger of the deductee (CGST + SGST of another State) would be difficult and therefore, the TDS provisions would not apply.

Thus, when both the location of supplier as well as the place of supply is different from that of the recipient registration, no TDS deduction can be made.

These situations can be understood by way of following table:

Particulars	Situation (a)	Situation(b)	Situation(c)
LOS (Supplier/ Deductee)	Telangana	Mumbai	Mumbai
POS	Telangana	Telangana	Mumbai
LOR (Recipient/ deductor)	Telangana	Telangana	Telangana

Tax charged	(CGST + SGST) of Telangana	(IGST) with Place of supply as Telangana	(CGST + SGST) Maharashtra
TDS applicability	Yes	Yes	No GST TDS to be deducted

TDS and taxability of supplies

TDS is to be deducted on taxable supplies of goods or services or both.

TDS shall not be liable to be deducted if the underlying supply is exempt or non-taxable (i.e.) supply that is not leviable to GST.

TDS deduction in case of unregistered, whose supplies are taxable under RCM and composition scheme suppliers

Section 51 of the CGST Act, 2017 mandates that the notified persons shall deduct TDS from amounts paid or credited to the supplier of taxable goods or services if the contract value exceeds Rs. 2,50,000/-.

On making perusal of section 51 and section 2(105) wherein the term "Supplier" is defined, it may be inferred that the word "supplier" encompasses all persons who are supplying any goods or services whether registered or not. This proposition seems to hold good even in case of supplier whose supplies are liable to tax under reverse charge mechanism. However, the study material on TDS released by NACIN contains Para 4 titled as "When tax deduction is not required to be made under GST:" and the said Para *inter-alia* contradict the situation while stating that the tax deduction is not required in the following situation-

(k) Where the tax is to be paid on reverse charge by the recipient;

(l) Where the payment is made to an unregistered supplier.

In case of vendors registered under the composition scheme, yet again the law is unclear that as to the applicability of TDS provisions. Under the composition levy, a supplier would not be charging any GST from the recipient of supplies. A manufacturer or a trader of composition scheme would be required to pay GST at the rate of 1% on the supply whereas imposing TDS levy on the said supply would outrightly deduct 2% of tax out of the consideration receivable by him which appears to be an outright anomaly in the law.

Registration requirements under GST

As per section 24(vi) of the CGST Act, 2017 read with rule 12 of the CGST Rules, 2017, every person who is required to deduct tax at source under section 51 is required to mandatorily obtain a registration whether already registered or not.

This gives us the following scenarios:

Particulars	Decision
Not registered since aggregate turnover is < Rs. 20 lakhs but required to deduct TDS under section 51	-Mandatory registration as a "Tax Deductor" -No requirement to take a regular GST registration.
Already registered under GST and having a valid GSTIN	Required to take a separate GST registration again as a "Tax Deductor" even if already having a valid GSTIN.

- GST registration as a tax deductor has to be applied in FORM GST REG-07.
- Certificate for registration shall be granted in FORM GST REG-06.
- The option to avail registration as a "Tax Deductor" has to be selected in the home page of the GST portal prior to generating the TRN only.
- GST registration as tax deductor shall be available on the basis of PAN or TAN of the taxpayer.

An important premise to be noted here is that this registration as a tax deductor would be over and above the regular GST registration already obtained by the entity. Regular compliances such as those filing monthly FORMS GSTR-3B & GSTR-01 under the main registration shall continue *status quo*.

Returns to be filed by a TDS deductor

Every tax deductor is required to file return in FORM GSTR-07 by the 10th of the succeeding month in which such tax deduction is made.

For Ex: If TDS is withheld with respect to a payment or a credit to the supplier on 15th October, 2018, such TDS amount has to be deposited to the Government by filing FORM GSTR-7 before 10th November, 2018.

Circular No. 65/ 39/ 2018-DOR, dated September 14, 2018 prescribe the guidelines for deduction and deposit of TDS by the DDO's.

Post depositing the TDS to Government by filing FORM GSTR-07 on or before 10th of every month, deductor is required to issue a TDS certificate in FORM GSTR-7A giving details of the GSTIN of the supplier (deductee), invoice details, value of supply made and tax deducted thereon within five days of date of remittance of TDS to the Government.

The amount of TDS deducted shall appear as a credit in the electronic cash ledger of the supplier (deductee) and would be available to him as cash equivalent at the time of filing his monthly FORM GSTR-3B for payment of tax.

References:

- (i) Section 24 & Section 51 of the CGST Act, 2017
- (ii) Section 20 of the IGST Act, 2017
- (iii) Rule 66 of CGST Rules, 2017
- (iv) FORM GSTR-7 & FORM GSTR-7A
- (v) Notification No. 33/ 2017-Central Tax, dated 15th September, 2017

- (vi) Notification No. 50/ 2018-Central Tax, dated 13th September, 2018
- (vii) Circular No. 65/ 39/ 2018-DOR, dated 14th September, 2018 amended vide Circular No. 67/ 41/ 2018-DOR, dated 28th September, 2018

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XX

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- Indirect Taxes Committee