

Supply of goods or services or both

4.1 Meaning of 'goods'

'Goods' include all materials, commodities and articles - Article 366(12) of Constitution of India.

This is inclusive definition. It should cover all movable property.

GST Law defines 'goods' as follows -

'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 the land which are agreed to be severed before supply or under a contract of supply - section 2(52) of CGST Act.

'Actionable claim' shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882) - section 2(1) of CGST Act.

4.1-1 Goods must be movable and marketable

The item must be such that it is **capable of being** bought or sold. This is the test of 'Marketability'. The goods must be known in the market. Unless this test of *marketability* is satisfied, these will not be *goods*. This view, expressed in *UOI v. Delhi Cloth Mills* - AIR 1963 SC 791 = 1963 (Suppl.) (1) SCR 586 = 1977 (1) ELT (J 177) (SC 5 member Constitution bench), has been consistently followed by Supreme Court in subsequent cases and by all High Courts. It was held that to become 'goods' an article must be something which can ordinarily come to market to be bought and sold.

Some important judgments where test of 'marketability' is upheld are : *South Bihar Sugar Mills Ltd. v. UOI* - 2 ELT (J336) (SC) = AIR 1968 SC 922 = (1968) 3 SCR 21 * *A P State Electricity Board v. CCE* - 1994 (2) SCC 428 = 70 ELT 3 (SC) = 95 STC 595 (SC) * *Union Carbide India Ltd. v. UOI* - 24 ELT 169 (SC) = 1986 (2) SCR 162 = AIR 1986 SC 1097 = 64 STC 444 = (1986) 2 SCC 547 (SC 3 member bench) * *Bhor Industries Ltd. v. CCE* - 40 ELT 280 = AIR 1989 SC 1153 = (1989) 1 SCC 602 = 184 ITR 129 = 73 STC 145 = (1989) 1 SCR 382 * *Hindustan Polymers v. CCE* - 43 ELT 165 (SC) = (1989) 4 SCC 323 = AIR 1990 SC 1676 * *Moti Laminates (P) Ltd. v. CCE* 76 ELT 241 (SC) = (1995) 3 SCC 23 = 1995 AIR SCW 2035 = 7 RLT 1 (SC) - 3 member bench * *Porritts and Spencer (Asia) Ltd. v. CCE* - AIR 1995 SC 2344 = 106 ELT 18 = 1995 (Suppl) SCC 219 (SC 3 member bench) * *Anil Starch Products Ltd. v. CCE* 1997(89) ELT 21 (SC) *

Rajasthan State Electricity Board v. Associated Stone Industries 2000 AIR SCW 2482 = (2000) 6 SCC 141 * *FGP Ltd. v. UOI* (2003) 10 SSC 270 = 168 ELT 289 (SC) * *CCE v. Aldec Corporation* 2005 (188) ELT 241 (SC) * *White Machines v. CCE* (2008) 224 ELT 347 (SC) * *Medley Pharmaceuticals v. CCE* (2011) 2 SCC 601 = 263 ELT 641 (SC).

4.1-2 Illustrations of 'goods'

Goods includes all movable property. It includes * steam - *Nizam Sugar Factory Ltd. v. CST* - (1957) 8 STC 61 (AP HC) * animals and birds in captivity - *K J Abraham v. Asstt. STO* - (1960) 11 STC 291 (Ker HC).

Crops, grass, trees attached to earth - Growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under the contract of supply has been specifically defined as 'goods'.

Standing trees are not 'goods' and not taxable. However, standing timber will be taxable under CST if timber is identified, contract is unconditional and timber is in deliverable state. In such case, it is 'movable property' and 'goods' hence can be taxed. - *State of Orissa v. Titaghur Paper Mills Co. Ltd.* - AIR 1985 SC 1293 = (1985) 60 STC 213 (SC) * *Shantabai v. State of Bombay* AIR 1958 SC 532 - same view in *CST v. Durga Shellac Factory* (1999) 116 STC 282 (MP HC DB).

Master copies of film songs and music - Master copies of film songs and music are 'goods'. Intangible property can be 'goods' - *CIT v. Giza Impex* (2008) 166 Taxman 30 (Mad HC DB).

Drawings - Technical drawings are goods - *Associated Cement Companies Ltd. v. CC* 2001(4) SCC 593 = 2001 AIR SCW 559 = 128 ELT 21 = AIR 2001 SC 862 = 124 STC 59 (SC 3 member bench).

Knowledge in the form of drawing and design relating to machinery are 'goods' - *Prerna Textiles v. CCE* 2000(117) ELT 241 (CEGAT) - civil appeal dismissed by SC (2001) 134 ELT A169.

Design and drawings are 'goods' and supply of drawings and designs would not be liable to service tax - *Solitz Corporation v. CST* (2009) 18 STT 550 (CESTAT).

Design and drawings expressed on media are 'goods' and same cannot be subjected to service tax - *Mitsui & Co v. CCE* (2013) 42 GST 157 = 32 taxmann.com 31 = 68 VST 43 (CESTAT) * *CCE v. Kirloskar Brothers* (2014) 43 GST 282 = 39 taxmann.com 153 (CESTAT).

Films and programmes on disk is 'goods' - In *Ushakiran Movies v. State of Andhra Pradesh* (2006) 148 STC 453 (AP HC DB), the appellant had produced films and programmes. These were copies on disks and rights to telecast films and programmes were given to ETV for minimum guaranteed fee and share of advertisement revenue. Senior Counsel of applicant gave up the contention (in words of Court 'fairly gave up contention') that these are not goods. Hence, Court proceeded on the basis that these are 'goods'.

Old newspaper are 'newspaper' - Old newspapers are still newspapers as they still have news element and State Govt. cannot tax the same - *Sait Rikhaji Furtarnal v. State of Andhra Pradesh* 1991 taxmann.com 1318 = (1992) 85 STC 1 (SC) = AIR 1991 SC 354 – followed in *CST v. Agrahari Rope Stores* (2006) 146 STC 596 (All HC)

This was followed in *State of Tamil Nadu v. P.S. Sambandam Mudaliar & Co.* [2018] 94 taxmann.com 196 (Madras HC) (as it was a later decision).

In *All India Reporter Karamchari Sangh v. All India Reporter Ltd.* (1988) 70 STC 349 (SC), it was held that law journals are 'newspapers'. Hence, these will stand excluded from definition of 'goods' under CST Act though otherwise, they are no doubt 'goods'.

Earlier in *Indian Express v. State of Tamilnadu* (1987) 67 STC 474 (SC), it was held that old newspapers are not 'newspapers'. It loses its character as 'newspaper'. They are disposed of as waste paper and are taxable. - same view in *The Hindu v. State of Andhra Pradesh* (1987) 67 STC 477 (SC).

4.2 Intangibles can be 'goods'

Any movable property is 'goods'. Thus, intangible property can be 'goods'.

Sale of Copyright - In *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 = AIR 2006 SC 1383 = 3 VST 95 = 2 STR 161 (SC 3 member bench), it was also observed that incorporeal right of copyright could be regarded as 'goods'. In *CIT v. Sun TV Ltd.* (2007) 161 Taxman 351 (Del HC DB), it has been held that right to telecast TV program in foreign countries is 'sale of goods'.

Trade mark - Trade mark is intangible goods - *SPS Jayam & Co. v. Registrar, TNTST* (2004) 137 STC 117 (Mad HC DB) * *Malabar Gold v. CTO* (2013) 38 STT 606 = 30 taxmann.com 606 = 58 VST 191 (Ker HC).

In *CST v. Duke and Sons* (1999) 112 STC 370 (Bom HC DB), it was held that transfer of intangible property like trade mark by mere permission in writing is 'transfer of right to use goods' and is taxable. Trade mark itself or right therein need not be transferred.

Royalty collected on mining lease - Royalty to remove minerals is '*profit a prendre*'. No transaction of sale or purchase is involved - *Tamilnadu Magnesite Ltd. v. State of Tamilnadu* (2007) 9 VST 360 (Mad HC DB) - following *State of Himachal Pradesh v. Gujarat Ambuja Cement* (2005) 142 STC 1 (SC).

Carbon credit - Certified Emission Reductions (CER) commonly known as carbon credit is 'goods' and Vat is payable - Ruling published vide Notification No. 256/CDVAT/2009/43 dated 13-1-2010 issued by Delhi Government [28 VST 29 (St)].

GST payable on sale of duty credit scrip as 'goods' but exempted w.e.f. 13-10-2017 - Duty credit scrips are goods falling under heading 4907 (document of title). However, these are exempted from GST w.e.f. 13-10-2017 - Notification No. 2/2017-IT (Rate) dated 28-6-2017 amended on 13-10-2017.

GST is payable on DFIA as DFIA is not duty credit scrip and not exempt - *Spaceage Syntex P Ltd. In re* (2018) 99 taxmann.com 234 (AAR-Maharashtra).

GST is payable on sale of duty credit scrip. The rate was 12% IFST or 6% SGST plus 6% CGST w.e.f. 1-7-2017 - FAQ issued by CBE&C in August 2017 [upto 13-10-2017].

In following cases, duty credit scrips were held as goods.

In *Yash Overseas v. CST* (2008) 8 SCC 681 = 15 STT 375 = 17 VST 182 (SC 3 member bench), it has been held that DEPB has intrinsic value that makes it marketable commodity. Hence it is 'goods'. It is like prepaid meal ticket. If DEPB has to be compared with a lottery ticket, it can only be compared with a lottery ticket that has won the prize. The prize-winning lottery ticket ceases to be a mere piece of paper having no value itself. It acquires inherent value and becomes itself a thing of value [Principle applies to Duty Credit Scrips and DFIA as these are transferable].

REP Licenses (now DFIA or Duty Credit Scrips) which can be sold in market at premium are 'goods' - *Bharat Fritz Werner Ltd. v. Commissioner of Commercial Taxes* - (1992) 86 STC 170 (Kar HC) affirmed in 86 STC 175 (Kar HC DB) * *P S Apparels v. Dy. CTO* - (1994) 94 STC 139 (Mad HC DB) * *Hemant Spices v. ACST* - (1994) 95 STC 336 (Ker HC) * *Shivdam Wood v. CTO* (1999) 112 STC 87 (WBTT) * *Inter Gold (India) v. State of Maharashtra* (2010) 3 GST 260 = 29 VST 360 (Bom HC DB) * *CTO v. State Bank of India* (2016) 10 SCC 595 = 341 ELT 481 (SC).

DEPB (Duty Entitlement Passbook Scheme) is freely tradable. It is right to claim back credit. It is freely tradable and is 'goods'. It is taxable under sales tax. It is not actionable claim. - *Philco Exports v. STO* (2001) 124 STC 503 (Del HC DB) * *Jindal Drugs v. State of Maharashtra* 2004 (178) ELT 105 = 17 VST 164 (Bom HC DB) * *International Creative Foods v. State of Kerala* (2008) 17 VST 178 (Ker HC).

In *Vikas Sales Corporation v. CCT* AIR 1996 SC 2082 = (1996) 102 STC 106 (SC) = 86 Taxman 369 (Mag) (SC 3 member bench), it was held that REP licenses (now DEPB) have their own value. They are bought and sold as such. It is by itself a property. For all purposes and intents, it is 'goods'.

In *Baraka Overseas Traders v. CCT* (2001) 121 STC 277 (Karn HC DB), it was held that tax is payable if REP licenses are renounced for a 'charge'. The charge is nothing but sale.

There can be inter-state sale of DEPB authorisation - *Hansa Overseas Enterprises v. State of Andhra Pradesh* (2012) 47 VST 524 (AP HC DB).

Electrical energy - In following cases, it was held that electricity is 'goods'. Electricity has been mentioned Customs Tariff under heading 2716 00 00 with tariff rate of Rs 2,000 per 1,000 Kwh.

In GST Tariff, the GST rate is Nil.

In case of electrical energy, generation or production coincides almost instantaneously with its consumption. Sale, supply and consumption takes place without any hiatus. - - Electricity is movable property though it is not tangible. It is 'goods'. - *State of Andhra Pradesh v. National Thermal Power Corporation (NTPC)* 2002 AIR SCW 1956 = (2002) 5 SCC 203 = 127 STC 280 (SC 5 member bench).

The 'electricity' is 'goods' - *CST v. MPEB* - (1970) 25 STC 188 (SC) = (1969) 2 SCR 939 = AIR 1970 SC 732 (partly overruled in 2002 only to the extent that it was held in 2002 judgment that electricity cannot be stored). - followed in *Indian Oil Corpn. v. CTO* (1997) 107 STC 463 (Raj TT) - same view in *CMS (India) Operations and Maintenance Co. P Ltd. v. CCE* (2007) 10 STT 65 = 9 VST 228 = 7 STR 369 (CESTAT).

Electrical energy has been specified in heading 2716 in both Central Excise and Customs Tariff and hence is 'goods'.

Service of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST - Notification No. 12/2017-CT (Rate) and No. 9/2017-IT (Rate) both dated 28-6-2017, effective from 1-7-2017.

Duty drawback is simply money not goods - Duty drawback received in respect of exports is simply money. It is not goods and no sales tax is payable if exporter receives duty drawback - *KMA Finished Leather v. State of Tamil Nadu* (2004) 134 STC 185 (Mad HC DB).

Since money is neither goods nor service, GST should not apply on duty drawback.

Money (cash) is not 'goods' - Cash (money) is not 'goods' [Hence, ITC for vehicle used for transportation of cash is not available] - *CMS Info Systems Ltd. In re* (2018) 69 GST 471 = 96 taxmann.com 292 (AAAR - Maharashtra).

4.3 Actionable claim

Definition of 'goods' specifically includes 'actionable claim'.

Inclusion of 'actionable claim' in definition of 'goods' has been held as valid in *Skill Lotto Solutions (P) Ltd. v. Union of India* [2020] 122 taxmann.com 49 = 43 GSTL 289 (SC 3 member bench).

"Actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 - section 2(1) of CGST Act.

Actionable claims, other than lottery, betting and gambling are neither as a supply of goods nor a supply of services - Schedule III of CGST Act read with section 7(2)(a) of CGST Act.

Thus, only activities relating to lottery, betting and gambling will be subject to GST.

As per section 3 of Transfer of Property Act, actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Section 130 of Transfer of Property Act provides that an actionable claim may be assigned for value.

Basically, actionable claim means a claim for any amount receivable (debt) or claim for benefit of any movable property not in possession for which relief can be claimed in Civil Court. Such claim can be assigned/transferred.

Transfer/assignment of unsecured debt is assignment/transfer of 'actionable claim'. Claim to secured debt is not actionable claim. Thus, transfer of secured debt through securitization is not assignment of 'actionable claim'. However, it is mere transaction in money or mere transfer of title of immovable property and hence not a 'service'.

An actionable claim can be enforced only through Court of Law and cannot be bought and sold as goods, though it can be assigned.

Debt for which action is necessary to realise can only be said to be an actionable claim. Where no action is necessary to realise the debt, it cannot be said to be actionable claim - *Jindal Drugs v. State of Maharashtra* 2004 (178) ELT 105 = 17 VST 164 (Bom HC DB) [In this case, it was held that DEPB credit is not actionable claim as no action in law is necessary for its realisation. In case of transfer of DEPB, it confers upon the transferee the immediate right to pay duty (through DEPB credit).

In *Jugal Kishore v. Raw Cotton Co.* AIR 1955 SC 376, it was held that a Judgment Debt or Decree is not an actionable claim as no action is necessary to realise it.

An actionable claim would include right to recover insurance money or a partner's right to sue for account of a dissolved partnership or right to claim benefit of a contract not coupled with any liability - *UOI v. Sri Sarada Mills* (1972) 2 SCC 877 = 43 Comp Cas 431 (SC).

In *Venkatasamy Jagannathan In re* (2019) 75 GST 628 = 107 taxmann.com 276 (AAR-TN), appellant had profit sharing agreement (PSA), where applicant was entitled to get profit for strategic sale of equity shares above a specified sale price per equity share. It was held that the claim is beneficial interest in the profits arising. The claim is contingent on such event occurring. It is 'actionable claim' and hence no GST.

A claim for arrears of rent is an actionable claim - *State of Bihar v. Maharajadhiraja Sr Kameshwar Singh* (1952) SCR 889.

Right to claim provident fund is actionable claim - *Official Trustee v. L Chippendale* AIR 1944 Cal 335 * *Bhupati Mohan Das v. Phanindra Chandra Chakravarty* AIT 1935 Cal 756.

In *Sunrise Associates v. Government of NCT of Delhi* (2006) 5 SCC 603 = 4 STT 105 = 145 STC 576 = 3 VST 151 (SC 5 member Constitution Bench), it was held that actionable claim is transferable [In this case, it was held that lottery ticket is an actionable claim].

Recharge coupon vouchers are sold by distributors of mobile telephone companies. The recharge coupon is for accessing telephone services for pre-determined period of time. Thus, recharge coupon is acknowledgement of receipt of money in advance for providing telecom service in future is actionable claim and hence not subject to sales tax - *Bharti Airtel v. ACST* (2010) 4 GST 342 = 34 VST 202 (WBTT).

Reward points earned by customer on purchases made by him under loyalty programme is actionable claim, as customer can redeem the payback points within the validity period (for purchase of goods). However, after the validity period is over is not 'actionable claim'. [really, it can come under 'tolerating an act or situation', which is deemed service]. It is taxable under GST - *Loyalty Solutions and Research P Ltd. In re* (2018) 69 GST 277 = 95 taxmann.com 204 (AAR - Haryana).

4.3-1 Illustrations of 'actionable claim'

Following are illustrations of 'actionable claim' -

- ◆ Lottery ticket (before draw)
- ◆ Insurance policy
- ◆ Claim for arrears of rent
- ◆ Claims for future rents (these can be assigned)
- ◆ Unsecured loans
- ◆ Option to purchase securities or movable/immovable property
- ◆ Claim for unpaid dower (in case of Muslim woman getting divorce)
- ◆ A claim in profit by partner in firm, dividend declared
- ◆ Right to sue for infringement of brand or copyright (IPR) even when brand or copyright is not registered [Note that registration of patent is mandatory as without such registration, protection under law is not available. However, in case of copyright and brand, action for infringement can be initiated even if brand or copyright was not registered].
- ◆ Reward points earned by customer on purchases made by him under loyalty programme.
- ◆ Assignment or sale of secured or unsecured debt - FAQ No. 40 issued by CBI&C on banking sector on 27-12-2018.

Actionable claims other than specified actionable claims are neither goods nor service - Actionable claims, other than specified actionable claims are neither as a supply of goods nor a supply of services - Schedule III of CGST Act read with section 7(2)(a) of CGST Act proposed to be amended *vide* CGST (Amendment) Act, 2023 from date to be notified [likely to be made effective from 1-10-2023]. Presently, paragraph 6 of Schedule III reads as follows - Actionable Claims, other than lottery, betting and gambling

Specified Actionable Claim - "Specified actionable claim" means the actionable claim involved in or by way of (i) betting (ii) casinos (iii) gambling (iv) horse racing (v) lottery; or (vi) online money gaming - section 2(102A) of CGST Act, proposed to be inserted *vide* CGST (Amendment) Act, 2023 from date to be notified [likely to be made effective from 1-10-2023].

4.3-2 Lottery tickets are subject to GST

Lottery ticket is actionable claim. Actionable claim has been included in definition of 'goods' under GST Law.

However, earlier, actionable claim was excluded from definition of 'goods'.

Lottery ticket is 'actionable claim' - *Sunrise Associates v. Government of NCT of Delhi* (2006) 5 SCC 603 = 4 STT 105 = 3 VST 151 = 145 STC 576 (SC 5 member Constitution Bench) - followed in *State of Kerala v. Prabhavathy Thankamma* (2009) 3 SCC 511 (SC) * *Commercial Corporation of India Ltd. v. ASTO* (2007) 10 VST 175 (Ker. HC) * *LIS v. State of Kerala* (2008) 17 VST 432 (Ker. HC DB) * *MRS Lucky Lottery Centre*

v. *State of Tamil Nadu* (2010) 29 VST 16 (Mad. HC DB) * *State of Karnataka v. State of Meghalaya* (2022) 60 GSTL 161 (SC).

Lottery is actionable claim and can be taxed under GST – *Teesta Distributors v. UOI* [2018] 99 taxmann.com 162 (Cal HC).

State Government can levy tax on lotteries – *State of Meghalaya v. State of Karnataka* [2022] 142 taxmann.com 6 (SC).

4.3-3 Transfer of unsecured debt is actionable claim but not subject to GST

If an unsecured debt is transferred to a third person for a consideration, the activity be treated as ‘goods’ as it is actionable claim.

However, in essence, it is mere transaction in money.

However, actionable claims, other than lottery, betting and gambling are neither as a supply of goods nor a supply of services - Schedule III of CGST Act read with section 7(2)(a) of CGST Act.

Hence, such transfer of unsecured debt will not be subject to GST.

4.3-4 Securitisation of debts, mortgage

Often debts are securitized and transferred to another Financial Institution/Bank. Sometimes, this is done under ‘Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002’.

Technically, such debt is not unsecured debt and hence cannot fall within the definition of ‘actionable claim’.

The transaction is not ‘transfer of actionable claim’ (under Transfer of Property Act), but acquisition of ‘financial asset’ under ‘Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002’.

Departmental clarification that acquisition of secured debt is transaction in money - Sale, purchase, acquisition or assignment of a secured debt like a mortgage will constitute a transaction in money. However if a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax - Para 2.8.9 of CBE&C’s ‘Taxation of Services : An Education Guide’ published on 20-6-2012.

If it is transaction in money, it can come within the definition of ‘service’.

However, GST should be payable only on charges relating to transfer of secured debt and not on entire quantum of secured debt.

Further, security receipt issued under the Securitisation Act is included in definition of ‘security’. Hence, it is outside GST net - FAQ No. 65 issued by CBI&C on banking sector on 27-12-2018.

4.3-5 Beneficial interest in movable property

Beneficial interest in movable property not in possession is defined as ‘actionable claim’ and hence subject to GST.

Para 2.8.10 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 clarifies as follows -

Black's Law Dictionary defines 'beneficial interest' as follows— "A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property".

Therefore 'beneficial interest in movable property' is a right or expectancy in a movable property like right to receive income accruing from a movable property.

4.3-6 Taxability of vouchers

Voucher means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identity of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument – section 2(118) of CGST Act.

In case of supply of vouchers by a supplier, the time of supply shall be - (a) the date of issue of voucher, if the supply is identifiable at that point; or (b) the date of redemption of voucher, in all other cases – section 12(4) of CGST Act and section 13(4) of CGST Act.

Vouchers qualify neither as supply of goods nor as supply of services and GST is not leviable on vouchers as they are in nature of instruments covered under definition of 'money' - *Premier Sales Promotion P. Ltd. v. UOI* [2023] 147 taxmann.com 85 = 3 Centax 64 = 70 GSTL 345 (Kar HC DB). In this case, the appellant company was providing marketing services in area of sourcing and supply of e-vouchers [reversing *Premier Sales Promotion P. Ltd., In re* (2021) 88 GST 3 = 130 taxmann.com 404 = 57 GSTL 266 (AAR-Kar.) - view was upheld in *Premier Sales Promotion (P.) Ltd., In re* [2022] 90 GST 669 = 134 taxmann.com 73 = 59 GSTL 183 (AAAR-Kar.). Now decisions of AAR and AAAR not valid].

Vouchers and subscription packages are neither goods nor services. Hence, ITC of GST paid on vouchers/coupons is not available – *Myntra Designs P Ltd. In re* (2023) 97 GST 387 = 73 GSTL 106 = 4 Centax 156 = 148 taxmann.com 186 (AAAR-Karn) [In that case, GST should not have been paid at all].

Vouchers entitling a person to enjoy service is not actionable claim - Vouchers that entitle a person to enjoy a service, for example a health club, is not actionable claim. Such a voucher does not create a 'beneficial interest' in a movable property but only entitles a person to enjoy a particular service for a single or specified number of times - Para 2.8.11 of CBI&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 [Thus, these would be taxable].

Recharge vouchers is not actionable claim - Recharge vouchers issued by service companies for enabling clients/consumers to avail services like mobile phone communication, satellite TV broadcasts, DTH broadcasts etc. is not actionable claims. Such recharge vouchers do not create a 'beneficial interest' in a movable property but

only enable a person to enjoy a particular service - Para 2.8.12 of CBE&C's 'Taxation of Services: An Education Guide' published on 20-6-2012 [Thus, these would be taxable].

Pre-paid Instruments issued are neither 'goods' nor services – In *Kalyan Jewellers India Ltd., In re* [2021] 127 taxmann.com 37 (AAAR - Tamil Nadu), it was held that pre-paid instruments are neither goods nor services. A voucher is a means for advance payment of consideration for future supply of goods or services. However, it was held that the time of supply of the gift vouchers/gift cards by the applicant to the customers shall be the date of issue of such vouchers and the applicable rate of tax is that applicable to that of the goods [In fact, at the time of issue of voucher, exact product to be supplied is not identified at all].

Earlier, in *Kalyan Jewellers India Ltd., In re* [2020] 82 GST 355 = 113 taxmann.com 58 (AAR - Tamil Nadu), the applicant was issuing pre-paid instruments (PPI) either in paper form or in form of smart cards which could be read electronically. These could be redeemed by purchase of jewellery. It was held that these are 'vouchers'. PPI in paper form is classifiable under heading 4911 and GST rate is 12%. Smart cards are classifiable under heading 8523 and GST rate is 18% [Now this decision stands reversed].

4.4 Supply of goods at future date - Hire purchase and financial lease

Any transfer of title in goods under an agreement which stipulates that property in goods will pass at a future date upon payment of full consideration as agreed, is a supply of goods - para 1(c) of Schedule II of CGST Act.

The financial lease or hire purchase of goods should get covered under 'supply of goods', in view of aforesaid specific definition.

4.4-1 Financial Leasing

As per International Accounting Standards, 'lease' is an agreement whereby the lessor passes to the lessee the right to use the asset for an agreed period for consideration of rent.

In operating lease, ownership of asset rests with lessor. Whole of rent received is income of lessor and expenditure for lessee.

So far as lessee is concerned, it is not shown as asset in his books and hence it is called 'off balance sheet' transaction. Of course, lease rental is shown as expenditure in books of lessee and hence it is not 'off P&L account' transaction.

Lessor reserves right to repossess goods if lessee fails to pay consideration in time.

Lessor charges Lease Management fees as initial payment. Such payment may be about 0.5% to 1% of price of asset.

In *Space Capital Service v. Prakash Industries Ltd.* (2000) 101 Comp Cas 437 = 30 SCL 420 (Del HC), it was held that leased property does not belong to lessee and lessor can take back possession - same view in *GE Capital v. Dee Pharma Ltd.* (1998) 4 Comp LJ 527 = 96 Comp Cas 192 = 47 DRJ 265 (Del) - followed in *PNB Capital Services v. Atul Glass Industries Ltd.* (2004) 51 SCL 122 (Del HC).

4.4-2 Financial and Operating Lease

Lease can be broadly classified as (a) Financial or (b) Operating lease. Financial lease is usually long term agreement covering entire economic life of asset. Whole investment is recovered by lessor (plus, of course, his profit). Asset is usually maintained by lessee. It is non-cancellable contract. Practically, lessee becomes owner, though not legally.

Operating lease is for short period. The asset may be given to more than one parties on lease during economic life of asset. Hence, cost of asset is not recovered in one contract of lease. Usually, lessor upkeeps and maintains the asset. Contract can be cancelled by lessee/lessor by giving notice of period as prescribed in contract. Giving computers or furniture on monthly charge basis is one example of 'operating lease'.

Depreciation in case of lease - In case of operating lease, the lessor is *de facto* and *de jure* owner of the goods. He can claim depreciation. However, in case of financial lease, the lessee is *de facto* owner though lessor is *de jure* owner. Hence, in *Indusind Bank Ltd. v. Addl. CIT* (2012) 19 taxmann.com 173 = 135 ITD 165 (ITAT Mumbai), it was held that in case of financial lease, depreciation can be claimed by the lessee and not lessor.

4.4-3 Meaning of Financial lease

As per AS-19 of ICAI, a finance lease is a lease that transfers *substantially* all the risks and rewards incident to ownership of an asset [If all risks and rewards are transferred, it will be an outright sale and not a lease]. As per AS-19 of ICAI, 'Operating lease' is a lease other than a finance lease.

A financial lease is one where the lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. - - In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipment or the machinery is by the borrower. For all practical purposes, the borrower becomes the owner of property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from lessor any of the abovementioned expenses. The period of lease extends over and covers the entire life of property for which it may remain useful, divided either into one term or divided into two terms, with clause for renewal. In either case, the lease is non-cancelable - *Asea Brown Boveri Ltd. v. Industrial Finance Corpn. of India* AIR 2005 SC 17 = 154 Taxman 512 = 2004 AIR SCW 6198 = 56 SCL 21 (SC).

In hire purchase or financial leasing, there are two different and distinct transactions, viz. the financing transaction and the equipment leasing/hire purchase transaction. The former is exigible for service tax under section 66 of Finance Act, 1994 whereas the latter would be exigible to local tax/VAT. - - A financial lease transfers all the

risks and rewards incidental to ownership, even though the title may or may not be eventually. An operating lease is other than finance lease. - - Equipment lease is a form of long-term financing - *Association of Leasing and Financial Services v. UOI* (2010) 7 taxmann.com 740 = 35 VST 549 (SC 3 member bench)

Almost entire finance in financial lease - The financial lease can finance entire cost of asset. Practically, the lessor collects some amount as 'security deposit' from lessee, which may be 10% to 25%. Thus, actual financing of asset is about 75% to 90%.

Hire purchase is not a 'loans and advances' - Hire purchase is not a 'loans and advances'. The finance charges collected by hire purchase company cannot be treated as a loan agreement, and hence, interest tax cannot be levied on interest component embedded in hire purchase agreement - *Muthoot Leasing v. CIT* (2023) 292 Taxman 5 = 146 taxmann.com 53 (SC).

4.4-4 Distinction between hire purchase and financial lease

Both hire purchase and financial lease are methods of financing an asset. In both cases, lessor (in case of lease) and owner (in case of hire purchase) continue to have 'property' over the goods during period of lease/hire purchase.

Financial lease is theoretically 100% finance (less security deposit taken, if any, from lessee). Hire purchase need not be 100% finance. Provisions relating to depreciation are different.

In hire purchase, goods are let out on hire under a hire purchase agreement, with option to purchase in accordance with terms and conditions. Until the option to purchase is exercised by the hirer, upon payment of all amounts agreed upon between hirer and the financier, financier continues to be owner of goods. Till then, hirer remains trustee. If hirer does not pay instalments, the financier can take repossession of his own vehicle. However, notice should be given before re-possession. Otherwise, it amounts to deficiency in service - *Magna Fincorp Ltd. v. Rajesh Kumar Tiwari* [2020] 10 SCC 399.

Hire purchase is but a loan and that hirer obtains goods from the seller and the banking and financial institution finalised the purchase of the goods, with the title firmly resting with the hirer with the financial institution vested with the right to acquire possession of the goods through judicial intervention - *Commissioner of CGST & Central Excise v. Shriram Transport Finance Company Ltd.* [2021] 124 taxmann.com 341 (Bombay HC DB).

4.5 Securities are neither 'goods' nor 'service'

Securities have been specifically excluded from definition of 'goods' and 'service' - see section 2(102) which defines 'service' and section 2(52) of CGST Act which defines 'goods'.

Hence, 'supply of securities' will not be subject to GST.

Transaction in securities which involves disposal of securities is not a supply in GST and hence not taxable. However, facilitation or arranging transactions in securities

is taxable w.e.f. 1-7-2017. The amendment to definition of 'service' w.e.f. 1-2-2019 (by adding explanation, which stated that 'service' includes facilitating or arranging transactions in securities) is only clarificatory - CBI&C circular No. 119/38/2019-GST dated 11-10-2019.

"Securities" shall have the same meaning assigned to it in section 2(h) of the Securities Contracts (Regulation) Act, 1956 - section 2(101) of CGST Act.

Section 2(h) of Securities Contracts (Regulation) Act, 1956 defines 'securities' as follows -

Securities - 'Securities' include -

- (i) Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate
- (ia) Derivative
- (ib) Units or any other instrument issued by any collective investment scheme to the investors in such schemes
- (ic) Security Receipt issued by Securitisation Company, as defined in section 2(1)(zg) of 'Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002'
- (id) Units or other such instruments issued to investors under any mutual fund scheme.

Explanation.—For the removal of doubts, it is hereby declared that 'securities' shall not include any unit linked insurance policy or scrips or any such instrument or scrip, by whatever name called, which provides a combined benefit of risk on life of persons and investment by such persons and issued by insurer referred in section 2(9) of Insurance Act (The *Explanation* has been added w.e.f. 9-4-2010)

- (ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity, which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be.
- (ii) Government securities
- (iia) Such other instruments as may be declared by the Central Government to be securities; and
- (iii) Rights or interest in securities. [section 2(h)]

In *Sahara India Real Estate Corpn. Ltd. v. SEBI* (2012) 115 SCL 478 = 25 taxmann. com 18 (SC) it has been held that 'security' covers hybrid also. Optionally Fully Convertible Debentures (OFCB) is a 'security'. These are debentures *in praesenti* and shares *in future*.

In *PCS Industries v. SEBI* (2002) 35 SCL 939 (SAT), it was held that unit issued by mutual fund is a 'security', as definition of 'security' is an inclusive definition. Now, this has been specifically included in definition of 'security' w.e.f. 12-10-2004.

In *Bhagwati Developers P Ltd. v. Peerless General Insurance* (2013) 9 SCC 584 = 120 SCL 264 = 35 taxmann.com 596 (SC), it has been held that shares of public limited company not listed on stock exchange are also 'securities'. Transfer of such shares is covered under Securities Contracts (Regulation) Act, unless it is a spot delivery contract - confirming *Bhagwati Developers P Ltd. v. Peerless General Finance and Investment Co.* (2005) 128 Comp Cas 444 (Cal HC).

A security is 'marketable' only if it is permitted to be sold and purchased in any stock exchange. [Some judgments quoted in *Gramercy Emerging Market Fund v. Essar Steels* (2002) 39 SCL 435 (Guj HC) para 18, but the citations appear to be incorrect]. [This view is not valid in view of contrary Supreme Court decision]

Optionally fully convertible debentures (OFCDs) are 'hybrid securities' and hence SEBI has jurisdiction regulate issue of such OFCD - *Sahara India Real Estate Corporation Ltd. v. SEBI* (2011) 110 SCL 217 = 14 taxmann.com 141 (SAT) - view confirmed in *Sahara India Real Estate Corpn. Ltd. v. SEBI* (2012) 115 SCL 478 = 25 taxmann.com 18 (SC).

Units in mutual funds is security and hence neither goods nor service - Units of mutual fund is included in definition of 'security'.

Earlier, in some cases, it was held as 'goods'.

In *Geojit Financial Services Ltd. v. CCE* (2007) 8 STR 390 (CESTAT), it was observed that SEBI has categorized mutual fund as 'goods' - following *Aknam Finvest P Ltd. v. CCE* (2007) 7 STR 267 (CESTAT).

In *CCE v. P N Vijay Financial Services* (2008) 17 STT 107 = 23 VST 31 (CESTAT) also, it has been held that unit of mutual fund is 'goods' as per section 2(7) of Sale of Goods Act - same view in *CCE v. Yogesh J Shah* (2014) 45 GST 493 = 45 taxmann.com 137 (CESTAT).

Holding of shares by holding company in subsidiary is not service and not taxable - In classification of services, there is SAC entry 997171, reading "the services provided by holding companies, i.e. holding securities of (or other equity interests in) companies and enterprises for the purpose of owning a controlling interest". However, 'security' is neither goods nor service. Securities include 'shares'. Hence, this activity is not a service - CBIC Circular No. 196/08/2023-GST dated 17-7-2023.

Transaction in securities is 'exempt supply' for purposes of Input Tax Credit - As per section 17(3) of CGST Act, value of exempt supply shall include - (a) - - (b) transactions in securities (c) - - (d) - - .

For determining the value of an exempt supply as per section 17(3) of CGST Act, the value of security shall be taken as 1% of the sale value of such security - *Explanation* under Rule 45 of CGST and SGST Rules, 2017.

Facilitating or arranging transactions of securities is subject to GST - An *Explanation*, inserted to section 2(102) of CGST Act (which defines 'services') vide CGST (Amendment) Act, 2018, effective from 1-2-2019 reads as follows -

For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities.

Since the amendment is only to remove doubts, it will have retrospective effect.

Thus, though supply of securities are not subject to GST, share brokers and stock exchanges will be liable to pay tax on services supplied by them for facilitating or arranging transactions in securities

This *Explanation* has been added 'for removal of doubts' and will have retrospective effect from 1-7-2017. These services were even otherwise taxable, in view of wide definition of 'services' and 'business'. However, it was being argued that since securities is neither goods nor services, there should be no tax on services of share brokers and stock exchanges. This explanation is only to set such doubts at rest.

Transaction in securities which involves disposal of securities is not a supply in GST and hence not taxable. However, facilitation or arranging transactions in securities is taxable w.e.f. 1-7-2017. The amendment to definition of 'service' w.e.f. 1-2-2019 (by adding explanation, which stated that 'service' includes facilitating or arranging transactions in securities) is only clarificatory - CBI&C circular No. 119/38/2019-GST dated 11-10-2019.

Dividend income is not taxable as not 'supply' - In *Anil Kumar Agrawal, In re* [2020] 116 taxmann.com 428 (AAR - Karn), it was held that dividend income, capital gain/loss on sale of shares and amount received after maturity of LIC policy is not income received from 'supply'. It is not 'exempt income' for purpose of calculating 'aggregate turnover'.

4.5-1 Share brokers and sub-broker are liable to pay GST

Since securities are neither goods or service, a view is expressed that the share brokers are not liable to GST. In my view, this is not correct, as the share broker does not himself supply securities. He only arranges, helps or coordinates supply of securities. Hence, the share broker and sub-broker should be liable to charge and pay GST.

4.6 Supply of Services

'Services' means anything other than goods [Article 366(26A) of Constitution of India]. However, definition of 'services' in GST Act is different. Section 2(102) of CGST Act defines 'services' as follows—

"Services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Explanation.—For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities – The *Explanation* inserted vide CGST (Amendment) Act, 2018 w.e.f. 1-2-2019.

Services can even cover immovable property - Though definition of 'service' can cover even immovable property, sale of land and sale of completed building has been excluded from definition of goods or services.

The definition of 'service' is so broad that practically sky is the limit for imposing any tax by Union or State Governments.