4.1 MEANING OF SUPPLY

4.1-1 A layman meaning of supply is
To Deliver,
To Provide, or
To Render.

4.1-2 In the matter of Levob Verzekeringen BV, OV Bank NV v. Saats secretaries van Financien [2012] 22 taxmann.com 174 ECJ, Supply of Goods or Services was defined as-

“Where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction takes place in order to determine, firstly, if there are two or more supplies or one single supply and, secondly, whether in the latter case, that single supply is to be regarded as a supply of services. Further, every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system.”

4.1-3 The entire concept of GST revolves around the term SUPPLY. The onset of taxable event for levy of GST is “SUPPLY of goods or services”.

Observation - Indian GST is full of deeming provisions of supply.

4.2 WHAT IS SUPPLY?

A supply is something which passes from one entity to another. The supply may be one of particular goods or services or both.
Supply is defined under clause (a) of sub-section (1) of Section 7 of CGST Act which states that supply include all forms of supply such as:

- a. Sale
- b. Transfer
- c. Barter
- d. Exchange
- e. License
- f. Rental
- g. Lease or disposal

Made or agreed to be made for consideration by person in the course or furtherance of business.

Hence, the definition of supply is very wide and exhaustive i.e. it includes all such things rather than being restricted to certain things expressed in the definition.

### 4.3 SINE QUA NON OF SUPPLY

4.3-1 Before we refer and try to analyse the limbs and pillars of supply under GST, it is imperative to understand the sine qua non of supply as contained ONLY under clause (a) of sub-section (1) of Section 7 of CGST Act as below:

#### 4.3.2 Elemental factors

The elemental factors, irrespective of nature and forms of supply, are as below:

- a. supply of goods or services
- b. made or agreed to be made
- c. for a consideration
- d. by a person
- e. in the course or furtherance of business.

The elemental factors constituting the sine qua non of supply are dealt further as below:

#### 4.3.2-1 Supply of goods or services

A supply of taxable goods or supply, by a taxable person, in any form or manner as sale, transfer, barter, exchange, license, rental, lease or disposal is the first element to complete the chain of supply.

#### 4.3.2-2 Made or agreed to be made

A promise of supply made or entered between two persons with a two way obligation can be understood as "made or agreed to be made" towards a supply.
a. It can be under a contract and/or by implied acceptance and action thereto to result immediate supply *i.e.* supply made or a supply to be made in future as agreed to be made in the course or furtherance of a business.

b. A promise that a supply will be made between two persons with obligations from both side that one will supply as supplier and the other as a recipient will pay consideration towards such a supply.

4.3.2-3 Consideration - Consideration has been well defined under Section 2(31) of the Act and it has already been dealt under important definitions. But for the purpose of this chapter and better understanding it is being dealt in different perspective.

a. **Limbs of consideration**- In simple words, both the limbs of consideration as provided under Section 2(31) are bifurcated and summarised in the following manner:

   i. **Payment** - made or to be made, whether in *money* or otherwise

   ii. **Monetary Value** - the *monetary value* of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

   Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

b. On perusal of such definition, consideration can be understood as below:

   i. Consideration is any *money paid or payable*;

   ii. Consideration is anything given which has monetary value;

   iii. Consideration given in respect of supply;

   iv. Consideration given in response to supply;

   v. Consideration given for the inducement of supply;

   vi. Consideration can be received from any person other than recipient;

   vii. Consideration received as subsidy *from a person other than* Central Government or a State Government, or

   viii. Consideration is a payment which if and when a supplier applies to a deposit towards a supply.
c. **Consideration versus Supply** - As per clause (a) of sub-section (1) of Section 7 read with Section 2(31) of the Act, Consideration and supply demands a linkage and nexus for being considered as transaction value of supply. However, such linkage is not a must for Schedules I & II of Section 7 of the Act. Whereas, Schedule III has no applicability with any such factors.

d. **Chain of Supply** - Consideration is said to be the most important chain of a supply as more than 80% of supplies will be said to complete if consideration forms the part of a supply barring the exceptions carved out under Schedules I & II of sub-section (1) of Section 7 of the Act.

e. **Other GST model** - The countries where GST is implemented for last many years had dealt with various peculiar issues as to whether the nature of payment itself is of consideration or otherwise before concluding that it had linkage with a supply.

f. **Grey area** - The author must share that in lieu of the proviso to Section 2(81) of the Act, a grey area will evolve in differentiating as to whether every advance payment or deposit will be justifiable towards the consideration or otherwise.

A small attempt is being made to highlight, various significant developments and rulings in GST countries, in this chapter itself under Para 3.3.

4.3.2-4 **By a person** - The expression deployed in the body of clause (a) of sub-section (1) of Section 7 of the Act is "by a person" and "not to a person". Whereas, a person is defined under Section 2(84) of the Act can be summarized as:

‘Person’ includes an individuals, HUF, Firm, Company, limited liability partnership, association of persons, body of individuals, co-operative society, local authority, government including a corporation established by or under any Central, State or provincial Act, trust and artificial juridical person.

a. **Foreign entity** - Further, anybody incorporated by or under the laws of a country outside India is also a person under the ambit of Section 2(84).

b. **Taxable person** - By the word person, it has to be understood as taxable person likewise supply to be taxable supply in taxable territory in order to attract GST under the ambit of laws made for levy and collection of GST.

4.3.2-5 **In the course or furtherance of business** - The expression “in the course or furtherance of business” can be understood as any business
can run and intend to run in the future if it deploys at least the required reasonable and business sense in carrying out its trade and activity.

a. In other words, the expression of “in the course or furtherance of business” can be understood from the following & pertaining to:

i. The smallest sense of business,

ii. Activity pursued in regular manner,

iii. Activity carried out on the sound and recognized business principles,

iv. Diligence is effected,

v. Seriousness in business model,

vi. Manpower and operations including infrastructure to run,

vii. Business sense and every smallest thing from which even a layman can make out that a business is running and will be able to sustain the business in future.

4.3-3 Supply versus Consideration - In other GST countries following OECD guidelines at par, India, which has also signed to follow OECD guideline, the following parameter has been set by various Courts of law. This is being reproduced for reference purpose only.

4.3.3-1 Is the supply made for consideration?

The general theme of a ‘supply for consideration’ is as much a cornerstone of the VAT and GST regimes in the UK, NZ and Canada as it is under the GST Act.

a. The need for nexus

There must be a sufficient nexus between the supply and the payment. In C of IR v. New Zealand Refining Co. Ltd (1997) 18 NZTC 13187, at 13193 Blanchard J commented:

“It can be seen that... a linkage between supply and consideration is requisite to the imposition of the tax. There is a practical necessity for a sufficient connection between the payment and the supply. The mechanics of the legislation will otherwise make it impossible to collect the GST.”

b. The nexus test in Canada and the European Community

The Canadian legislation uses the expression ‘consideration for the supply’. The VAT law in the European Community uses the expression ‘supply effected for consideration’, with no elaboration on what ‘for’ means in this context. The Courts in the UK have adopted a ‘direct link’ test in determining whether consideration is ‘for’ a supply in those jurisdictions.
c. Prepositions of supply

An interesting set of prepositions as laid down by authority under Australian GST may be helpful under Indian context in as much as the definitions of supply and consideration in Australia is almost similar to Indian GST.

<table>
<thead>
<tr>
<th>Propositions</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Proposition 1</strong></td>
<td>For every supply there is a supplier</td>
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<tr>
<td><strong>Proposition 2</strong></td>
<td>Generally, for every supply there is a recipient and an acquisition</td>
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<tr>
<td><strong>Proposition 3</strong></td>
<td>A supply may be mixed, composite or neither</td>
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<td><strong>Proposition 4</strong></td>
<td>A transaction may involve two or more supplies</td>
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<td><strong>Proposition 5</strong></td>
<td>To ‘make a supply’ an entity must do something</td>
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<tr>
<td><strong>Proposition 6</strong></td>
<td>‘Supply’ usually, but not necessarily, requires something to be passed from one entity to another</td>
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<tr>
<td><strong>Proposition 7</strong></td>
<td>An entity cannot make a supply to itself</td>
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<tr>
<td><strong>Proposition 8</strong></td>
<td>A supply cannot be made by more than one entity</td>
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<tr>
<td><strong>Proposition 9</strong></td>
<td>Creation of expectations alone does not establish a supply</td>
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<tr>
<td><strong>Proposition 10</strong></td>
<td>It is necessary to analyse the transaction that occurs, not a transaction that might have occurred</td>
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d. Out of Court Settlements

In Lighthouse Financial Advisers (Townsville) Pty Ltd and Commissioner of Taxation [2014] AATA 301, the Tribunal held that:

"26. In respect of out-of-court settlements, such supplies are described in GSTR 2001/4 as “discontinuance” supplies. The Commissioner accepts that the settlement agreement between the parties does contain a discontinuance supply.

27. Whether a discontinuance supply is a taxable supply depends on the requirements of s 9-5 of the GST Act being met in relation to that supply. Under s 9-5(a) a supply is a taxable supply if, among other things, the supply is made “for consideration”.

28. Sections 9-15 of the GST Act provides that a payment will be consideration for a supply if the payment is “in connection with” a supply and “in response to” or “for the inducement” of a supply. There must be sufficient nexus between the supply and the payment.”

The Tribunal concluded that the payment was not made in consideration of the surrender of the right to sue, noting that such terms are not unusual where litigation is settled. Further, those terms did not
give rise to an additional payment and they should not be ascribed a separate value.

e. In Commissioner of Taxation v. Qantas Airways Limited [2012] HCA 41, the High Court of Australia by majority held that Qantas Airways Limited (“Qantas”) was liable to pay goods and services tax (“GST”) when it received fares on unclaimed flights.

Issue- It is to be noted that not all passengers take the flight they book. Whether the fare the passenger has paid is refundable is determined by the applicable fare rules and conditions of carriage. Even if a refund can be claimed, not all passengers who have not taken the booked flight claim the refund. The Commissioner of Taxation (“Commissioner”) assessed a GST liability on the fares received for flights not taken. The Administrative Appeals Tribunal affirmed the assessment. On appeal, the Full Court of the Federal Court held that as actual travel was the sole purpose of the transaction, there was no taxable supply if the travel does not occur. This meant a GST liability was not incurred.

By special leave, the Commissioner appealed to the High Court of Australia. The High Court held, by majority, that Qantas made a taxable supply which attracted GST when it received fares whether or not the passenger took the flight that was booked. Flights were sold and bookings taken on the basis that Qantas would use its best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline. Consequently, even if the passenger did not actually travel, there was a taxable supply incurring GST liability and Qantas was liable to remit the GST received on fares for unclaimed flights to the Commissioner.

Findings:

“41. The statutory question posed by sections 9-75 and 9-15 is whether there was a supply of anything for which the unused fares were consideration (i.e., in connection with which they were paid). …

44. …What the Act does say is that “a supply is any form of supply whatsoever”, that “consideration includes any payment … in connection with a supply of anything”, and that a taxable supply is (relevantly) one made for consideration. There is no basis for limiting words of such explicit breadth by notions of essence, purpose or “relevance”.”

4.4 LIMBS OF SUPPLY

As per Section 7 of the Act, the term supply can be said to have 3 limbs as below: