

Goods and Services Tax - An Analysis of Some Important Amendments



When mountains need to be moved to bring about amendments in Central and State legislations, the number of amendments made conveys much by the amendments themselves and much more by the provisions that were left unamended. Central laws – CGST Act, IGST Act, UTGST Act and Compensation Act – were amended, assented by President and notified on 30th August 2018. All States and two UTs also followed with their amendments to meet the date set for its roll out – 1st February 2019. With the Legislative work having been done, implementation of these amendments requires some analysis as to the nature and effect of each of these amendments. And where possible, to also touch upon such of those amendments that are conspicuous by their absence, in the exercise carried out by the Legislature. The Government of the day leaves behind a law, that has affected our Nation permanently, to set it up on course and to become strong internally and transparent internationally. GST has become all that it had promised to be and lent itself to fine adjustments to accomplish the goal that has left the world in awe!

Substantive vested rights cannot be taken away even by an Amending Act. Drafting tools like 'proviso' and 'explanation' are often used to bring about an amendment. A *proviso* carves out an

exception to advance the object and suppress the mischief sought to be overcome by the extant law. An *explanation* aids in more accurately expressing the legislative intent that always was. As important as it is to understand the 'nature and scope' of amending provisions; Of equal importance is the 'effect' of these amendments. It is common understanding that when amendments are clarificatory, they will be retrospective, but when they are substantive, they will be prospective. Date of notification brings the amended law into the statute book but merely because amended



CA. A Jatin Christopher
and CA. S Venkatramani

The authors are members of the Institute. They can be reached at jatin.christopher@gmail.com

law takes facts, that occurred previously into consideration, it does not make it an *ex post facto* law and come under challenge. Hon'ble Supreme Court in *Sundaram Pillai v. Pattabiraman* 1985 AIR 582 SC laid down some guiding principles of the effects that these drafting tools – proviso and explanation – can have on the construction of the amended law by the amendments so made. While surveying the key amendments made, effect of these amendments must not be lost sight of and one may assume they are all prospective. So, let's plough through some key amendments that were made and reflect on those that weren't made.

Business Covers 'Activities', Not Just 'Services'

Section 2(17) is amended in case of race clubs in clause (h), to substitute the word 'services' with 'activities' (by way of totalizator) and identify 'transacting persons' (licensed book maker). It is key to identify the deficiency in earlier definition that demanded this amendment. And when it is extrapolated, the question that comes up for consideration is whether 2(17) enlists activities that will be admitted as 'business' in GST law or does it pick-out transactions in an enterprise to identify it as 'business'.

Section 2(17) is amended in case of race clubs in clause (h), to substitute the word 'services' with 'activities' (by way of totalizator) and identify 'transacting persons' (licensed book maker). It is key to identify the deficiency in earlier definition that demanded this amendment.

With this amendment, the gross transaction value of a race club is attempted to be exposed to GST. One may have guessed that this was coming by virtue of insertion of Rule 31A vide notification no. 3/2018-CT(R) dated 23 January 2018 and insertion of entry 229 to IV Schedule taxable at 14% CGST (plus SGST at 14%) vide notification 6/2018-CT(R) dated 25 January 2018 which reads "Actionable claim in the form of chance to win in betting, gambling, or horse racing in race club".

Business Vertical Gone

The subtilty of differentiating activities within an enterprise into homogeneous subgroups and to allow separate registration has admittedly failed and Section 2(18) has been omitted. Now, separate

registration (within the same State) is permissible when activities are carried out in two different places even if they are homogeneous.

Corresponding amendment is also made in section 25(2) along with insertion of rule 41A to permit 'transfer of credit' *inter se*. This rule allows *pro rata* transfer of credit when assets are now located in a separately registered place of business. It will be interesting to examine if such asset-allocation is in itself a supply (see schedule I or Section 18(6) or Section 7 read with para 4(b) of schedule II).

Schedule II Only a 'Treatment' of Supply

By deeming it to have always been so from 1st July 2017, Section 7(1A) now houses schedule II. When it was within Section 7(1)(d), schedule II could itself furnish the definition of supply. But now when it is taken out of Section 7(1), schedule II remains only a 'categorization' of what is otherwise determined to be a 'supply'. And subject it to 'treatment' as dictated by law—supply of goods or supply of services. In other words, where a transaction is not a supply, merely finding it in schedule II does not attract the incidence. Similarly, a transaction missing from schedule II, does not mean that it remains free from tax.

Schedule III Expanded

Three kinds of transactions that take place outside taxable territory and until they cross customs frontiers of India are listed and excluded from the scope of supply.

These transactions are not new, they have been going on even before the introduction of GST. The jurisprudence, that GST law does not apply to such transactions finds support in *proviso* to Section 5(1) of IGST Act which surrenders authority to tax 'goods brought into India' to Customs law.

As stated by Hon'ble SC, the enlisting of these transactions in schedule III, now, more accurately presents the same jurisprudence on taxability of transactions occurring before they 'cross over' into India.

Amendment to schedule III is not merely to effect reversal of common credits but to lay down the law that GST law enjoys no jurisdiction in respect of such transactions. Insertion of explanation to Section 17(3) only harmonizes the procedure with the substantive clarification introduced in this amendment to schedule III.

Transactions listed in schedule III are explicitly excluded from the mischief of Section 17(2). And the artificial meaning of exempt supplies for this purpose provided in Section 17(3) and in explanation after Rule 45, continues.

Inward Supplies from 'Unregistered' Persons

It was so scary when it was originally introduced that it continues to create fear even when it is replaced by a brand-new Section 9(4). Even after this amendment, there is no tax that is to be paid on inward supplies received by a registered person from unregistered persons.

'Inward Supplies from 'Unregistered' Persons' was so scary when it was originally introduced that it continues to create fear even when it is replaced by a brand-new Section 9(4). Even after this amendment, there is no tax that is to be paid on inward supplies received by a registered person from unregistered persons.'

Exemption issued vide notification 8/2017-CT(R) dated 28 June 2017 that was amended to remain in force till 30 September 2019 has been rescinded vide notification 1/2019-CT(R) dated 29 January 2019.

Notice use of the word 'specify' in this provision. Not only are 'categories' of goods or services that will attract this provision, to be specified by the Government. But also, the 'class' of registered persons who will come within the requirement of this provision need to be specified.

Authors believe that the class of registered persons who could be 'specified' here may be works contractors, composition tax payers, job-workers and their principals, e-commerce operators liable to TCS, principals-agents attracting schedule I and inter-State suppliers. So, who's remaining? And all goods and services other than a very short list could be 'specified' here in respect of these registered persons.

Composition

While the threshold of ₹ 1 crore has been revised to ₹ 1.50 crore, it is only an enabling amendment that is not yet available for registered persons to opt.

Significant amendment made in this section declares that amount payable under section 10 will be a 'in lieu of tax payable under section 9(1) of the Act'. This is significant because any doubt about composition tax payers being liable to tax under section 9(3) and 9(4) of the Act has now been completely removed.

Relief that was much awaited in respect of relaxation in the 'no other services' condition. That is, where there are incidental activities of 'supply of services' that is not more than 10 per cent of the State turnover (or ₹ 5 lacs), the same would not disqualify the registered person from opting for the composition facility.

Question that remains is whether this ₹ 5 lacs is per registration or per entity. Author's hold the view that when two objects are put up for comparison, unless expressly found otherwise, reference must be to comparables. That is, ₹ 5 lacs must apply per registration and not for the entity.

Deemed To Be Received

One of the credit conditions in Section 16(2) are that the goods or services must be 'received'. And there are occasions when the recipient and consignee (of goods) or beneficiary (of services) are not the same.

Amendment has been made by including an explanation that 'deems' that goods or services are satisfactorily received.

Deeming fiction only applies to facts and not law. Here, receipt of goods or services is a fact that operates as a condition for claim of credit. Explanation inserted deems the fact that when goods or services are delivered or provided 'on the direction' of a registered person, then such delivery or provision is 'deemed' to be received by the registered person (claiming credit).

In other words, even though the registered person (claiming credit) has NOT received the goods or services, when some other person receives the same but 'on the direction' of such registered person, the condition is 'deemed' to be satisfied.

Further, this explanation ought not to arouse doubts whether 'bill to-ship to' form of supply is now recognized in law even in respect of 'services'. Since, this explanation is mirrored in all State GST enactments, there is no question of 'power to determine' inter-State nature of supply being usurped by States. Article 269A(5) leaves this power exclusively with the Union. Therefore, the explanation inserted in Section 16(2) only deems a fact for the limited purposes of satisfying conditions to claim credit not indirectly pretend to be a 'place of supply' provision, which is impermissible.

Blocked Credits More 'Precisely' Blocked Now

Recasting clauses (a) to (b)

Amendment to Section 17(5) now more precisely blocks credits in respect of motor vehicles, their upkeep and benefits provided by an enterprise.

Once law makes it clear that credit is blocked, there arises no occasion to search for ways to unblock them. However, the extent to which credit is blocked does not follow logic or tests but by listing transactions which are wholly blocked.

With motor vehicle being qualified with words 'for transporting passengers,' credit in respect of commercial vehicles (for transport of goods) along with their cost of maintenance or upkeep will be fully available as they do not come within this restriction.

Exception 'in-built' within provision

While laying down the credits that are blocked, the provision itself contains an exception by use of words 'except when...'. For eg. where motor vehicles are used for further supply or passenger transport or driving training, the credit will not be blocked.

Exceptions 'expressly' provided

In case of supplies, in respect of which, credit is blocked are themselves involved in being resupplied – as such or as composite supply or mixed supply, the credit is not blocked and is fully available.

But this exception does not apply where the value of these inward supplies become includible in the transaction value of other taxable supplies due to requirement of Section 15(2) relating to valuation or failure to satisfy Rule 33 (Pure Agent transactions), etc.

Exception by 'proviso' after provision

Another route for blocked credits to enjoy an exception is where 'proviso' is placed after the said clause or sub-clause.

Credit on services of maintenance or upkeep of vehicles will not be blocked 'provided' these costs are incurred in respect of vehicles that are eligible for credit.

Special exception to 'such' goods or services

When various credits are blocked, an exception appears at the very end of this amendment in respect of 'such goods or services' that are obligatory. The placement of this *proviso* appears to cause some

confusion but to read it only to last sub-clause would rob the *proviso* of any real effect. The last sub-clause deals with travel benefits to employees, which is one single service and does not include any goods. But the *proviso* refers to '.....credit in respect of such goods or services....'

To save from loss of credit, it must first include 'goods' along with services. As such, reference must be to entire clause (b) and not just sub-clause (iii), is the authors' view.

Registration et al

Alteration of 'threshold' for registration

It is an enabling provision that will become operational by a notification after the States choose their 'threshold' for registration. Please note that this *proviso* to Section 22 will find a place in State GST legislations. And once the threshold is notified, the requirement to register for the Person (in all States) will be affected by the 'lowest threshold' State where the Person operates.

Separate registration for SEZ

Requirement pre and post amendment remains the same. That is, the condition that SEZ must operate under a separate registration apart from that of the non-SEZ operations (in a State) that was contained in rule 8, now appears in Section 25 itself.

Multiple registrations allowed

Registration is now permitted for every separate 'place' of business in the State. With this amendment in *proviso* to Section 25(2) and insertion of Rule 11, there is freedom for each place of business from dependence on other places of business in the State.

However, such multiple registration is independence no doubt, but not without the perils of inter-branch supplies being liable to tax. Authors caution to consider credit effect of such multiple registrations.

Suspension of registration

Cancellation of registration requires due process to inquire into the transactions and review of final return filed by registered person. Pending cancellation, amendment to Section 29 and insertion of Rule 21A, allows 'suspension' to save from requirement of recurring compliances that are effectively 'nil'.

Many-to-One Credit-Debit Note

Restriction of having to issue one credit note for every invoice was affecting industry that has been redressed

by an important amendment to Section 34. With this amendment 'many-to-one' will now be possible.

While there are several issues to be discussed in the context of credit-debit notes, authors feel compelled to caution that the 'reason' for credit-debit note will be subject to challenge. Establishing *bona fides* about the invoice issued originally is the first hurdle to cross before the next comes up with the credit-debit note relating to the invoice.

GST Returns 2.0

*Flexi-returns 'to be' enabled**

Section 39 has been amended to allow 'form', 'manner' and 'time' to be taken out of the law and placed with the realms of delegated legislation where it will be 'prescribed'.

This amendment has far reaching effects on the inapplicability of Section 50(1) until completion of matching under section 42 and so on. Authors advise care in understanding that this seemingly innocuous amendment will have far reaching consequences.

Section 39 has been amended to allow 'form', 'manner' and 'time' to be taken out of the law and placed with the realms of delegated legislation where it will be 'prescribed'. This amendment has far reaching effects on the inapplicability of Section 50(1) until completion of matching under section 42 and so on.

*Make way for Simplified Returns 2.0**

Another insertion that is significant is Section 43A that allows the new supplier-controlled credit flow system that is to take effect from April 2019 (or July 2019). There is authority to cap of 20 per cent where there are discrepancies.

This amendment clearly indicates that returns based on 'GSTR 1-2-3' system will not be implemented anytime soon. And though GSTR 3B which was a stop-gap arrangement will now continue in ver. 2.0 and key features are likely to be based on:

- Supplier-controlled reporting, that is, outward supplies will be reported by supplier and recipient (with a valid invoice on hand) will not have 'call' option to avail credit;
- All uploaded outward supplies available for Recipient to 'accept-reject-hold'. And it will be deemed-to-be-accepted if no-action is taken by Recipient;
- Accepted invoice will be 'locked' for

Recipient to bank the credit available (subject, of course, to adjustments under sections 17(2) and 17(5));

- Non-payment of tax on outward supplies will disable uploading facility (of future outward supplies) until regularized by clearing tax dues;
- Recipient not denied credit (which is locked) and recovery action initiated against supplier for unpaid dues relating to such credit already availed by Recipient.

** not included in implementation notification*

Utilisation of Credit

With the introduction of Section 49A, it appears that working capital will come under a lot of pressure for business that operate on 'import for local sale' model. An illustration may help understand the workings:

Pre-amendment:

Details	IGST	CGST	SGST
Credit balance	200	50	50
Output tax	100	100	100
<i>Utilization:</i>			
➤ IGST	(100)	(50)	(50)
➤ CGST or SGST	-	(50)	(50)
➤ Cash paid	Nil	Nil	Nil
➤ Carry forward	Nil	Nil	Nil

Post-amendment:

Details	IGST	CGST	SGST
Credit balance	200	50	50
Output tax	100	100	100
<i>Utilisation:</i>			
➤ IGST	(100)	(100)	Nil
➤ CGST or SGST	-	Nil	(50)
➤ Cash paid	Nil	Nil	(50)
➤ Carry forward	Nil	50	Nil

This amendment is expected to take effect immediately, that is, 1st February 2019 by upgrade of credit utilization table in portal.

Pre-Deposit Capped

Pre-deposit is now capped at ₹ 25 crores in case of first appeal and ₹ 50 crores in case of second appeal. This is not a matter of routine but one of strategy to avail this cap or make the pre-deposit.

As this limit in respect of CGST, there will be corresponding limit additionally in respect of SGST and in respect of IGST dues, this limit will be doubled.

The attention paid to this amendment appears to provide relief where the disputed tax is in excess of ₹ 500 crores. Authors caution that the preparedness in matters of detail only reflect on the occasions to engage in such litigations are imminent in GST.

Transition 'Wow' Provisions

Section 140 has been amended from 1st July 2017 to make it clear that cess is not eligible for transition into GST even though it was 'in the nature of' a creditable tax when it was levied.

Job Work Duration Extendable

Section 143 is amended to empower Commissioner to extend the duration of one year (for inputs) and three years (for capital goods) by additional one year and two years, respectively, a welcome measure.

IGST Amendment Act

Definition of export of services

With the relaxation of definition in Section 2(6), zero-rated benefit will be allowed to service exports where the transaction value is repatriated in Indian Rupees, where permitted by RBI. Authors caution that trade must look for this 'permission' that RBI has granted, not very liberally to all.

Inward supplies from unregistered persons

Identical to the amendment under CGST Act, Section 5(4) has also been amended. And where the inward supply has the host-State as its 'place of supply' will continue to remain untaxed even with this amendment.

Registered person (if notified as a class liable to tax) visits another State where inward supplies (if notified as category of goods and services liable to tax) is provided will NOT be liable to pay tax in home-State if place of supply is such host-State.

While such transactions are not excluded, the provisions dealing with 'payment of tax' cannot alter the provisions imposing the 'incidence of tax'. Authors caution that this may be an area of much debate but that is for another such article once the class of registered persons and categories of goods and services are notified.

Outbound Mail or Courier

Where both parties are located in India but the destination of goods transported by 'mail or courier' is outside India, Section 12(8) has been amended to

declare the place of supply to be outside India. This is a very welcome amendment. Authors caution that 'cargo' movement outside India should not be considered here as transportation of goods is circumscribed by the mode – mail or courier – and no others.

Jobbing Business Saved

Where goods are sent to India for job work, place of supply to be India as this is clearly 'location-based service'. With the amendment to Section 13(3), jobbing business is saved when work is undertaken for overseas customers but 'at' location in India.

Remarkable that this amendment only saved 'treatment or process' and did not allow room for saving 'testing' operations where India is emerging to be a hub for many location-based services but for overseas clients.

Council Decisions Need Another (Set) of Amendment Acts Later

GST Council in its January meeting has approved composition for service providers and increase in threshold from ₹ 20 lakhs to ₹ 40 lakhs. Implementing these decisions will NOT be possible unless another Amendment Act is introduced, to Section 10 and 22, just for these two decisions.

GST Council in its January meeting has approved composition for service providers and increase in threshold from ₹ 20 lakhs to ₹ 40 lakhs. Implementing these decisions will NOT be possible unless another Amendment Act is introduced, to Section 10 and 22, just for these two decisions.

Councils approval is the first step in a long process of bringing about amendments in Central and (all) State GST legislations. Authors caution that news reports must be considered with corresponding amendments in the law. And as seen above, there are no amendments to implement these decisions.

Conclusion

Amendment to any law shows the Legislatures most recent relook at the law. And if trade had presented scores of suggestions to amend the law, the amendments that have actually found favour with the Legislature shows the resolve with which the law stands before us. Mountains have really been moved and credit must be given where it is due – to all the unsung heroes of the Government machinery. Dedicated to the Nation, we now need to move forward to implement this remarkable law that stands as a testimony to what India can do! ■