

GST—Money and Securities



GST law provides for some exclusions from GST in several ways – excluding from levy, listing in schedule III and issuing specific exemption – but excluding from the definition itself is spectacular. This article discusses the impact of such a spectacular exclusion from the definition in case of ‘money & securities’ and analyses its impact. While the word ‘money’ is defined under the GST Laws, it is well understood and accepted that “cash” is narrower than “money”. While money, in business parlance, is understood as an exchange for purchase of goods and / or services, it may not be goods in itself. So understood, it is possible to argue that currency notes when accepted as ‘money’ are not goods. Then, there are transactions in this age that bends and stretches our understanding of ‘share’ representing a fractional ownership of an enterprise. And the underlying value of the enterprise has been offered as incentives to employees through an ‘option plan’ to derive the benefits of the value of the enterprise that they help create. Transactions ‘associated’ with securities just like money are liable to tax, though securities themselves are free from the incidence. And then there are the look-alikes that become a talking point and here’s what the authors have to say.



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Services means ‘anything’ and anything includes everything and leaves nothing! It is for this reason – that it includes everything – that there is a compelling need to enlist with the words ‘.... other than’ in the definition itself. So, where do these articles go, if they are excluded from both definitions. And what is its effect on proportionate credit reversals. Money and Securities comprise a significant part of ‘other than,’ which needs careful

consideration because any business is riddled with issues arising from a spectacular definition that lie beneath the surface. And if you can think of it as an ‘ice berg’, then there’s way more ice below the surface.

Statutory Definition

Just like ‘supply’ which was expected to be all encompassing, and is now being accepted to exclude some transactions, the spectacular definition of ‘services’ has its own exclusions.

Admittedly due to specificity of the definition, services is not a verb, it will more often come to the rescue for the purpose of levy of GST every time a transaction evades the definition of the word “goods”.

The path to finding out whether services are involved, requires us to inquire into whether the object (in a given case) is goods or not. And if it’s not, then it’s clearly a service.

Now, to take a quick look at the definition itself:

- 2(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;
- 2(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.

Discussion

Having seen the definitions, now, for some back-story we need to get into what new implications do ‘money’ and ‘securities’ have on our understanding.

Money

Nothing short of spectacular, this definition, so as to include foreign currency, Pre-Paid Instruments or ‘any other instrument’. A purposive-test is provided for future application while deciding whether something is ‘money’ or not:

Object		Purpose
Indian legal tender *	Foreign currency **	Used as consideration to: <ul style="list-style-type: none"> ➤ settle an obligation or ➤ exchange with Indian legal tender of different denomination (not held for numismatic value)
Cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognized by RBI #		
* <i>currency recognized by law – RBI Act, 1934 and includes currency notes and coins. Legal tender issued records liability of the Central Government and a guarantee to its holder to secure value-in-exchange</i>		
** <i>legal tender of other countries recognized by India. Does not include securities denominated in foreign currency</i>		
# <i>stored value instrument known as Pre-Paid Instrument (PPI) issued by a licensee under Payment and Settlement Systems Act, 2007</i>		

For the sole reason that RBI has approved, money will include ‘stored value’ cards and wallets.

Vouchers

Here’s another elaborate definition that stops short of trespassing into the domain of money but still recognized as ‘instrument with an obligation’* and that’s what makes a voucher. It’s not a coupon where the ‘issuer’ is its ‘redeemer’. And yet not the same as a stored-value instrument but it’s the value-to-use that differentiates voucher from pre-paid instruments. Voucher is taxed either as goods or as services, depending on the underlying supply which it’s used to redeem.

* s.2(118) of Central Goods and Services Tax Act, 2017

Cash-back

Quite literally, cash is ‘credited’ to a customer’s

account statement, implying a supply of 'some' services (reason, no goods move to Payer from Payee). As to 'why' the customer was credited this cash may still need to be answered but admittedly it's an inward supply to the Payer. Neither is adequacy of consideration nor is *a priori* intent to contract, necessary to bring this supply into reckoning.

Loyalty Points

Just so that they seem like cash-back, cash-like 'points' are credited into an account-like repository, but not quite the same. Here, future purchases are discounted by a predetermined amount. 'Attraction to return' and make the next purchase (and redeem the incentive) is the purpose of its existence. Given the transient nature – use-it-or-lose-it – of these credits, they fall short of being regarded as consideration under the extended definition in 2(31)(b).

But, when intermediaries get involved to release the Issuer-Redeemer of the obligation to deliver on the promises made or expectations set, these points transform into a voucher and is taxed either as goods or as services, depending on the underlying supply which it's used to redeem.

Actionable Claim

Although representing a 'right', actionable claims are included in the definition of goods in CGST Act quite contrary to Sale of Goods Act* which specifically excludes 'actionable claims'. This clearly shows the purposive attempt in crafting these two definitions – goods and services.

Lawful interest in the benefits from movable property, is a good view of actionable claim. If possession exists, it's not actionable claim but 'ownership' complete. Decree is not actionable claim because any further action to be taken to receive decretal amount is recovery not claim.

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Chose-in-action is property and aside from the recognition granted by law, it has no existence of its own. Getting possession of each claim determines which of those are actionable claims. Assignment of debts is actionable claim. Likewise, assignment of benefits of contract (without its obligations) is not substitution or sub-contracting but an actionable claim.

Debt is property and actionable when 'due' and so, an actionable claim. Also, arrear of rent is an actionable claim but not the reversionary right of repossession.

Transfer of rights of a partner in his capital balance, right to being named loss-Payee in an insurance policy, share in joint-property, rights to registered brand name, fixed deposit in banks etc., are some examples[#].

Stocks, shares, debentures and mercantile title documents such as LR, RR, AWB, BL and warehouse-keeper's warrant are actionable but expressly excluded by s.137 of TP Act, 1882. And lottery is goods, not actionable claim, said Hon'ble SC.

* s.2(7) of Sale of Goods Act, 1930

[#] s.130 of Transfer of Property Act, 1882

Cryptocurrency

RBI says cryptocurrency is not legal tender. No approval is granted by RBI to accept it as pre-paid instrument. Is it an instrument with obligation to accept as consideration, to be called voucher? Enforceability in a Court of Law necessary to be regarded as an 'obligation'. It's a matter of contract, that the parties admit to cryptocurrency being valuable exchange. A Court would accord its permission to enforce a Payee to accept consideration in the form of cryptocurrency if so agreed in the contract. But, question is not whether cryptocurrency is a voucher because voucher is not an object of supply, it only affects time of supply.

When a willing supplier accepts cryptocurrency as consideration for some supply, the part relating to taxability of the supply (in that supplier's hands) is understood. But, is there a supply 'of' cryptocurrency itself by this recipient when the supplier accepts it in an 'exchange' transaction.



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Since, it's not legal tender or 'other' instrument approved by RBI, it is not excludible as money. And when it's not money but accepted as consideration in an exchange, it becomes an object of supply in itself. An exchange with 'something' also attracts tax as even something is includible in anything and service means anything. Unless cryptocurrency is actionable claim, it would very much be taxable as a service.

But, is cryptocurrency an actionable claim? Actionable claim being a lawful interest in the benefits from movable property – does cryptocurrency represent underlying 'real property'? If so, is it property 'fit to be transferred'?* Enforceability presupposes legitimacy and unless (or until) declared illegal, cryptocurrency may well rely on the exclusion in schedule III. Being both 'real' and 'property', cryptocurrency seems to be a 'claim' to lawful interests that's 'actionable' under a contract, albeit, amongst a (class of) private parties. It is possible that the Government could choose to levy tax on such transactions in which case the outcome of the litigation cannot be predicted at this stage. Readers may form their own defence mechanism to defend their cases.

*s.6 of Transfer of Property Act, 1882

Money-back Policy

Payment of premium towards a money-back or endowment policy is not supply. But, that portion of risk premium embedded in the annual payment is liable to GST if it is adjusted, extracted and appropriated by insurer. If the insurer reinsures risk of premature termination, then risk premium is supply between insurer and reinsurer (but not with policyholder).

Out of premium paid, the amount 'held as' invested and accretions (by any name called) are free from incidence of GST.

Prize Money

Games would involve chance or skill or both in securing an outcome. But, there's no reason to be gripped with fear by equating 'games of chance' with 'sports with uncertainty'. The dependence on skill differentiates the two. Though one indulges

in gambling, indeed skillfully, exercise of skill is, in optimizing the chance, that's really at work.

Games that depend on 'chance' is gambling and taxable as such. And when it's skill, it's still taxable but under a different entry. Whether gambling is legal or not is interesting but relevant only to determine specific sub-group in HSN 9996. Now, there's chance at one end and skill at the other, in between the two, lies sporting events that's high on recreation. No escape unless it's granted 'recognition'.

Entry to a venue and participation in the game organized at such venue, are two different transactions that are taxed independently.*

* Circular No. 27/01/2018-GST dated 4 Jan, 2018

* Sl.no.68, 80 and 81 of 12/2017-CT(R) r/w para 2(zw)

Insurance Claim

Supply having already suffered tax, is not disturbed either by accident in-transit or subsequent settlement by insurer. Realization of money from insurer does not amount to collection of receivables but compensation arising from assurance in insurance. Output tax having already been paid on the supply, stays.

ESOP et al

While 'securities' are excluded, clearly, equity-based incentives beg an explanation whether they too are 'securities' being in the nature of 'rights or

While 'securities' are excluded, clearly, equity-based incentives beg an explanation whether they too are 'securities' being in the nature of 'rights or interests' in securities*. The underlying transaction (expense) that occasions the grant of this – equity-based incentives – must answer for itself, whether taxable supply or secured by schedule III.

interests' in securities*. The underlying transaction (expense) that occasions the grant of this – equity-based incentives – must answer for itself, whether taxable supply or secured by schedule III. With expense accounted, the actual gains or inherent gains (due to discount-on-offer) from investment activity remains beyond reach of GST. And so, do all variants including SAR and Phantom plans.

Plans offered by Overseas Affiliate (from its equity) to employees of Indian Affiliate, avail no special or different treatment in GST. Underlying relationship guides this treatment.

Futures, derivatives and dividend warrants all come within the sweep of this well-thought definition that is referenced in the GST law.

Similarly, innovative transactions such as dividend stripping, bonus stripping, buy-back of share for extinguishment are excluded from levy but included for reversal of common credits.

** s.2(h)(iii) of Securities Contracts (Regulation) Act, 1956*

Sweat Equity

The settlement of a liability to pay may be in cash or equity. The two transactions must be decoupled and examined for applicability of GST. The underlying contract – employment or consultancy or supply of goods – will stand scrutiny for the incidence of tax. And then the settlement of dues (towards such supply) by issuing securities enjoys the exclusion from GST due to these spectacular definitions dealt with in this article.

Allotment of Shares

While ‘everything’ may be ‘in furtherance’ of business, not everything is supply. Business requires to reach a certain point since formation of the entity to be recognized as such. Allotment of shares to form an entity may suffer from the incidents of being pre-mature for availability of credit, though it’s a step towards bringing the business into existence.

Furtherance of ‘business’ is the test for determination of eligibility to input tax credit. And if business is identified as the activity leading to ‘outward supply’ activities involving allotment of shares, public offering of shares, fund raising initiatives lie at the periphery of ‘leading’ to outward supply. Monitoring end-use of each inward supply is necessary to satisfy the eligibility to input tax credit.

Deemed income

When ‘shortfall’ in transacted value over fair value of securities is treated as income*, would this fiction imply a supply. Though Income-tax law recognizes a benefit that justifies its incidence, it must form ‘consideration for supply’ to attract incidence of GST.

** s.56(2)(x) of Income-tax Act, 1961*

Creation of ‘duty credit scrips’

Transfer of duty credit scrips has been stated to be taxable*. But, consider the nature of the underlying ‘real property’ at the time of their ‘grant’. The property and its value-in-exchange are both real and exist right at the time of its grant. If ‘transfer’ is taxable, there seems to be some explanation required to excuse incidence on ‘grant’, by Government and tax applies on reverse charge basis.

And if duty credit scrips are admittedly goods, to think of Development Rights’ Certificates (DRC) any differently, is really a wonder. When ‘all documents of title’# come within HSN 4907, does the express mention of duty credit scrips limited to allow exemption or does this express mention implicitly exclude DRCs? DRCs can be the object of a transfer but the real property in a DRC is the underlying immovable property. This immovable property is not land per se but ‘right to develop’ (additional area in some other land). If it’s to tax ‘development rights’, that’s dealt with in 4/2018-CTR. But, if it’s to tax ‘transfer of DRCs’ itself, one must answer – are DRCs ‘goods’ because they are ‘documents of title’ or ‘actionable claims’? And the answer lies in another question – how does GST apply to grant of DRC?



Documents of title – granted or transferred – are goods and hence, by definition, will not be services. And it seems any attempt to impose tax on them as ‘anything other than goods’ stands settled against revenue.

* #122A of 2/2017-CT(R)

Circular No. 46/20/2018-GST dated 6 Jun, 2018

Denomination ‘exchange’ and fee or discount

Translation of currency is not excluded from tax and so is change in ‘denomination’ of the same currency. The consideration for entertaining this supply would be taxed. As much as ‘cash trucks’ are held to be vehicle for transport of ‘goods’, currency brought for translation or denomination exchange will also be ‘goods’ and the consideration exposed to tax.

Depending on how the ‘fee’ is payable, the exchange can be equal or more or less than face value tendered for changing denomination. Consideration may take the form of fee or discount and the incidence arises in either case.

When the underlying commodity is currency, the incidence gets excluded as ‘money’ and exclusion continues as ‘securities’ when the underlying commodity is metals, spices, etc.

Delay Charges

While interest is exempted from tax, but only when it’s towards ‘loans, advances or deposits’*. But, delay charges imposed by a supplier are expressly regarded as ‘additional amount towards original supply’.

Delay charges are expected to receive every ounce of the treatment of the levy of GST – nature and rate – as applicable to the original supply#.

Securitization of receivables is another transaction where the levy makes way as it is in the nature of ‘securities’@.

* Sl.no.27 of 12/2017-CT(R)

12(6) and 13(6) of CGST Act, 2017

@ 2(zg) of SARFESI Act, 2002

Gold (Metal) Loan Scheme

By its very nature does not involve a promise to

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return the same gold article unlike a mortgage. It’s a promise to return the accepted weight-of-gold immune from the spread in its price. Clearly, there’s an inward supply from the customer and an outward supply with intricacies in valuation. And admittedly the exemption available to ‘interest on loan’ is not available and Gold (Metal) Loan scheme as approved by RBI*.

* #59 and 60 of BFSI-FAQs of CBIC

Chit Fund

Kerala HC has led the charge on elucidating the nature and role of various parties involved in operating a Chittyscheme. Activities of the Foreman are decidedly taxable in this savings scheme that plays a stellar role in micro finance to support trade and small savings needs of India. Principal amount (contributed or recovered) remains free from tax incidence though the ‘charges’ are taxable.

Conclusion

Money and Securities ought not to be glossed over as if they lie beyond the reach of this law. To avail this exclusion, they must fall within a very narrow compass and fit the statutory definitions that have motivated this article. And this exclusion is only at the peril of losing proportionate amount of common credits by another definition given to ‘exempt supplies’ by an explanation at the end of Chapter V of CGST Rules. With a new and spectacularly new definition available, services is (not are) nothing like we’ve ever known and because it ‘means’ anything, it includes everything and leaves nothing, almost nothing! It is made clear that the paper writers have attempted to bring out the underlying issues and a reader may have completely different views. This paper is just to incite the thoughts of a reader on the wide ranging issues that may arise in respect of ‘money & securities’ in a GST regime. ■