

Issues under Section 9(5) of CGST Act 2017

1. Background

Section 9(5) of CGST Act 2017 (section 5(5) of IGST Act 2017) empowers the government to notify specified categories of supply of services the tax on the intrastate/interstate supplies of which shall be paid by the Electronic Commerce Operator (hereinafter referred as 'ECO') if such services are supplied through it and all the provisions of the CGST Act/ IGST Act shall apply to such ECO as if he is the supplier liable for paying the tax in relation to the supply of such services.

Consequent to above power, vide notification number 17/2017-Central Tax (Rate)/ 14/2017-IGST Tax (Rate) both are dated 28 June 2017, Central Government has notified following supply of services under section 9(5) of CGST Act 2017/section 5(5) of IGST Act 2017: -

- (i) Services by way of transportation of passengers by a radio-taxi, motor-cab, maxi-cab and motor cycle
- (ii) Services by way of providing accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes, except where the person supplying such service through ECO is liable for registration under sub-section (1) of section 22 of the said Central Goods and Services Tax Act
- (iii) Services by way of house-keeping, such as plumbing, carpentering etc, except where the person supplying such service through ECO is liable for registration under sub-section (1) of section 22 of the said Central Goods and Services Tax Act

2. With the above background, we now analysis some of the issues which arises under section 9(5) of CGST Act 2017

2.1 Issue No.1: - Whether nature of supply i.e. Intrastate Supply or Interstate Supply needs to be determined on the basis of location of actual supplier or on the basis of location of Electronic Commerce Operator

Analysis: - As we know that 'intrastate supply' is liable to CGST and respective state SGST and 'interstate supply' is liable to IGST. Section 7 and 8 of IGST Act 2017 deals with the determination of nature of supply. Section 7 of IGST Act 2017 deals with the scenario when a supply is considered 'interstate supply' and section 8 of IGST Act 2017 deals with the scenario when a supply is considered 'intrastate supply'. As a general rule, following are the principal for determining the nature of supply: -

| Nature of Supply | Conditions to be Fulfilled | Exceptions |
|--------------------------|---|---|
| Interstate Supply of GST | Location of the supplier and place of supply are in different state | Supply to SEZ, Export Supply, High Seas Sales, Supply of goods to tourist |
| Intrastate Supply of GST | Location of the supplier and place of supply are in same state | Supply to SEZ, Export Supply, High Seas Sales, Supply of goods to tourist |

Now the question arises whether location of the supplier needs to be determined qua the actual service provider or qua the location of ECO.

To understand the above, we take the example of XYZ Limited. XYZ Limited is engaged in the business of taxi aggregation service wherein it provides the IT platform including Mobile App and website both to the customers and taxi drivers to integrate both of them on a single platform. Let us assume that all IT infrastructure required for maintaining mobile app and website is located at Maharashtra. Say XYZ Ltd is also starting its aggregation service in the state of MP. In the state of MP, XYZ Limited has also opened a regional office wherein employee of the XYZ Limited sits who perform following functions: -

- (i) Verifying the KYC documents of taxi related documents
- (ii) Verifying the KYC documents of drivers related documents
- (iii) Solving day to day queries of drivers regarding pay-out etc.

As per section 12(9) of IGST Act 2017, place of supply of Passenger Transportation Service is determined as follows: -

| Scenario | Place of Supply |
|-------------------------------|--|
| Supply to registered person | Location of registered person |
| Supply to unregistered person | Place where the passenger embarks on the conveyance for a continuous journey |

Now the question arises what will be the Location of the Supplier of Service for above supply. Whether it is location of the actual supplier or location of ECO on the basis of which 'Location of the supplier' will be determined. To analyse the same, it is pertinent to read the statutory text of section 9(5) of CGST Act 2017 which reads as follows: -

*The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and **all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services***

It is evident from the above that section 9(5) cast a responsibility on the ECO for paying the tax in relation to supply of such services. Now a view can be taken that section 9(5), by virtue of deeming fiction, consider the Electronic Commerce Operator a supplier of service only for the limited purpose of discharge of applicable GST liability. Hence nature of supply should be decided on the basis of actual supplier of service not on the basis of location of Electronic Commerce Operator. Hence XYZ Ltd (MP) needs to take GST registration in the state of MP and required to discharge CGST and MP SGST.

An alternative view can be taken that section 9(5) deems the ECO as actual supplier of service for all purposes not merely for the limited purpose of discharge of GST liability. Hence location of supplier should be analysed in the context of ECO. If the view is taken that location of ECO needs to be considered then in above example question arises whether it will be the location of XYZ Limited (Maharashtra) or XYZ Limited (MP).

Section 25(5) of CGST Act 2017 reads as follows: -

Where a person who has obtained or is required to obtain registration in a State or Union territory in respect of an establishment, has an establishment in another State or Union territory, then such establishments shall be treated as establishments of distinct persons for the purposes of this Act.

It is evident from the above that XYZ Limited (Maharashtra) and XYZ Limited (MP) will be considered as establishments of distinct persons for the purposes of GST Act. If the XYZ Limited (MP) is considered as supplier of service then transaction will be liable to CGST plus MP SGST. If the XYZ Limited (Maharashtra) is considered as supplier of service then transaction will be liable to IGST. As per section 9(5) of CGST Act 2017, it is the ECO which will be considered as supplier liable to pay tax in relation to notified supply of services. The term 'ECO' has been defined vide section 2(45) of CGST Act 2017 in the following manner: -

(45) "electronic commerce operator" means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce;

It is evident from the above that ECO means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. In the above example, it is the XYZ Limited (Maharashtra) which owns, operates the IT platform hence on the basis literal interpretation, it is the location of XYZ Limited (Maharashtra) which should be considered as location of supplier.

It is evident from the above that above issue is prone to litigation and CBIC should clarify the same at the earliest to avoid unnecessary litigation.

2.2 Issue No.2 – Whether any reversal of ITC arises in the hand of Electronic Commerce Operator if the services notified under section 9(5) is exempted from GST or liable to concessional GST rate subject to the condition that no ITC of input or input services has been taken.

The above issue is also an interesting issue which is having huge impact on the Electronic Commerce Operator. Let us understand the same with the following example: -

Let us assume that XYZ Ltd has opted for 5% GST rate on Passenger Transportation Service which is provided by entry number 8(ii) of notification number 11/2017 – CGST (Rate) dated 28 June 2017 which reads as follows: -

| HSN Code | Description of Service | Rate | Condition |
|--|--|------|--|
| Heading 9964 (Passenger transport services) | (ii) Transport of passengers, with or without accompanied belongings by- (a).. air-conditioned contract carriage other than motor-cab; (b).. air-conditioned stage carriage; (c)... radio taxi. | 2.5% | Provided that credit of input tax charged on goods and services used in supplying the service has not been taken |

It is evident from the above that passenger transportation service is liable to 5% GST rate subject to the condition that credit of input tax charged on goods and services used in supplying the service has not been taken. Now the question arises whether said restriction of

input tax credit will apply to Electronic Commerce Operator by virtue of section 9(5) of CGST Act 2017.

Now two interpretations are possible in this issue. One interpretation that said restriction should not apply to ECO since the ECO is not the actual supplier of service. To analyse the same further, analysis of section 68 of Finance Act 1994 has been done which had fastened liability on recipient of service under reverse charge basis. The said analysis is explained as follows: -

SECTION 68. Payment of service tax. — (1) *Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.*

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service:

The term 'person liable to pay service tax' has been defined vide rule 2(1)(d) of Service Tax Rules 1994 which includes the person liable to pay service tax under reverse charge mechanism.

The term provider of taxable service has been defined vide rule 2(r) of Cenvat Credit Rules 2004 in the following manner: -

(r) *“provider of taxable service” include a person liable for paying service tax;*

In view of above Service Tax provisions, person liable to pay service tax under reverse charge become the provider of taxable service.

Consequent to above, a doubt has been raised whether a person who is neither a service provider nor a manufacturer of final product can avail the Cenvat credit of service tax paid under reverse charge in respect of Goods Transport Agency Service in view of above deeming fictions. The CBEC vide their circular number 345/4/2005-TRU, dated 3-10-2005 clarified the following: -

*In the present case, the person liable to pay service tax under Section 68(2) is neither the provider of an output service nor the manufacturer of final product and therefore the input service cannot be used either for providing output service or manufacture of a final excisable product. **The person is treated as deemed provider of service in relation to services for which he is taxable only for the limited purpose of discharging the service tax liability and not for all purposes.***

On the basis of above interpretation, inferences can be drawn that section 9(5) of CGST Act 2017 only treats the ECO as deemed supplier of service for limited purpose of discharging GST liability and not for all purposes. It is the only payment of tax for which ECO is responsible and all provisions of CGST Act 2017 relating to collection and payment of tax like provisions relating to Tax Invoice, Time of Supply, GST Returns etc will apply to such ECO. Thus, section 9(5) of CGST Act 2017 cannot be read in the manner making ECO as the actual supplier of service and thus requiring reversal of Credit in case service is exempted from GST.

Another interpretation can be taken that by virtue of section 9(5) of CGST Act 2017, ECO steps into the shoes of Actual Supplier hence supply of services in respect of notified services

under section 9(5) will be considered as supply made by the ECO. Once it has been deemed that services notified under section 9(5) is considered as supply made by the ECO then restriction with respect to ITC should apply to ECO.

It is evident from the above that above issue is prone to litigation and CBIC should clarify the same at the earliest to avoid unnecessary litigation.

2.3 Issue No.3 – Whether Electronic Commerce Operator can use ITC for discharge of GST liability on notified supply of Services

The above is also an interesting issue and having a critical impact on Cash outflow of the ECO. As per Section 49(4) of CGST Act 2017, amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed. The term output tax has been defined vide section 2(82) of CGST Act 2017 in the following manner: -

“output tax” in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis

The term ‘taxable person’ has been defined vide section 2(107) of CGST Act 2017 in the following manner: -

“taxable person” means a person who is registered or liable to be registered under section 22 or section 24

It is evident from the above that term output tax means supply of goods or services or both made by taxable person but does not include tax payable by taxable person under reverse charge basis.

Now two interpretations are possible. One interpretation that tax payable by the ECO by virtue of section 9(5) is not the output tax since said supply cannot be said to be made by the ECO. The same is based upon the interpretation that ECO is considered as supplier for limited purpose of discharge of GST liability on notified services under section 9(5). Hence ECO cannot be said to be actual supplier of services as envisaged under section 2(82) of CGST Act 2017. Hence ECO is required to discharge GST liability in respect of notified services under section 9(5) of CGST Act 2017 through Electronic Cash Ledger only.

Another interpretation can be taken that by virtue of section 9(5) of CGST Act 2017, ECO steps into the shoes of Actual Supplier hence supply of services in respect of notified services under section 9(5) will be considered as supply made by the ECO. Hence tax payable by ECO in respect of notified services under section 9(5) will fall under the ambit of ‘output tax’ as defined vide section 2(107) of CGST Act 2017. Another argument can be made that if the term output tax includes only tax payable in respect of actual supply of goods or services made by taxable person then what is the need of specifically excluding tax payable under reverse charge from the definition of output tax.

It is evident from the above that above issue is prone to litigation and CBIC should clarify the same at the earliest to avoid unnecessary litigation.

3. **Conclusion:** - Four years of GST has been passed and still there are various areas which are debatable and having huge Financial Risk. Unlike the pre-GST regime, risk merely not related with the taxability of transactions but also related with the registration requirement in a particular state i.e. from which state GST liability needs to be discharged. If the taxpayer has to face this kind of risk, the same will be against the ease of doing business policy of the government. The above article also an attempt to analyse the various risks in the implementation of section 9(5) of CGST Act 2017 by various startups organisations which are digitally driven based in a particular state but do business across the Taxable Territory. Clarity by the Government on above issues will create a tax friendly environment for startups in the India.

(The views expressed in this article are strictly personal)