



GST AND E- COMMERCE

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Abstract This article was written in February, 2017. Since then the Central Goods and Services Tax Bill (CGST) has been passed by Parliament and has been notified in April, 2017. The article explores the interplay between India's upcoming Goods and Services Tax (GST) regime and its growing e-commerce sector. It does so by mapping the major features of the GST regime and the e-commerce sector. Thereafter, by analysing the Model GST Law circulated by the Central Board of Excise and Customs, it voices the major concerns of the e-commerce players and argues that Law must be re-thought to prevent a regulatory overburden.

First, I briefly comment on various aspects of the Goods and Services Tax (GST), then e-commerce, and finally on treatment of e-commerce by GST.

I. STRUCTURE OF GST

GST is a tax on the *supply* of goods and services, and not on their manufacture like Central and State Excise, or provision of services like Service Tax, or sale of goods like State VAT, etc. It is a destination-based consumption tax. India has decided to adopt a Dual GST model wherein both the Centre and the States would levy and collect GST on a common tax base. It will be done in a pre-determined manner such that a taxpayer would have an interface with only one of the two tax administrations – the Centre or the State. GST will subsume seventeen current indirect taxes of the Centre and the States - the principal ones being Excise, Countervailing Duty of Customs, Service Tax of the Centre, and State VAT. Supplies within a particular state will have two components – Central GST (CGST) and States GST (SGST), which will be administered by the Centre and the States respectively. In the case of interstate supplies, the tax would be known as Integrated GST (IGST), and it would basically be a summation of CGST and

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SGST. Being a destination based tax, the States' shares of IGST would accrue to the destination state.

In the GST regime, there would be a multipoint levy throughout the supply chain with the full credit of input taxes paid at each stage of Business to Business (B2B) transactions. Consequently, there will be no cascading of tax. Secondly, the replacement of multiple tax authorities with only two tax authorities i.e. Centre and the States will bring down compliance costs. Thirdly, the subsuming of interstate Entry Tax in the GST, and elimination of interstate trade barriers will make India a common economic market. It will also drastically reduce the travel time of goods, and lower the logistics cost of movement of goods across the states. Essentially, a substantial reduction of cost of goods will result in the lowering of inflation.

Besides, being a destination based consumption tax, GST will enhance the revenue of states which are industrially backward but have high consumption. The extra revenue would enable these states to spend more on the development of roads and other infrastructure (including power plants), thus attracting industries which would lead to equitable distribution of industries across the country, and give a boost to the country's manufacturing base.

II. CONSTITUTIONAL AMENDMENT

After the Union Finance Minister in his Budget Speech of 2006 made an announcement about India's proposal to introduce GST, the Empowered Committee of State Finance Minister's (EC), which also had representatives from the Central Government, was tasked with providing a structure of GST which would be agreeable to both the Centre and the States. The EC recommended the aforesaid Dual GST mode. This necessitated an amendment of the Constitution of India so as to empower both the Centre and the States to levy and collect GST in terms of the proposed structure. After years of negotiations between the Centre and States, in August 2016, both Houses of the Parliament cleared the Bill for a constitutional amendment. An important feature of the Constitution (One Hundred and First Amendment) Act, 2016 was the creation of the GST Council which will be chaired by the Union Finance Minister. The Finance Ministers of all the States will be members of the Council. The Council will make recommendations to the legislatures regarding issues related to policy and implementation of GST, including the tax rates and exemptions. The Council has since met nine times, and is on its way to steering the implementation of GST. The roll-out date has been announced to be 1st July, 2017.

III. CHALLENGES AND COMPROMISES

GST will essentially be a joint venture between Centre and the States. Success of a joint venture depends on the happiness of both the partners. Keeping this in mind, the Centre has made a number of compromises with the States. On demand from the States, the essential inputs like petroleum and its products have been kept outside the ambit of GST; so has been the case of Alcohol, which is a State subject, although other demerit goods like Tobacco and Cigarettes (Central subjects) are within the ambit. The threshold exemption has been kept at an annual turnover of Rupees twenty lakhs. Small tax payers with turnover up to Rupees fifty lakhs can opt for Composition Levy. The States have also been allowed to vary their GST rates within a band. Most importantly, the Centre also agreed to compensate the States fully for the first five years in case of loss of their revenue. Although these compromises have impaired the shine of a good GST, they were considered necessary to bring the States on board and make them happy.

A seamless flow of Input Tax Credit for both intra-state and inter-state supplies would be the hallmark of GST. Implementation of IGST for taxing inter-state supplies would also be a challenge. It is essential to understand basic concepts like the Scope of Supply, Place and Time of Supply, Taxable Event and Taxable Person, Flow of Credit etc., and follow procedural provisions relating to Registration, Payment, Filing of Returns, Claim of Refund, Audit and Enforcement etc. **Follow up Legislations**

Implementation of GST will have to be preceded by a few legislations - the CGST Act and the IGST Act to be passed by the Parliament, and the SGST Acts to be passed by the respective State Legislatures. Draft Model GST Laws were placed in the public domain, and based on the response from the stakeholders, these model laws have been revised and the final template is expected to be revealed soon. Based on the agreed template, all the aforesaid laws are expected to be cleared by Parliament and State Legislatures by the end of March 2017. Thereafter, three months would be available for completing preparations by the taxpayers and the taxmen, the target date being 1st July, 2017.

IV. GST NET – IT INFRASTRUCTURE

Having regard to the enormity of the job, GST has been proposed to be backed by a robust IT infrastructure called GST Net. The GST Net portal will provide an interface between the taxpayers and the two tax authorities, and facilitate basic functions in the tax collection process like Registration, Self-Assessment and Payment of tax, and Filing of Returns. The functions of GST Net would also include forwarding the Returns to the network of Central and State authorities, matching of tax payment details with the banking network, running the 'matching engine' for matching of invoices relating to the output supply and

corresponding input supply to ensure proper availment of credit, providing various MIS reports and analysis of taxpayer's profiles, etc. The GST Net would also integrate the common GST portal with the IT systems of Centre and States for Audit, Refunds, Adjudication etc., and build an interface for taxpayers.

V. GST RATES

As for the GST rates, there will be four rates - the standard rate of 18%, the two reduced rates of 12% and 5% for items of use by common man and the poor, and a peak rate of 28% for the demerit goods like Tobacco & Cigarettes, Aerated Water, Luxury Cars, etc. In addition, there will be a Central Cess on some of the demerit goods. Besides these, two small lists of goods would be exempted and zero-rated. The list of exemptions will be common for the Centre and the States. The Council has not yet decided which specific goods will fall in the four aforementioned rate groups.

VI. PREPARATORY STEPS

Now that the contours of GST have taken shape, both the taxpayers and the taxmen have been preparing hard for GST. The ERP (Enterprises, Resource, Planning) of taxpayers are being reworked keeping in mind the requirements of law and procedure. Their IT software is also being customized for appropriate link ups with the GST Net. For the tax authorities, GST will bring about a huge change in functioning of field formations. The emphasis would now be on Audit, Enforcement and Dispute Resolution. The tax administrations would have to restructure and reorganize themselves to suit the requirements of business operations in the GST regime.

VII. IMPACT OF GST

Summing up, GST will not merely be an indirect tax reform; it will impact the economy in various aspects. It will change the way in which business is done in India. Issuing of invoice, payment through banks, and maintenance of records would be compulsory for availment of credit. Further, all the records of receipt and supply would be maintained electronically. GST would also impact the fortunes of tax professionals, consultants, lawyers, and law firms. As for the economic sectors, almost all sectors including Manufacturing, Service, Trading and Retailing, Logistics and Transportation, Telecommunication, Information Technology, Banking and Financial Services, and E-commerce are going to benefit from GST. GST will give a fillip to the Government's two laudable concepts: 'Make in India' and 'Digital India'. Thus, GST in India would be a win-win proposition for all sectors of the economy including e-commerce, in spite of not being perfect because of constraints of a joint venture between the Centre and the thirty-one States, ruled by different political parties.

VIII. E-COMMERCE

Now, a few words on e-commerce. Broadly speaking, e-commerce is the business of buying and selling goods and services on the Internet. It is also associated with conducting any transaction involving the transfer of ownership or rights to use goods or services through a computer mediated network. Driven by a young demographic profile and increasing Internet penetration, the growth in e-commerce has been phenomenal. According to a joint ASSOCHAM–Forrester Study Paper, India’s e-commerce revenue is expected to jump from \$30 billion in 2016 to \$120 billion in 2020, at the annual growth rate of 51%.² Starting with a traditional ‘stock and sell’ model, the e-commerce companies have transformed themselves into a multi-model platform. Therefore, today it can be said that e-commerce means “*use of electronic communication and digital information processing technology in business to create, transform, and redefine relationship for value creation between or among organisations, and between organisations and individuals*”.³ Indian e-commerce industry is unique because of its sheer number of transactions, complexity and the employability of the unorganised sector.

E-commerce keeps evolving itself in various new formats for different types of transactions. There are many models for making supplies through e-commerce. Some of the important models are briefly discussed below:

A. Direct Sales Model

This model is adopted by the entities which were already doing business through physical stores. They now sell their goods directly through their portals (e-commerce route). Direct Sale Portals of Titan, Nike, etc. fall in this category.

B. Inventory Model

In this model, the e-commerce operator acts like a mega retailer. He buys the goods from the seller, manages the inventory on his premises, and sells it to the end-buyers. e.g. Jabong.

C. Marketplace Model

A popular model is the Marketplace Model where the e-commerce companies provide a meeting point for the sellers and buyers through their portal. In this

² India’s e-commerce sector to see \$120 billion revenue by 2020: Assocham-Forrester report, THE ECONOMIC TIMES, (May 8, 2016) <http://economictimes.indiatimes.com/industry/services/retail/indias-e-commerce-sector-to-see-120-billion-revenue-by-2020-assochem-forrester-report/article-show/52172120.cms>.

³ E. Lallana et al, *ePrimer: An Introduction to eCommerce*, Philippines DAI-AGILE, 2, (2000).

model, the end customer in Business-to-Consumer (B2C) transactions can book an item, order for it, and then cancel it as well, or even return the goods through an online Portal or App. In a pure marketplace model, the e-commerce operator would not be involved in any activity other than providing a platform to the sellers to display their goods and facilitating buyers to view and place orders to buy those goods. E.g. Naaptol, E-bay etc.

D. Managed Marketplace Model

In the Marketplace Model, the supply of the goods is dependent on the efficiency of the seller, over which the e-commerce operator does not have direct control. In the Inventory Model, the operator can fulfil the supply commitments at his own level of efficiency, but the operator will have to invest in the inventory. The Managed Marketplace Model attempts to get the best of both these models. Here, the operator not only creates a marketplace, but also gets involved in other aspects of the sale contract, and handles parts of the supply chain of goods as well e.g. Amazon India.

E. Fulfilment Model

This model is a particular type of Managed Marketplace Model where the goods are shipped and stored by the sellers in warehouses of the e-commerce operators even before the sale takes place. Once purchase orders are received, the goods are packed and dispatched by the e-commerce operator under intimation to the seller. The e-commerce operator neither makes payment to the seller, nor owns the inventory. Although he does not invest in inventory, he has to invest in storage, transport and logistics. Thus, he cuts down capital investment, and has better control over supply of goods. Today, most of the e-commerce operators have adopted this mode. E.g. Flipkart, Snapdeal, etc.

F. Hybrid Model

It is becoming increasingly difficult for the large e-commerce operators to have a single model for all the sellers and all types of goods because of the sheer volume and variety. This compels the large operators to adopt a mix of aforesaid models for different sellers and different types of goods. e.g. Myntra.

IX. TRENDS DRIVING E-COMMERCE IN INDIA

The key trends driving e-commerce in India have been explained in a CII-Deloitte Report.⁴ The first trend has been reported to be the **Government**

⁴ Confederation of Indian Industry, *e-Commerce in India - A Game Changer for the Economy*, (2016).

initiatives in embracing and leveraging e-commerce digital platforms. Besides launching of e-market platform to connect farmers with the 'mandi's of different states to sell agro commodities, the other flagship initiatives from the Government include Digital India, Start-up India, Make in India, Skill India, etc. The second trend is the phenomenal increase in **internet penetration** owing to major improvements in the telecom infrastructure. This has facilitated the fast growth of e-commerce. The third trend has been the **widespread adoption of smartphones** which turned out to be the most favoured medium of e-commerce. Almost 70-75% of their online traffic comes from mobile applications of smartphones. **Evolution of new digital payment solutions** has been reported to be the fourth trend. Some such initiatives are the launch of e-wallets, different digital payment products, Unified Payments Interface (UPI) by the Reserve Bank of India, etc. The fifth trend has been an increasing incidence of **partnership of e-commerce operators with the Third Party Logistics Service Providers (3PLS)** like India Post in order to reach the hinterlands of the country. Last but not the least, the e-commerce operators' **expectations that GST would enhance their growth** because of its structure and operational efficiency; Logistics Service providers can leverage seamless '**hub-and-spoke**' models for delivery, resulting in lower costs and fewer bottlenecks.

X. GST'S TREATMENT OF E-COMMERCE

A. Current Indirect Tax System for E-commerce

The current indirect taxation system comprising Service Tax on provision of services, State VAT on sale of goods, and Central Sales Tax on inter-state sale of goods is not geared to recognize and accommodate the evolving business models of e-commerce. The Central Government has been collecting the Service Tax on the services provided by various e-commerce operators. During the 2015-16 Budget, the tax base was further widened by bringing in the concept of 'aggregator' and taxing the services provided by him. An aggregator has been defined as a person who owns and manages a web-based software application. By means of the application and a communication device, he enables a potential customer to connect with the persons providing services of a particular kind under the brand name or trade name of the aggregator. Soon thereafter, the liability for collecting and depositing Service Tax was shifted to the Aggregator, thus enabling a reverse charge mechanism, which allows charging Service Tax from the receiver instead of the provider of service.

In the existing indirect taxes, there are no specific provisions for e-commerce operators to pay taxes on sale of goods, or make any tax deductions from the payments made by them to the actual sellers of the goods. But many states have started prescribing Returns to be filed by the e-commerce operators with information relating to supplies made through their portal. Attempts by some states

to equate e-commerce companies operating through the 'Marketplace Model' as dealers, and collect State VAT from them have not succeeded; this has reference to the Kerala High Court judgment in *Flipkart Internet (P) Ltd. v. State of Kerala*⁵.

Currently, the e-commerce sector faces many difficulties, particularly in the following issues of indirect taxation. On classification issues, the challenge is a categorization of the offerings in e-commerce as 'goods' - inviting the payment of VAT/CST, or as 'services' - inviting the payment of Service Tax. Both State VAT/CST authorities and Service Tax authorities want to exercise their right over digital transactions like downloads of software, music, e-books, etc., leading to disputes and endless litigation. On the issue of compliance costs, the difficulties arise particularly in inter-state movement of the offerings of e-commerce operators. These relate to compliance of the requirements of statutory forms, way-bills, road-permits, registration of e-commerce market place entity for entry/sale of their offerings into a State etc.

There are many challenges in the management of supply chains. The shipments and returns across the country involve a lot of paperwork and other compliance costs. Further, at present, the sourcing, distribution, and warehousing strategies are designed by the companies from the perspective of minimizing the tax liability. Besides, in view of non-uniform tax (VAT, Entry Tax, etc.) structure across the States, the pricing of the goods and calculation of margins are a challenge at present. Further, there is a lack of clarity on taxation and documentation management for typical e-commerce sector transactions such as e-wallet (advance deposits by the consumers), cash-on-delivery (payment collected at the doorstep of the consumer), gift vouchers, drop-shipment (direct delivery of goods from the e-commerce company vendor to the e-commerce company customer), etc.

Conventionally, indirect taxation revolves around the physical presence and the physical movement of goods across jurisdictions. But e-commerce models are different because the supply of goods is happening across internet networks. Since it is difficult to establish and track the physical movement of goods and the millions of transactions, the possibility of pilferage and revenue leakages is high. However, problems in taxation are faced mostly in models wherein the e-commerce operator does not buy or sell the goods directly from the sellers but claims to only facilitate the sale. In these cases, the sale is being claimed to have happened between the seller and purchaser with the e-commerce operator being only a service provider to the seller. The operator charges a commission from the seller for each sale. In these cases, the seller is declaring the sale of goods in his returns while the E-commerce company only declares the total amount of "services" provided to the seller and pays tax on it. Thus, the e-commerce company completely dissociates itself from the act of sale of goods. However, as mentioned

⁵ *Flipkart Internet (P) Ltd. v. State of Kerala*, 2015 SCC OnLine Ker 31723 : (2015) 11 TMI 159.

before, some States have prescribed filing of information return by the e-Commerce companies operating on the marketplace or managed marketplace model, thereby receiving information about sales which have taken place through their portal.

XI. GST LEGISLATION ON E-COMMERCE

From a taxation point of view, it is important that the online ordering and subsequent delivery of goods and services are taxed consistently and fairly. It is also important that the small traders not be adversely affected because of inconsistency in taxation practices. In the GST era, the challenge is tracking and taxing inter-state sales. The matter of incidence of CST on inter-state trade through e-commerce is already in litigation in a number of Indian states.

While the first draft Model GST Laws (MGL) of June, 2016 had retained the concept of aggregators, it has been dispensed with by the Revised Model GST Law published in November, 2016. Chapter XIV of the Revised MGL deals with e-commerce. Certain definitions relating to e-commerce have been given in Section 2 of the Revised MGL. The term 'electronic commerce' has been defined as the "*supply of goods and/or services including digital products over digital or electronic network*".⁶ The term 'electronic commerce operator' has been defined as "*any person who owns, operates or manages digital or electronic facility or platform for electronic commerce*".⁷ In the first draft MGL the definition of 'e-commerce operator' covered only the platform players. It had separately provided for an 'aggregator' in similar lines with the existing Service Tax provisions. Companies like Uber, Ola, OYO Rooms, etc. could fall under this category. As mentioned, the concept of aggregator has been dropped in the Revised MGL, and instead, the definition of e-commerce operator has been expanded to cover all kinds of e-commerce operators that include: Providers of a platform where supply and invoicing are done by the actual supplier (e.g. Amazon), Suppliers of their own goods/services online (e.g. Fabindia), and Entities which raise invoices for supply of others' services (e.g. Google Play.)

There is only one section, i.e. Section 56 in the revised MGL which deals with Tax Collection at Source (TCS). It has twelve clauses. Every e-commerce operator providing a platform to facilitate the supply of goods and/ or services is required to collect tax at source while making payments to vendors, and file a statement giving details of the transactions. The vendors would then be eligible to utilize this tax amount to pay their output tax liability. Monitoring the businesses that supply goods and services *via* e-commerce operators appears to be the basic intention of the GST Council.

⁶ Central Board of Excise and Customs, GST Council Secretariat, Section 2(41), Model GST Law (2016).

⁷ Central Board of Excise and Customs, GST Council Secretariat, Section 2(42), Model GST Law (2016).

The most critical concern is that every vendor on the e-commerce platform will need to register, regardless of threshold, in every state where he supplies a good or service. The scheme of one central registration valid for the entire country is absent in the structure of GST. This will pose a great obstacle for small and occasional dealers who otherwise wish to increase their sales through e-commerce. The platform players would also be impacted since such dealers may decide to refrain from availing their services for effecting sales of the supplies. Further, it is not clear whether, for the purposes of depositing tax collected at source, the e-commerce operators would also be required to obtain registration in every state where the suppliers using their platform are situated.

Under the current indirect tax provisions, the vendors selling goods via e-commerce can not avail credit on Service Tax. The revised MGL has provided in Section 56(5) that the supplier using the facility provided by the e-commerce operator will be entitled to claim credit. Naturally, this will entail following the procedure of registering at each state of supply, and complying with the provisions relating to 'place of supply' in the cases of inter-state supplies.

The issue of multiple registrations depending upon the 'places' (read as states) of supply will be relevant for overseas suppliers as well. Currently, they discharge Service Tax through centralized registration either by themselves or through a representative.

XII. CONCERNS OF E-COMMERCE SECTOR

The concerns of e-commerce sector regarding TCS can be summed up as follows:

Although the tax collected by the e-commerce operator and paid by the vendors would be available as credit to be utilized later for payment of output tax, it is estimated by a major e-commerce operator that at the current scale of business, around Rs.400 crores of capital a year, will get locked in the system and will not be accessible to sellers. This is likely to deter the sellers from transacting online on the platforms of the e-commerce operators. Secondly, TCS may also enhance tax costs since many such suppliers who are below the threshold do not pay VAT, Entry Tax or Service Tax on date. The small-scale and start-up suppliers would suffer since the threshold of Rs. 20 Lakhs for GST would not apply to such transactions in terms of the provisions of Para 6 of Schedule V of the Revised MGL. Thirdly, TCS would be a compliance hazard, especially in cash-on-delivery scenarios. Fourthly, IT and other systems will need to be restructured to ensure compliance with strict disclosure requirements as prescribed in the MGL. Finally, all the aforesaid responsibilities will put a huge accounting and manpower burden on the e-commerce operators. Given the fact that there are now lakhs of sellers facilitating millions of transactions on these e-platforms, all these concerns have

brought the major e-commerce operators including Amazon, Flipkart, Snapdeal, Paytm, Grofers, and Zomato, etc. together. Recently, in the second week of February, they voiced their GST concerns jointly.⁸ Given that India's e-commerce revenue has been growing at an annual rate of 51%, it is hoped that the GST Council would mitigate their concerns by dropping the idea of TCS, and finding some other simpler way of monitoring businesses that supply goods and services via e-commerce operators.

GST must be beneficial to every sector of the economy. E-commerce being a comparatively new initiative which is growing at a commendable rate deserves to be dealt with deftly in the GST regime.

⁸ Yuvraj Malik, *Flipkart, Amazon, Snapdeal oppose tax collection at source under GST*, LIVEMINT, (February 9, 2017) <http://www.livemint.com/Politics/BZ9IUhcfkbofMcxIFAEo0K/Flipkart-Amazon-Snapdeal-flag-concerns-over-TCS-in-GST-d.html>.