



Constitutional Evolution : Levy and Collection of Taxes; Pre and Post GST

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Presentation Plan

- Taxes on Goods and Services - Pre GST era and GST era
- The Constitution (One Hundred and First Amendment) Act, 2016
- Treatment of Inter-State trade in Pre GST era and GST era
- Likely constitutional challenges from GST Law
- Likely areas of litigation in GST Law
- Administrative constraints of implementation of GST and legal issues resulting from it

Pre GST era - Taxes on Goods and Services

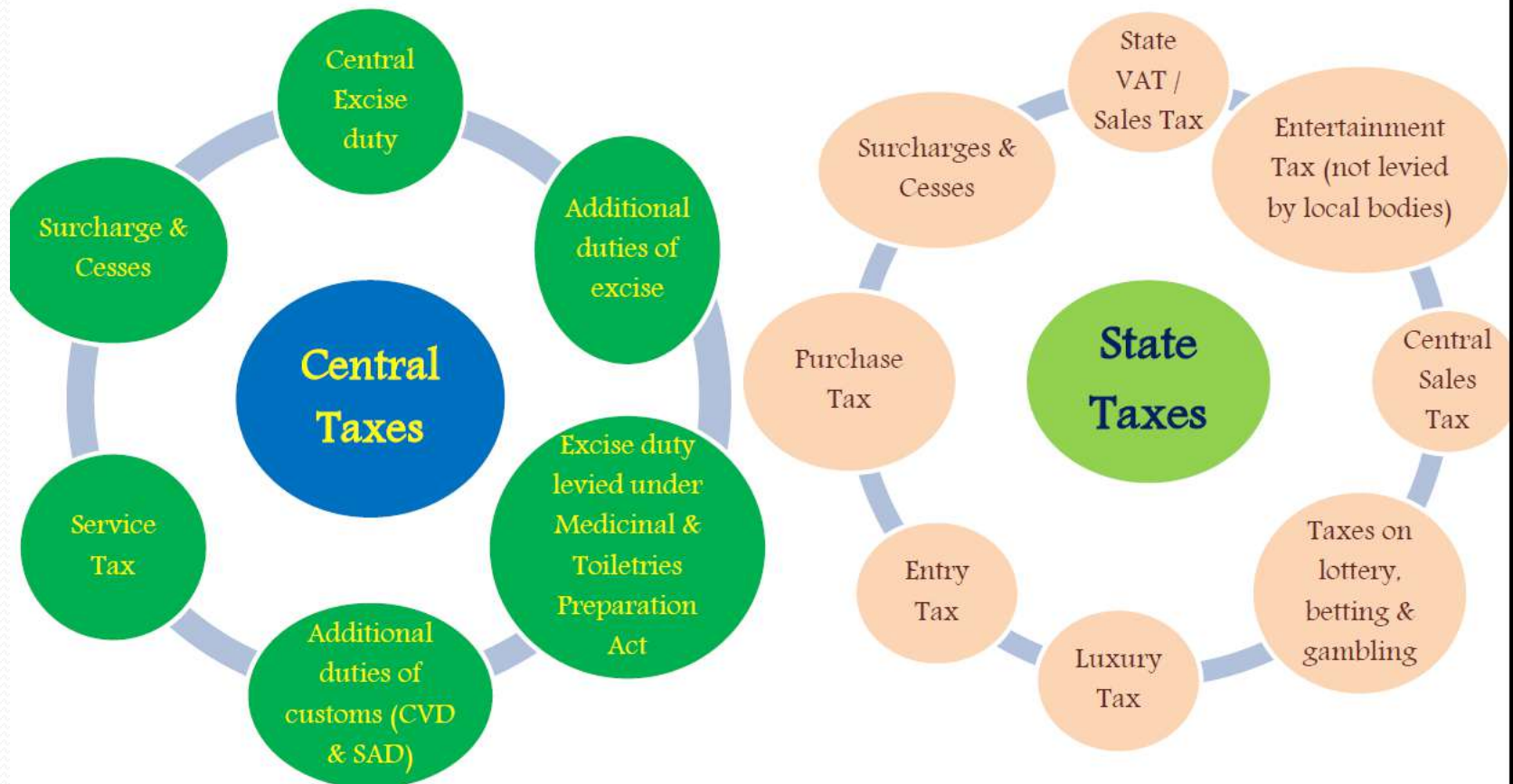
State Taxes

- Intra-State Sale of goods - VAT
- Inter-State Sale of goods – Central Sales Tax
- Works Contract – Works Contract Tax
- Purchase of certain goods – Purchase Tax
- Entry of goods in a State – Entry Tax
- Entertainment Tax
- Taxes on Lottery, Betting and Gambling
- Octroi or Local Body Tax
- Luxury Tax
- Tax on Advertisements
- Cesses

Central Taxes

- Manufacturing - Central Excise Duty
- Provision of Service – Service Tax
- Additional Duty of Customs (commonly called CVD)
- Special Additional Duty of Customs (SAD)
- Duties of Excise (Medicinal & Toilet Preparations)
- Additional Duties of Excise (Textiles and Textile Products)
- Additional Duties of Excise (Goods of Special Importance)
- Cesses

....GST – FEATURES....

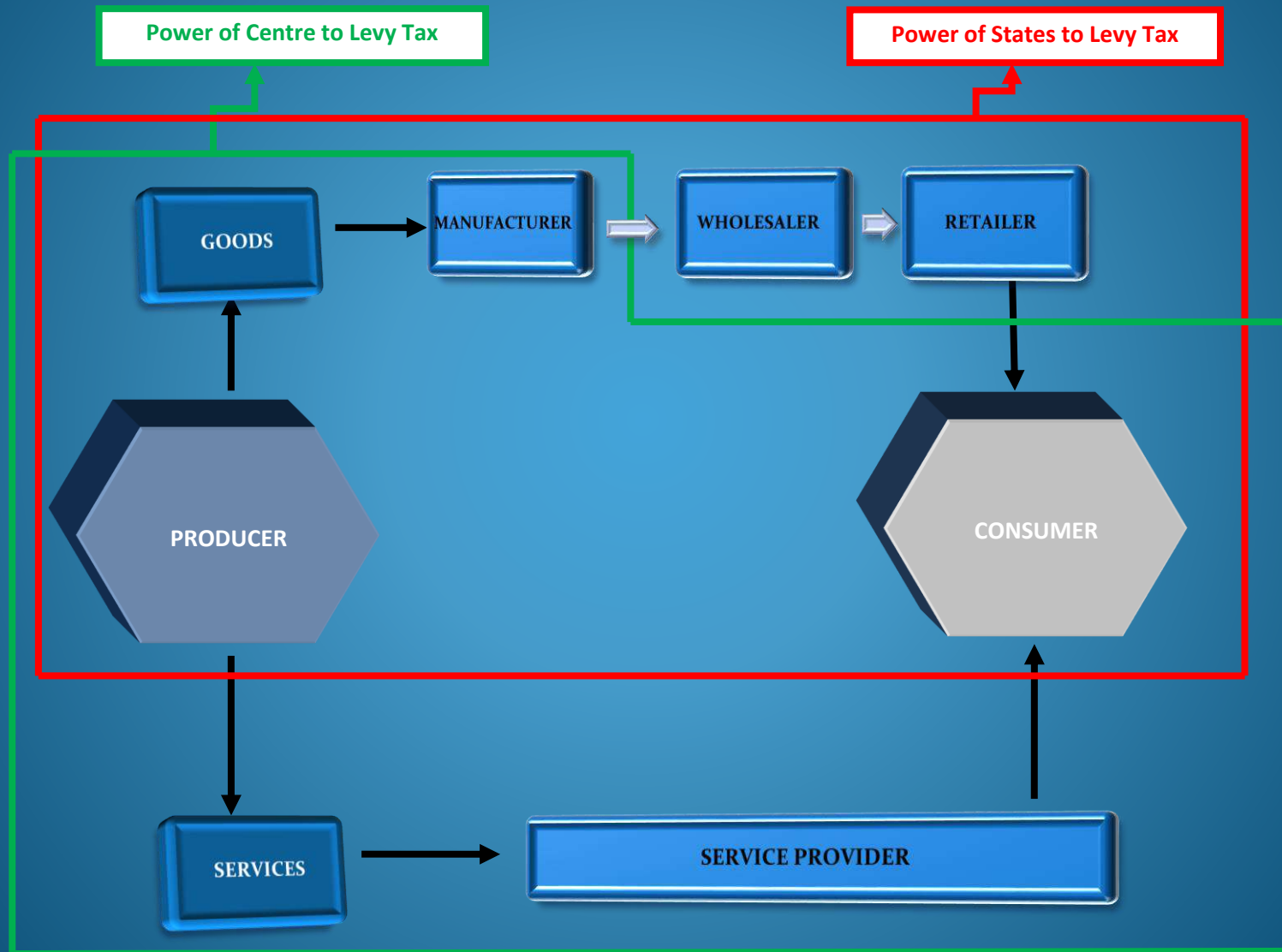


Central & State Taxes to be subsumed in GST

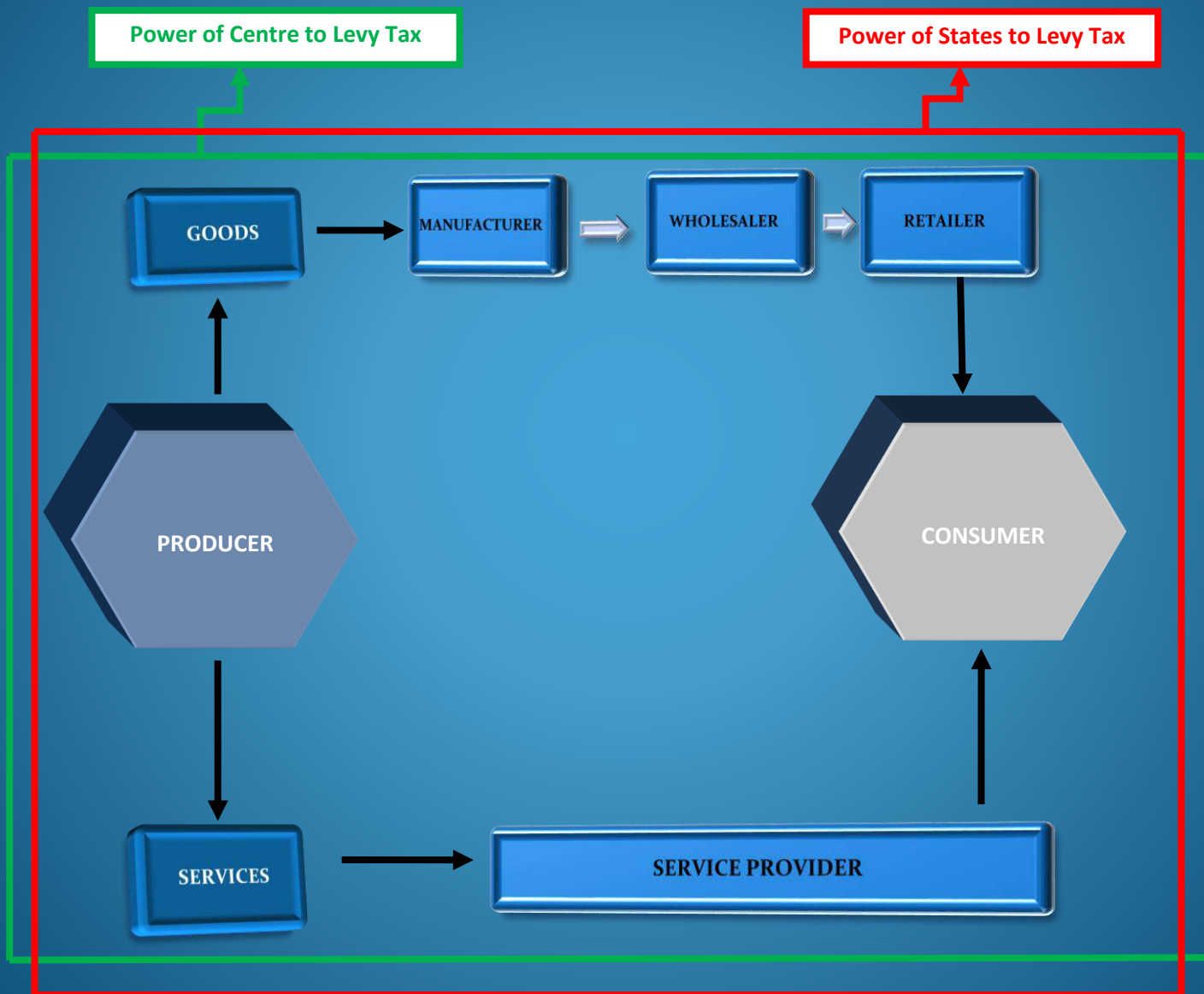
GST era - Taxes on Goods and Services

- Central GST
- State GST or UT GST
- Integrated GST
- Compensation Cess – for 5 years
- Taxes on Entertainment and Amusement levied and collected by a Panchayat / Municipality / Regional Council / District Council
- Mandi Tax / Mandi charges in certain States
- Fees on entry in Cantonments – Section 67(e) of The Cantonment Act, 2006 - Power to charge licence fee on entry of vehicles

Pre GST SCENARIO



GST SCENARIO



Taxable events

Pre GST era –

- Manufacture – For levy of Central Excise Duty
 - A large number of disputes arose due to limiting the collection of tax up to a particular stage in the supply chain
 - Marketability issues
- Provision of Services – For levy of Service Tax
 - Services being intangible, disputes arose about place of provision of service, whether or not in taxable territory
- Sale of goods – For levy of Sales Tax / VAT
 - Issues relating to treatment of deemed sale
- Entry of goods – Entry Tax / Octroi
- Purchase of goods – Purchase Tax

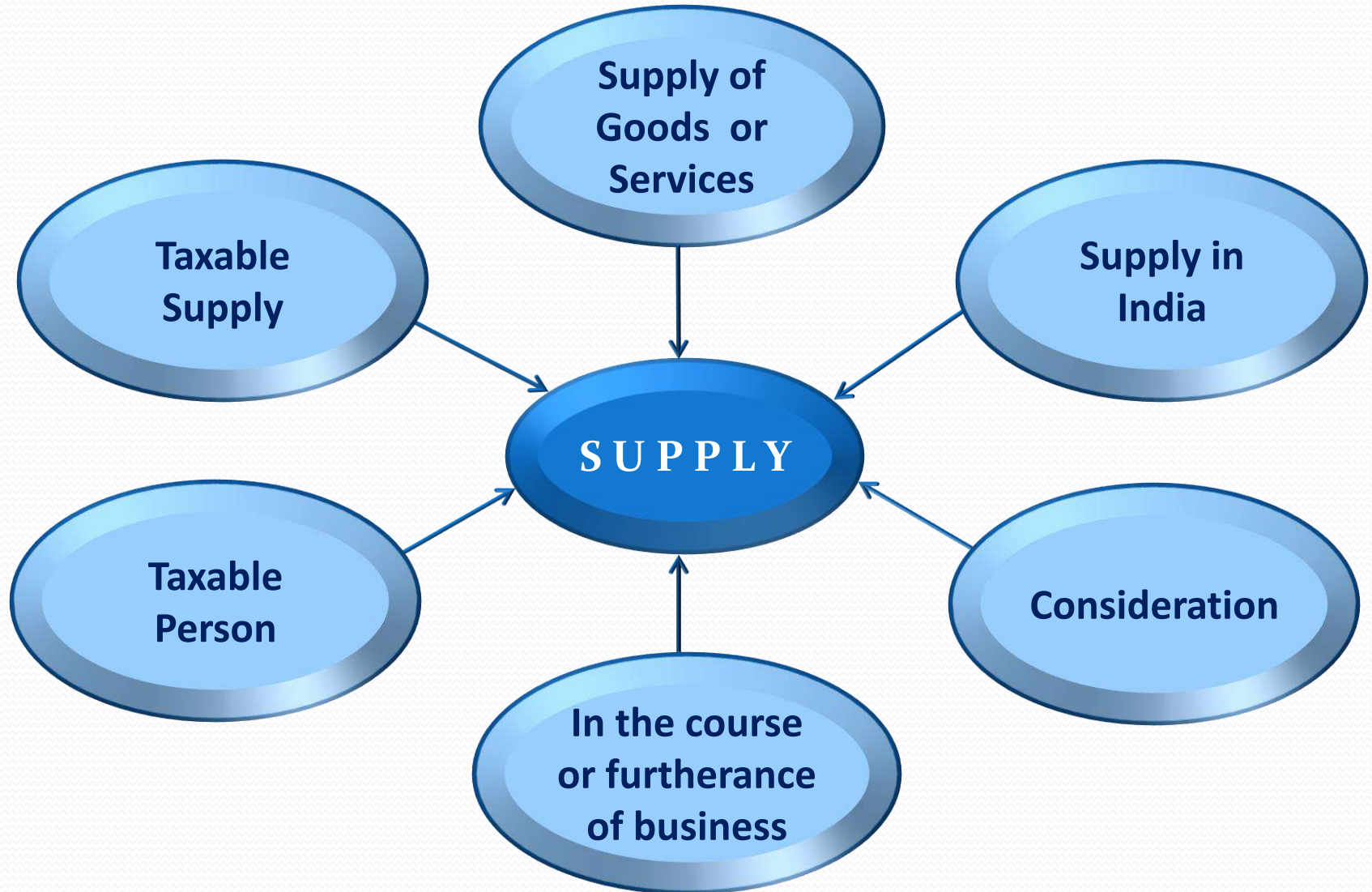
GST era –

- Supply of goods or services or both
- Scope of supply defined through an inclusive definition on Section 7 of Central GST Act

As a new taxable event has been introduced in GST Law, jurisprudence will evolve over a period of time

Supply- Basics

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.. Supply – Meaning

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‘Supply’

- Includes all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease, or disposition made or agreed to be made for a consideration in the course or furtherance of business
- Importation of service, for a consideration, whether or not in the course or furtherance of business, and
- Supply specified in Schedule I, made or agreed to be made without a consideration
- Schedule II, in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services
- Schedule III, in respect of activities mentioned therein, which shall neither to be treated as a supply of goods nor a supply of services

[Section 7 of CGST Act and Schedules-I, II &III]

Goods / Services

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- **‘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 land which are agreed to be severed before supply or under the contract of supply.

[Section 2(52) of CGST Act]

- **‘Services’** means anything other than goods, money and securities but includes activities relating to use of money or its conversion for which a separate consideration is charged.

[Section 2(102) of CGST Act]

Supply of Goods – Other Cases

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- Transfer of business assets without consideration
- Business assets for private use - temporary application is supply of services
- Business gifts and samples supplied free
- Competition Prizes
- Supply made on behalf of another, towards satisfaction of debt

Supply of Goods – Other Cases

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- Disposal of goods on closure of business or deregistration
- Self-supply or captive use
- Supply on commission basis
- Supply on approval basis
- Return & replacement
- Inter-state supply to an entity with same PAN

Supply of Services

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- In some situations, supplies involving goods may be treated as service
- The following are supply of services, even though they may involve supply of goods
 - lease/hire of goods
 - transfer/ sale of an undivided share of title in goods
 - temporary application of business assets for non-business use

Supply of Services

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- Sale of land or building involving transfer of title is neither supply of goods nor supply of service.
- However, the grant, assignment or surrender of a major interest in land or building will be treated as a supply of services

This includes:

- rights in rem giving the holder thereof a right of use over immovable property
- shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof
- Renting of immovable property including vacant land

Consideration in GST Law

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“Consideration” means

- any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods and/or services, whether by the recipient or by any other person – excluding subsidies given by Central Government or State Government
- the monetary value of any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of goods and/or services, whether by the said person or by any other person
- However, a deposit given in respect of the supply of goods and/or services shall not be considered as payment made for the supply unless the supplier applies the deposit as consideration for the supply

[Section 2(31) of CGST Act]

Schedule I - Activities to be treated as supply even if made without consideration

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Certain transactions made for no consideration are deemed to be supplies for GST purposes

Examples:

- the permanent transfer/disposal of business assets on which ITC was availed
- when services are put to a private or non-business use
- self-supply of goods or services
- assets are retained after deregistration
- Inter-State supplies made by the same PAN entity

In the Course or furtherance of Business

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- Unless a transaction is in the course or furtherance of business, it will not be liable to GST
- Activities deemed to be ‘in the course or furtherance of business’:
 - Admission, for a consideration, of persons to a premises
 - Services supplied by a person when he holds an office in the course or furtherance of a trade, profession or a vocation
 - Disposal of a business as a going concern

Business Test

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- There is no exhaustive definition or test for determining if an activity is business

Six-point test to determine whether an activity is in the course of business. These are:

- Is the activity a serious undertaking earnestly pursued
- Is the activity an occupation or function which is actively pursued with reasonable or recognizable continuity
- Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made?
- Is the activity conducted in a regular manner and on sound and recognized business principles

Business Test

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- Is the activity predominately concerned with the making of taxable supplies for a consideration
 - Are the taxable supplies that are being made of a kind which are commonly made by those who seek to profit from them
-
- The business test requirement ensures that occasional supplies, even if for a consideration, will not be subject to GST
 - For example, when a household makes a one-time sale of some paintings, if it is not in the business of selling paintings, the sale will not be a supply for GST purposes. But a painter, who sells his paintings on a regular basis, even if infrequently, will be liable to pay GST since he is in the business of selling paintings

Neither Goods nor Services !!!

- The following would not constitute supply of Goods or Services (Schedule -III of the Act)
 - by an employee to employer
 - Services by any Court or Tribunal
 - Functions performed by Members of Parliament/ State legislature/Panchayats/ Municipalities/ other local authorities.
 - Duties performed by Constitutional functionary.
 - Duties performed by Chairperson/Member /Director in a body of CG/SG/local authority, who is not deemed to be an employee before commencement of this clause.

Neither Goods nor Services !!! (Contd.)

- Funeral, burial, crematorium/mortuary service, including transportation of deceased
- Sale of land
- Sale of building[subject to clause (b) of paragraph 5 of Schedule II)
- Actionable claims, other than lottery, betting and gambling

Constitution (One Hundred and First Amendment) Act, 2016

In Pre GST era

- Taxation powers were distributed between Centre & States
- Centre levied
 - Central Excise duty on manufacture (except alcohol for human consumption)
 - Service Tax
- Central Sales Tax on inter-State sales –
 - Levied by Centre
 - But collected and retained by originating States
- States levied
 - VAT on intra-State sales
 - Entry tax / Purchase Tax / Octroi/ Luxury tax / Works Contract Tax / etc.

Thus Constitution amendment was needed for assigning concurrent powers to Centre and States to levy GST on all supplies

Constitution (One Hundred and First Amendment) Act, 2016 – Key Features

- Concurrent jurisdiction for levy & collection of GST by the Centre & the States - **Article 246A(1)**
- Parliament has exclusive power to make laws with respect to GST on inter-State supplies - **Article 246A(2)**
- Centre to levy & collect IGST on supplies in the course of inter-State trade or commerce including imports - **Article 269A**
 - IGST to be apportioned between Centre & States on recommendations of the GST Council (GSTC)
- Parliament may formulate the principles for determining the **place of supply**, and when the supply takes place in the course of inter-State trade or commerce - **Article 269A(5)**

Article 269A

- 269A. (1) Goods and services tax on supplies in the course of inter-State trade or commerce **shall be levied and collected by the Government of India** and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.
- *Explanation.*—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

GST Council

- **GST Council** constituted by the President on 16th September, 2016 - **Article 279A**
- Comprising of -
 - Union Finance Minister - Chairperson
 - MoS (Revenue) - Member
 - the State Finance/Taxation Ministers - Members
 - Members of GST Council may choose one of the Members as the Vice-Chairperson
- Quorum is half of total members
- Decisions by majority of 75% of weighted votes of members present & voting.

Weightage of votes:

- Centre – One-third
- States – Two-third

GST Council

- The GST Council shall establish a mechanism to adjudicate any dispute arising out of its recommendations or implementation thereof —
 - between the Government of India and one or more States;
or
 - between the Government of India and any State or States on one side and one or more other States on the other side; or
 - between two or more States,

- Article 279A (11)

GST Acts

- Central GST Act
- Integrated GST Act
- State GST Acts
- Union Territory GST Act
- GST (Compensation to States) Act
- Central GST (Extension to J&K) Act
- Integrated GST (Extension to J&K) Act

Inter-State trade in Pre GST and GST era

In Pre GST era

- Centre levied Central Sales Tax (CST) on Inter-State Sales under Central Sales Tax Act, 1956 – Article 269 r/w Entry 92A of List I
- Originating State collected & retained the CST
- Entry Tax (Importing State) – Article 246 r/w Entry 52 of List II
- Some of the Input Tax Credit (ITC) is retained by Exporting State – concept of Credit Burn Out

Inter-State trade in Pre GST and GST era

In Pre GST era

- C Forms for accountal/verification of Inter-State movement
- ITC of CST (in some States of Entry Tax too) not allowed to buying taxpayer
- CST Rates –
 - Reduced from 4% to 3% on 1st April, 20017
 - Further reduced from 3% to 2% on 1st June 2008
 - Was to be reduced to 1% on 1st April 2009, and eliminated on 31st March, 2010, but that never happened

Inter-State trade in Pre GST and GST era

In GST era

- IGST is payable on Inter-State trade
- IGST applicable on Inter-State stock transfer of goods
- IGST payable on imports and exports too
- Full Input Tax Credit of IGST admissible
- $IGST = CGST + SGST$

Therefore, no need of C Form and no incentive for the trader to mis-declare Intra-State sale as Inter-State sale

- IGST levied and collected by the Centre – [Article 269A](#)

Is GST a Work In Progress ?

What remains outside GST

- Alcohol for human consumption
- Land
- Electricity
- Five Petroleum Products in the initial years of GST implementation
- Input Tax Credit (ITC) not admissible on all goods and services, thereby not maintaining the complete credit chain – Negative list for ITC in [Section 17\(5\) of Central GST Act](#)
- Too many tax rates – Zero, 0.25, 3, 5, 12, 18, 28, 28+Cess

Section 17(5) of Central GST Act

- (5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—
 - (a) motor vehicles and other conveyances except when they are used—
 - (i) for making the following taxable supplies, namely:—
 - (A) further supply of such vehicles or conveyances ; or
 - (B) transportation of passengers; or
 - (C) imparting training on driving, flying, navigating such vehicles or conveyances;
 - (ii) for transportation of goods;
 - (b) the following supply of goods or services or both—
 - (i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

Section 17(5) of Central GST Act

- (ii) membership of a club, health and fitness centre;
- (iii) rent-a-cab, life insurance and health insurance except where—
 - (A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or
 - (B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and
- (iv) travel benefits extended to employees on vacation such as leave or home travel concession;
- (c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

Section 17(5) of Central GST Act

- (d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
- Explanation.—For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;
- (e) goods or services or both on which tax has been paid under section 10;
- (f) goods or services or both received by a non-resident taxable person except on goods imported by him;
- (g) goods or services or both used for personal consumption;
- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
- (i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

Cross Empowerment of IGST

- Dual control of Taxpayers was a major issue in GST implementation
- Since Law is common, why Taxpayers should have dual control – it increases compliance cost too
- GST Council decided in January 2017 –
 - One Taxpayer will be administered by One Tax Administration by cross empowerment of both Tax Administrators for collecting CGST, SGST and IGST
- Effect of this decision of GST Council is that States will collect IGST too, from the Taxpayers being Administered by them.
- **Is it valid constitutionally ? – Article 269A**

Challenge to levy of Compensation Cess

- Compensation Cess is being collected under Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016.
- Although this provision is contained in a Constitution Amendment Act, it does not make any modifications to the Constitution.
- No provision is added to or repealed from the Constitution.
- As a consequence of enactment of this provision, the Constitution does not stand amended.
- Thus, it is only a provision of ordinary law.

Challenge to levy of Compensation Cess

- This is a peculiar scenario - a provision of ordinary law is contained in a Constitution Amendment Act.
- Naturally then, a question arises –
 - whether this is permissible ?
- Can an ordinary law be enacted by means of a Constitution Amendment Act ?
- Does [Section 18](#) of the Constitution Amendment Act give powers to levy and collect any tax ?
- Or the said Section 18 only contains an obligation of the Centre to compensate the States ?
- **Mohit Minerals Pvt. Ltd. Vs UoI – 2017-TIOL-1678-HC-DEL-MISC -**
Listed for 26 October 2017

Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016

- *18. Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years.*
- Statement of Objects and Reasons of The Goods and Services Tax (Compensation to States) Bill, 2017 is relevant in this regard.

STATEMENT OF OBJECTS AND REASONS of

The Goods and Services Tax (Compensation to States) Bill, 2017

- *The Goods and Services Tax (Compensation to States) Bill, 2017, provides for payment of compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years in accordance with the provisions of section 18 of the Constitution (One Hundred and First Amendment) Act, 2016.*
-
- *2. The Constitution (One Hundred and First Amendment) Act, 2016, has amended the Constitution to facilitate the introduction of goods and services tax in the Country. The amendments made in the Constitution confer simultaneous powers upon Parliament and the State Legislatures to make laws for levy of goods and services tax on the supplies of goods or services or both. Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016, provides that, "Parliament shall, by law, on the recommendations of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years."*

Likely areas of litigation in GST Law

- In GST Law, Credit not admissible to recipient, if supplier has not paid GST – Section 16(2)(c) of the Central GST Act – Constitutional validity of this provision of GST Law is likely to be tested
- Central Excise and Service Tax Laws didn't have this provision. A number of VAT Laws had similar provision
- VAT jurisprudence on this issue –
 - **M/s. Gheru Lal Bal Chand Vs The State Of Haryana And Another** - Civil Writ Petition No.6573 of 2007 – Date of Decision: September 23, 2011 – Hon'ble Punjab & Haryana High Court held no liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer is established.

Likely areas of litigation in GST Law

- **M/s. Mahalaxmi Cotton Ginning Pressing and Oil Industries, Kolhapur Vs. The State of Maharashtra & Ors.** – W.P. 33 of 2012 - Date of Decision: 11th May 2012 - Hon'ble High Court of Bombay upheld Section 48(5) of Maharashtra VAT Act as not offending Article 14 of the Constitution – **This judgment was upheld by Hon'ble Supreme Court**
- **M/s. JKM Graphics Solutions Private Limited Vs. The Commercial Tax Officer** - W.P.No.105 of 2016 and others – Date of Decision 01.03.2017 - Hon'ble Madras High Court held that admittedly, in the instant case, there is no challenge to the statutory provisions and the complaint of all the dealers is largely on the procedure adopted by the respective Assessing Officers; that Tamil Nadu should make procedures similar to Maharashtra, Gujarat and Delhi for the dealer to put forth his case and establish that he is entitled to the concession/set-off availed

GST Act is self contained, unlike Central Excise and Service Tax Laws

Indian Association of Tour Operators Vs. UOI & Anr. - 2017-TIOL-1715-HC-DEL-ST – Hon'ble High Court of Delhi declared a Service Tax Rule ultra vires recently. Operative part of the judgment –

- (i) Rule 6A (1) read with Section 6A (2) of the ST Rules, insofar as it seeks to describe export of tour operator services to include non-taxable services provided by tour operators, **is ultra vires** the FA and in particular Section 94 (2) (f) of the FA and is, therefore, invalid.
- (ii) Section 94 (2) (f) or (hhh) of the FA does not empower the central government to decide taxability of the tour operator services provided outside the taxable territory. They only enable the central government to determine what constitutes export of service, the date for determination of the rate of service or the place of provision of taxable service.
- (iii) Section 66 C of the FA enables the central government only to make rules to determine the place of provision of taxable service but not nontaxable service.

Administrative constraints in implementation of GST and legal issues resulting there from

- GST Council's role ?
 - What is the force of the recommendations of the GST Council ? If a State perceives any particular recommendation of GST Council as not protecting the interests of the people of that State, it may refuse to implement that recommendation. Then what ?
 - In such a case, a State or the Centre may not issue (or issue after a delay), the enabling Notification to implement the legal provision, as recommended by the GST Council. Then what is the remedy ?

(No clarity on this aspect in the Constitution or the GST Law)

Administrative constraints in implementation of GST and legal issues resulting there from

- GST Council's role ?
 - All decisions relating to GST need to be essentially taken by the Governments on the recommendations of the GST Council
 - GST Council has formed a GST Implementation Committee (GIC), which takes decisions on behalf of GST Council, to resolve day to day issues relating to GST, as raised by the trade and industry
 - Currently Notifications and Circulars are being issued by both the Governments – Centre and States – to resolve the issues relating to GST implementation, as per the decisions taken by the GIC
 - Can the Executive be delegated the powers of a Constitutional Body ?

(No clarity on this aspect in the Constitution or the GST Law)

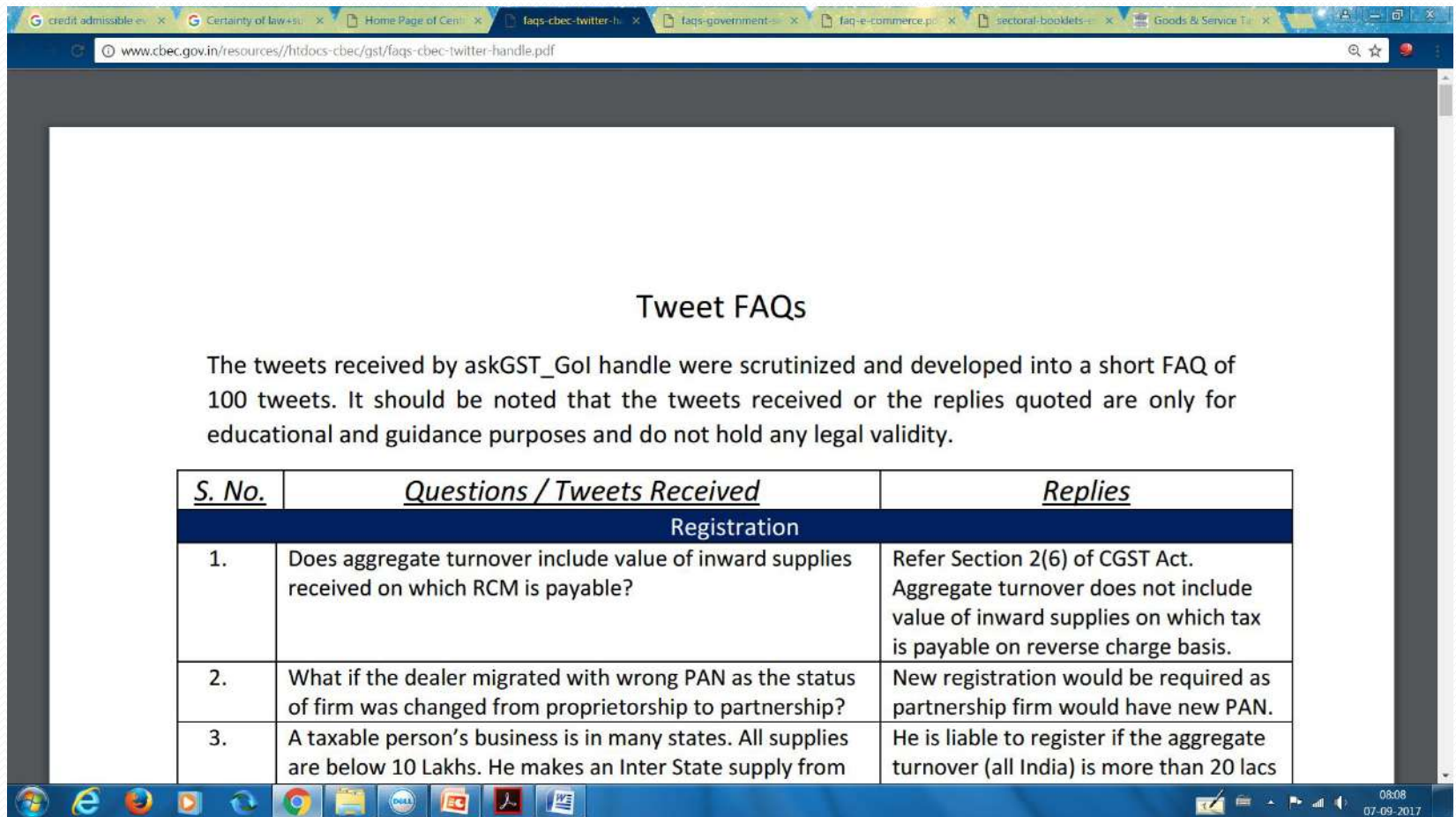
Administrative constraints in implementation of GST and legal issues resulting there from

- As per the Constitutional provision of fiscal federalism, the GST implemented in India is a Dual GST, with both Governments collecting their own GST – Central GST and State GST / UT GST. Issues likely to result from Dual GST Administration
 - Officers of various States and of Centre have different levels of capabilities and are used to following different procedures. Their decisions are likely to be impacted by the same
 - Practices regarding following the Principles of Natural Justice vary from one Tax Administration to another

Administrative constraints in implementation of GST and legal issues resulting there from

- Authority for Advance Ruling and its Appellate Authority will be at State level. Same Company has to take GST Registration in each State and will have to seek Advance Ruling from that State's Authority for Advance Ruling. If the Authority for Advance Ruling of one State gives a Ruling which is contradictory to the Ruling given by Authority for Advance Ruling of another State, then the purpose of Advance Ruling is defeated
- Appeals and Revision by Departmental Authorities – both provisions retained in GST Law –
 - Section 107 – Departmental Appeals – within 6 plus 1 months
 - Section 108 – Revision by Departmental Authority – within 3 years

Clarifications issued through Twitter, put on Official Website – Legally speaking, is disclaimer enough ?



www.cbec.gov.in/resources/htdocs-cbec/gst/faqs-cbec-twitter-handle.pdf

Tweet FAQs

The tweets received by askGST_Gol handle were scrutinized and developed into a short FAQ of 100 tweets. It should be noted that the tweets received or the replies quoted are only for educational and guidance purposes and do not hold any legal validity.

<u>S. No.</u>	<u>Questions / Tweets Received</u>	<u>Replies</u>
Registration		
1.	Does aggregate turnover include value of inward supplies received on which RCM is payable?	Refer Section 2(6) of CGST Act. Aggregate turnover does not include value of inward supplies on which tax is payable on reverse charge basis.
2.	What if the dealer migrated with wrong PAN as the status of firm was changed from proprietorship to partnership?	New registration would be required as partnership firm would have new PAN.
3.	A taxable person's business is in many states. All supplies are below 10 Lakhs. He makes an Inter State supply from	He is liable to register if the aggregate turnover (all India) is more than 20 lacs

08:08
07-09-2017

Thank You

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