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Can a right to collect toll become taxable payment? The GST question

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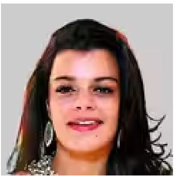
Synopsis
A Supreme Court case questions whether a government-granted right to collect tolls constitutes non-monetary payment for highway construction. This dispute could impact public-private partnerships across infrastructure sectors. The court must distinguish between a toll right, the actual toll paid by motorists, and deferred payments, ensuring that valuable entitlements are not automatically treated as taxable consideration for construction services, thereby preserving project bankability.



Tanessa Puri
The writer is assistant professor, taxation law, Jindal Global Law School

A taxing barrier

Governments don't always pay with money. Sometimes, they pay with rights. That proposition lies at the heart of a GST dispute before the Supreme Court. Can NHAI's grant of a right to collect toll be treated as a non-monetary consideration for constructing a highway?

This answer matters beyond roads. India increasingly develops highways, airports, ports, mines and other public assets through concessions. If gov-granted earning rights can later be characterised as payment for another taxable supply, developers may have to price GST into bids, financing assumptions and expected returns. This can transform project bankability across the PPP economy.

In CG Tollway v. Union of India, Rajasthan High Court held that CG Tollway supplied taxable works-contract services to NHAI and received commercially valuable concessionary rights in return, particularly the right to collect toll. It treated the arrangement as barter. That ruling has now been carried to the apex court. This appeal gives the court a chance to go beyond a particular case, and formulate a rule for concession contracts before similar disputes migrate across infrastructure sectors.

The high court's basic instinct has force. Section 7 of **CGST Act** recognises barter and exchange, while Section 2(31) includes payment 'in money or otherwise'. GST cannot be avoided merely by replacing cash with a valuable commercial entitlement. But the judgment moves from reciprocal economic value to supply specific consideration. These two are not synonymous.

Three distinct concepts must remain separate. A toll is paid by a motorist for using the road. A right to collect toll is the prior **legal entitlement** granted to the concessionaire. An annuity is ordinarily a deferred payment made by the party obliged to remunerate it. The motorist pays the toll. NHAI grants the toll-collection right. In an annuity model, NHAI makes the deferred payment. They may perform similar economic functions, but they are not the same legal payment.

The high court was right that the toll exemption does not automatically protect an independently identifiable **construction supply**. But the distinction must operate both ways. Toll paid by motorists can't become an annuity merely because both help the concessionaire recover its investment. Similar economic functions don't erase distinct legal relationships.

Nor does commercial value, by itself, establish consideration. A contractor may be permitted to enter government land, use a project site and exercise rights of way necessary to construct an asset. Those permissions are valuable and indispensable. Yet, they may merely enable performance, rather than pay for it.

Also, the law allows to entertain the question of not merely whether a benefit has value but why it was conferred. This inquiry is crucial because the concession agreement points in both directions. Six questions can discipline this inquiry:

- What precisely is the supply? The authority must identify the taxable supply, its supplier and its recipient. A concession agreement cannot be taxed as one economic mass merely because several obligations coexist within it.
- What right is said to be its price? The 'concession' is too broad where the bundle contains site access, rights of way, operating permissions, toll rights and several obligations.
- Was the right granted as quid pro quo for the identified supply, or merely to make performance possible? Commercial utility is insufficient. Revenue must prove the right was conferred in respect of, in response to, or as inducement for the specific supply sought to be taxed.
- In which direction does value travel? Where the private party pays government for a concession, that contractual allocation cannot be ignored. Each must be separately identified before the arrangement is labelled barter.
- Is the right being confused with the revenue it may generate? A toll right is not every rupee later collected. The right creates an opportunity to earn revenue subject to traffic risk, financing costs, maintenance obligations, tariff regulation and concession duration. A restaurant licence is not worth every rupee the restaurant will eventually receive from diners. Likewise, a toll right cannot casually be valued at gross future toll collections.

- Has valuation been left until the end? A right can be quantified only after it has been established as consideration. A valuation rule answers, 'How much?' not 'Consideration for what?'

This sequencing reflects the principle that taxation cannot work backwards from a convenient valuation figure to discover what is supposedly being taxed. It must identify the taxable event, person liable, rate and measure of tax.

For PPP investors, uncertainty is a financial, not semantic, dispute.

The writer is assistant professor, taxation law, Jindal Global Law School, Sonipat