

Conference on Goods and Services Tax

Date: 9th July, 2022 Venue: Dr. A.P.J. Abdul Kalam Auditorium, Judicial Academy, Jharkhand

READING MATERIAL



JUDICIAL ACADEMY, JHARKHAND



Judicial Academy Jharkhand

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INTRODUCTION

Time and again, the need for reforming the indirect tax structure has been considered by the Indian Parliament. The making of GST has been a long-drawn process. The idea of GST was first mooted in 2000 by Shri Atal Bihari Vajpayee's government. An empowered committee headed by Shri Ashim Dasgupta was set up to design the GST Model. In 2003, the taskforce on Implementation of the Fiscal Responsibility and Budget Management Act chaired by Shri Vijay Kelkar recommended the removal of inefficient and distortionary taxes, suggesting a comprehensive GST based on VAT model. Thereafter, in 2005-06, Shri P. Chidambaram, the then Union Minister proposed the idea of completely moving towards GST which would encompass both the centre and the states. He reiterated his proposal in his speech next year. An Empowered Committee of State Finance Ministers was set-up to work with the Central Government to prepare a roadmap for introduction of GST. The final version of the report of EC was presented in the form of 'A Model and Roadmap for Goods and Services Tax in India' on April 30, 2008.

Comments were received on the Report from the Central and State Government officials after which 'First Discussion paper on Goods and Services Tax in India' was released by EC on November 10, 2009 to obtain the inputs of industry, trade bodies, and people at large. On 22nd March 2011, the Constitution (One Hundred and Fifteenth Amendment) Bill was introduced in the Lok Sabha to operationalize the GST and enable Centre and States to make laws for levying of GST. However, the Bill lapsed with the dissolution of the 15th Lok Sabha. Thereafter, on 19th December, 2014 the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was introduced in the Lok Sabha to address various issues related to GST. Constitutional Amendment was required as the design of earlier indirect tax regime constrained the central government from levying tax on goods beyond the point of manufacture and the states in extending tax to services. The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was passed by the Lok Sabha on 6th May, 2015 after which the Rajya Sabha passed the Bill with 9 amendments on 3rd August, 2016. The Lok Sabha then passed the modified Bill on 8th August, 2016. After getting approval of half of the States, it was sent to the President for his assent which was given on 8th September, 2016. With this, the GST structure was established in India.

GST can be said to be the most ambitious and remarkable indirect tax reform since India's independence. The objective of GST is to levy a single uniform tax on all goods and services across India. GST laws provide for a comprehensive and uniform indirect tax regime replacing a number of Central and State taxes. It has brought more producers into the tax net making India more of a national integrated market. It will certainly add to growth as well as government finances. Implementation of a new tax structure of this scale, encompassing both goods and services by the Centre and the states in a complex federal system, is perhaps unprecedented in the modern global tax history.

In contrast to the earlier indirect tax structure which was origin-based, GST is a consumption-based tax. It is a tax on goods and services establishing a comprehensive and continuous chain of set-off benefits up to the retailer level. It is essentially a tax only on value addition at each stage, and a supplier at each stage is permitted to set-off the GST paid on the purchase of goods and services through a tax credit mechanism. Ultimately, the burden of GST is borne by the end-user, i.e., the final consumer of the commodity or services. Hence, the cascading effect of taxes is avoided and production costs are cut down. This is the essence of GST.

As already noted, prior to the introduction of GST, the indirect tax system of India suffered from various limitations. There was a burden of tax-on-tax in the pre-GST system of Central excise duty and the sales tax system of the States. GST has taken under its wing, a profusion of indirect taxes of the Centre and the States. It has integrated taxes on goods and services for set-off relief. Further, it has also captured certain value additions in the distributive trade. There is now a continuous chain of set-offs which would eliminate the burden of cascading effect entirely. Presently, services sector in India constitutes a tax base with vast potential which has not been sufficiently exploited. It is in this context that GST is justified as it subsumes almost all the services for the purpose of taxation. Since, major Central and State indirect taxes have got subsumed under GST, the multiplicity of taxes has been substantially reduced which, in turn, would decrease the operating costs of the country's tax system. The uniformity in tax rates and procedures across the country will go a long way in reducing compliance costs. In a nutshell, GST is a comprehensive indirect tax levy on manufacture, sale and consumption of goods as well as services at the national level. GST is an indirect tax for the whole of India to make it one unified common market. GST is designed to give India a world class tax system and improve tax collections. It would end the long-standing distortions of differential treatment of manufacturing sector and services sector. GST will facilitate seamless credit across the entire supply chain and across all States under a common tax base.

The GST Regime in force today, is an evolving design. Through this Reading material, we have tried to present a basic picture of GST structure as it presently exists. It covers different aspects relating to GST like that of Registration, Returns, Input Tax Credit, Assessment Procedure, Fake Invoicing, Circular Trading, E-Way Bill and Offences and Penalties. It is a collection of writings of several experts as well as organisations on topics pertaining to GST. It will surely help the readers in getting acquainted with the concepts and the pros and cons of the current GST structure.

Sudhanshu Kumar Shashi

Director Judicial Academy, Jharkhand An overview of GST

GOODS AND SERVICE TAX (GST) CONCEPT & STATUS

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS (CBIC) DEPARTMENT OF REVENUE, MINISTRY OF FINANCE GOVERNMENT OF INDIA AS ON 01ST AUGUST, 2019

1. INTRODUCTION:

Whether it was uniformity of taxation and consequent free interior trade or possession of 'the jewel in the crown' at the root of prosperity of Britain is debatable, nonetheless the words of father of modern economics on the benefits of uniformity of system of taxation cannot be taken too lightly. Before implementation of Goods and Service Tax (GST), Indian taxation system was a farrago of central, state and local area levies. By subsuming more than a score of taxes under GST, road to a harmonized system of indirect tax has been paved making India an economic union.

2. CONSTITUTIONAL SCHEME OF INDIRECT TAXATION IN INDIA BEFORE GST:

- 2.1 Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. As per Article 246 of the Constitution, Parliament has exclusive powers to make laws in respect of matters given in Union List (List I of the Seventh Schedule) and State Government has the exclusive jurisdiction to legislate on the matters containing in State List (List II of the Seventh Schedule). In respect of the matters contained in Concurrent List (List III of the Seventh Schedule), both the Central Government and State Governments have concurrent powers to legislate.
- 2.2 Before advent of GST, the most important sources of indirect tax revenue for the Union were customs duty (entry 83 of Union List), central excise duty (entry 84 of Union List), and service tax (entry 97 of Union List). Although entry 92C was inserted in the Union List of the Seventh Schedule of the Constitution by the Constitution (Eighty-eighth Amendment) Act, 2003 for levy of taxes on services, it was not notified. So tax on services were continued to be levied under the residual entry, i.e. entry 97, of the Union List till GST came into force. The

Union also levied tax called Central Sales Tax (CST) on inter-State sale and purchase of goods and on inter-State consignments of goods by virtue of entry 92A and 92B respectively. CST however is assigned to the State of origin, as per Central Sales Tax Act, 1956 made under Article 269 of the Constitution.

2.3 On the State side, the most important sources of tax revenue were tax on sale and purchase (entry 54 of the State List), excise duty on alcoholic liquors, opium and narcotics (entry 51 of the State List), Taxes on luxuries, entertainments, amusements, betting and gambling (entry 62 of the State List), octroi or entry tax (entry 52 of the State List) and electricity tax ((entry 53 of the State List). CST was also an important source of revenue though the same was levied by the Union.

3. HISTORICAL EVOLUTION OF INDIRECT TAXATION IN POST-INDEPENDENCE INDIA TILL GST:

- 3.1 In post-Independence period, central excise duty was levied on a few commodities which were in the nature of raw materials and intermediate inputs, and consumer goods were outside the net by and large. The first set of reform was suggested by the Taxation Enquiry Commission (1953-54) under the chairmanship of Dr. John Matthai. The Commission recommended that sales tax should be used specifically by the States as a source of revenue with Union governments' intervention allowed generally only in case of inter-State sales. It also recommended levy of a tax on inter-State sales subject to a ceiling of 1%, which the States would administer and also retain the revenue.
- 3.2 The power to levy tax on sale and purchase of goods in the course of inter-State trade and commerce was assigned to the Union by the Constitution (Sixth Amendment) Act, 1956. By mid-1970s, central excise duty was extended to most manufactured goods. Central excise duty was levied on unit, called specific duty,

and on value, called ad valorem duty. The number of rates was too many with no offsetting of taxes paid on inputs leading to significant cascading and classification disputes.

- 3.3 The Indirect Taxation Enquiry Committee constituted in 1976 under Shri L K Jha recommended, *inter alia*, converting specific rates into *ad valorem* rates, rate consolidation and input tax credit mechanism of value added tax at manufacturing level (MANVAT). In 1986, the recommendation of the Jha Committee on moving on to value added tax in manufacturing was partially implemented. This was called modified value added tax (MODVAT). In principle, duty was payable on value addition but in the beginning it was limited to select inputs and manufactured goods only with one-to-one correlation between input and manufactured goods for eligibility to take input tax credit. The comprehensive coverage of MODVAT was achieved by 1996-97.
- 3.4 The next wave of reform in indirect tax sphere came with the New Economic Policy of 1991. The Tax Reforms Committee under the chairmanship of Prof. Raja J Chelliah was appointed in 1991. This Committee recommended broadening of the tax base by taxing services and pruning exemptions, consolidation and lowering of rates, extension of MODVAT on all inputs including capital goods. It suggested that reform of tax structure must have to be accompanied by a reform of tax administration, if complete benefits were to be derived from the tax reforms. Many of the recommendations of the Chelliah Committee were implemented. In 1999-2000, tax rates were merged in three rates, with additional rates on a few luxury goods. In 2000-01, three rates were merged into one rate called Central Value Added Tax (CENVAT). A few commodities were subjected to special excise duty.
- 3.5 Taxation of services by the Union was introduced in 1994 bringing in its

ambit only three services, namely general insurance, telecommunication and stock broking. Gradually, more and more services were brought into the fold. Over the next decade, more and more services were brought under the tax net. In 1994, tax rate on three services was 5% which gradually increased and in 2017 it was 15% (including cess). Before 2012, services were taxed under a 'positive list' approach. This approach was prone to 'tax avoidance'. In 2012 budget, negative list approach was adopted where 17 services were out of taxation net and all other services were subject to tax. In 2004, the input tax credit scheme for CENVAT and Service Tax was merged to permit cross utilization of credits across these taxes.

- 3.6 Before state level VAT was introduced by States in the first half of the first decade of this century, sales tax was levied in States since independence. Sales tax was plagued by some serious flaws. It was levied by States in an uncoordinated manner the consequences of which were different rates of sales tax on different commodities in different States. Rates of sales tax were more than ten in some States and these varied for the same commodity in different States. Inter-state sales were subjected to levy of Central Sales Tax. As this tax was appropriated by the exporting State credit was not allowed by the dealer in the importing State. This resulted into exportation of tax from richer to poorer states and also cascading of taxes. Interestingly, States had power of taxation over services from the very beginning. States levied tax on advertisements, luxuries, entertainments, amusements, betting and gambling.
- 3.7 A report, titled "Reform of Domestic Trade Taxes in India", on reforming indirect taxes, especially State sales tax, by National Institute of Public Finance and Policy under the leadership of Dr. Amaresh Bagchi, was prepared in 1994. This Report prepared the ground for implementation of VAT in States. Some of

the key recommendations were; replacing sales tax by VAT by moving over to a multistage system of taxation; allowing input tax credits for all inputs, including on machinery and equipment; harmonization and rationalization of tax rates across States with two or three rates within specified bands; pruning of exemptions and concessions except for a basic threshold limit and items like unprocessed food; zero rating of exports, inter-State sales and consignment transfers to registered dealers; taxing inter-State sales to non-registered persons as local sales; modernization of tax administration, computerization of operations and simplification of forms and procedures.

3.8 The first preliminary discussion on transition from sales tax regime to VAT regime took place in a meeting of Chief Ministers convened by the Union Finance Minister in 1995. A standing Committee of State Finance Ministers was constituted, as a result of meeting of the Union Finance Ministers and Chief Ministers in November, 1999, to deliberate on the design of VAT which was later made the Empowered Committee of State Finance Ministers (EC). Haryana was the first State to implement VAT, in 2003. In 2005, VAT was implemented in most of the states. Uttar Pradesh was the last State to implement VAT, from 1st January, 2008.

4. INTERNATIONAL PERSPECTIVES ON GST / VAT:

4.1 VAT and GST are used inter-changeably as the latter denotes comprehensiveness of VAT by coverage of goods and services. France was the first country to implement VAT, in 1954. Presently, more than 160 countries have implemented GST / VAT in some form or the other. The most popular form of VAT is where taxes paid on inputs are allowed to be adjusted in the liability at the output. The VAT or GST regime in practice varies from one country to another in terms of its technical aspects like 'definition of supply', 'extent of coverage of

goods and services', 'treatment of exemptions and zero rating' etc. However, at a broader level, it has one common principle, it is a destination based consumption tax. From economic point of view, VAT is considered to be a superior system over sales tax of taxing consumption because the former is neutral in allocation of resources as it taxes value addition. Besides, there are certain distinct advantages of VAT. It is less cascading making the taxation system transparent and anti-inflationary. From revenue point of view, VAT leads to greater compliance because of creation of transaction trails.

- 4.2 When compared globally, VAT structures are either overly centralized where tax is levied and administered by the Central government (Germany, Switzerland, Austria), or dual GST structure wherein both Centre and States administer tax independently (Canada) or with some co-ordination between the national and sub-national entities (Brazil, Russia). While a centralized structure reduces fiscal autonomy for the States, a decentralized structure enhances compliance burden for the taxpayers. Canada is a federal country with unique model of taxation in which certain provinces have joined federal GST and others have not. Provinces which administer their taxes separately are called 'non-participating provinces', whereas provinces which have teamed up with the Federal Government for tax administration are called 'participating provinces'.
- 4.3 The rate of GST varies across countries. While Malaysia has a lower rate of 6% (Malaysia though scrapped GST in 2018 due to popular uproar against it), Hungary has one of the highest rate of 27%. Australia levies GST at the rate of 10% whereas Canada has multiple rate slabs. The average rate of VAT across the EU is around 19.5%.

5. NEED FOR GST IN INDIA:

- 5.1 The introduction of CENVAT removed to a great extent cascading burden by expanding the coverage of credit for all inputs, including capital goods. CENVAT scheme later also allowed credit of services and the basket of inputs, capital goods and input services could be used for payment of both central excise duty and service tax. Similarly, the introduction of VAT in the States has removed the cascading effect by giving set-off for tax paid on inputs as well as tax paid on previous purchases and has again been an improvement over the previous sales tax regime.
- 5.2 But both the CENVAT and the State VAT have certain incompleteness. The incompleteness in CENVAT is that it has yet not been extended to include chain of value addition in the distributive trade below the stage of production. Similarly, in the State-level VAT, CENVAT load on the goods has not yet been removed and the cascading effect of that part of tax burden has remained unrelieved. Moreover, there are several taxes in the States, such as, Luxury Tax, Entertainment Tax, etc. which have still not been subsumed in the VAT. Further, there has also not been any integration of VAT on goods with tax on services at the State level with removal of cascading effect of service tax.
- 5.3 CST was another source of distortion in terms of its cascading nature. It was also against one of the basic principles of consumption taxes that tax should accrue to the jurisdiction where consumption takes place. Despite remarkable harmonization in VAT regimes under the auspices of the EC, the national market was fragmented with too many obstacles in free movement of goods necessitated by procedural requirement under VAT and CST.

- 5.4 In the constitutional scheme, taxation powers on goods was with Central Government but it was limited up to the stage of manufacture and production while States have powers to tax sale and purchase of goods. Centre had powers to tax services and States also had powers to tax certain services specified in clause (29A) of Article 366 of the Constitution. This sort of division of taxing powers created a grey zone which led to legal disputes. Determination of what constitutes a goods or service is difficult because in modern complex system of production, a product is normally a mixture of goods and services.
- As can be seen from the previous paragraphs, India moved towards value added taxation both at Central and State level, and this process was complete by 2005. Integration of Central VAT and State VAT therefore is nothing but an inevitable consequence of the reform process. The Constitution of India envisages a federal nature of power bestowed upon both Union and States in the Constitution itself. As a natural corollary of this, any unification of the taxation system required a dual GST, levied and collected both by the Union and the States.

6. GST: A HISTORICAL PERSPECTIVE:

- 6.1 The Kelkar Task Force on Fiscal Responsibility and Budget Management (FRBM) recommended in 2005 introduction of a comprehensive tax on all goods and service replacing Central level VAT and State level VATs. It recommended replacing all indirect taxes except the customs duty with value added tax on all goods and services with complete set off in all stages of making of a product.
- 6.2 In the year 2000, the then Prime Minister introduced the concept of GST and set up a committee to design a GST model for the country. In 2003, the Central Government formed a taskforce on Fiscal Responsibility and Budget Management, which in 2004 recommended GST to replace the existing tax regime by

introducing a comprehensive tax on all goods and services replacing Central level VAT and State level VATs. It recommended replacing all indirect taxes except the customs duty with value added tax on all goods and services with complete set off in all stages of the value chain. An announcement was made by the then Union Finance Minister in Budget (2006-07) to the effect that GST would be introduced with effect from April 1, 2010 and that the EC, on his request, would work with the Central Government to prepare a road map for introduction of GST in India. After this announcement, the EC decided to set up a Joint Working Group in May 10, 2007, with the then Adviser to the Union Finance Minister and Member-Secretary of the Empowered Committee as its Co-conveners and four Joint Secretaries of the Department of Revenue of Union Finance Ministry and all Finance Secretaries of the States as its members. This Joint Working Group got itself divided into three Sub-Groups and had several rounds of internal discussions as well as interaction with experts and representatives of Chambers of Commerce & Industry. On the basis of these discussions and interaction, the Sub-Groups submitted their reports which were then integrated and consolidated into the report of Joint Working Group (November 19, 2007).

6.3 This report was discussed in detail in the meeting of the EC on November 28, 2007, and the States were also requested to communicate their observations on the report in writing. On the basis of these discussions in the EC and the written observations, certain modifications were considered necessary and were discussed with the Co-conveners and the representatives of the Department of Revenue of Union Finance Ministry. With the modifications duly made, a final version of the views of EC on the model and road map for the GST was prepared (April 30, 2008). These views of EC were then sent to the Government of India, and the comments of Government of India were received on December 12, 2008. These

comments were duly considered by the EC (December 16, 2008), and it was decided that a Committee of Principal Secretaries/Secretaries of Finance/Taxation and Commissioners of Trade Taxes of the States would be set up to consider these comments, and submit their views. These views were submitted and were accepted in principle by the EC (January 21, 2009). Based on discussions within the EC and between the EC and the Central Government, the EC released its First Discussion Paper (FDP) on GST in November, 2009. This spelled out the features of the proposed GST and has formed the basis for discussion between the Centre and the States.

7. CHALLENGES IN DESIGNING GST:

- 7.1 In the discussion that preceded amendment in the Constitution for GST, there were a number of thorny issues that required resolution and agreement between Central Government and State Governments. Implementing a tax reform as vast as GST in a diverse country like India required the reconciliation of interests of various States with that of the Centre. Some of the challenging issues, addressed in the run up to GST, were the following:
- Origin-based versus Destination-based taxation: GST is a destination based consumption tax. Under destination based taxation, tax accrues to the destination place where consumption of the goods or services takes place. The existing VAT regime was based on origin principle where Central Sales Tax was assigned to the State of origin where production or sale happened and not to the State where consumption happened. Many manufacturing States expressed concerns over the loss of revenue on account of shift from origin based taxation to destination based taxation.

- 7.2.1 An argument put forward on behalf of producing states in support of origin based taxation is that they need to collect at least some tax from inter-State sales in order to recover the cost of infrastructure and public services provided by the State Governments to the industries producing the goods which are consumed in other states. This line of reasoning is based on the assumption that in the absence of a tax on inter-State sales, the location of export industries within their jurisdiction would not contribute to the tax revenues of the exporting state. This view was missing the fact that any value addition in a jurisdiction necessarily means extra income in the hands of the residents of that jurisdiction. Spending of this income on consumer goods expands the sales tax base of the producing states and thereby contributes to their revenues. In fact, to the extent that consumer expenditures are dependent on the level of income of the residents of a State, it is the producing States that stand to gain the most in additional sales tax revenues (even under the destination basis of consumption taxes) from increased export output.
- Rate Structure and Compensation: There was uncertainty about gains in revenue after implementation of GST. Though attempts were made to estimate a revenue neutral rate, nonetheless it remains an estimate only. It was difficult to estimate accurately as to how much the States will gain from tax on services and how much they will lose on account of removal of cascading effect and phasing out of CST. In view of this, States asked for compensation during the first five years of implementation of GST.
- 7.3.1 A Committee headed by the Chief Economic Adviser Dr. Arvind Subramanian on possible tax rates under GST suggested RNR (Revenue Neutral Rate). The term RNR refers to that single rate, which preserves revenue at desired (current) levels. This would differ from the standard rate, which is the rate that would apply to a majority of goods and services. In practice, there will be a

structure of rates, but for the sake of analytical clarity and precision it is appropriate to think of the RNR as a single rate. It is a given single rate that gets converted into a whole rate structure, depending on policy choices about exemptions, what commodities to charge at a lower rate and what to charge at a very high rate.

- 7.3.2 The Committee recommended RNR of 15-15.5% (to be levied by the Centre and States combined). The lower rates (to be applied to certain goods consumed by the poor) should be 12%. Further, the sin or demerit rates (to be applied on luxury cars, aerated beverages, pan masala, and tobacco) should be 40%.
- 7.4 Dispute Settlement: A harmonized system of taxation necessarily required that all stakeholders stick to the decisions taken by the supreme body, which was later constituted as the Goods and Services Tax Council (the Council). However, the possibility of departure from the recommendations of such body cannot be completely ruled out. Any departure would definitely affect other stakeholders and in such circumstances there must be a statutory body to which affected parties may approach for dispute resolution. The nature of such dispute resolution body was a bone of contention. Under the Constitution (One Hundred Fifteenth Amendment) Bill, 2011, a Goods and Services Tax Dispute Settlement Authority was to be constituted for this purpose. This body was judicial in nature. The proposed constitution of this Authority was challenged because its powers would override the supremacy of the Parliament and the State Legislatures. The Constitution (One Hundred Twenty Second Amendment) Bill, 2014 departed from the previous GST amendment bill and proposed that the Goods and Services Tax Council may decide about the modalities to resolve disputes arising out of its recommendations.

7.5 Alcohol and Petroleum products: Alcoholic liquor for human consumption and petroleum products are major contributor to revenue of States. As States were uncertain about impact of GST on their finances and moreover loss of autonomy in collection of tax revenue, States unanimously argued for exclusion of these products from the ambit of GST. In the 115th Amendment Bill alcoholic liquor for human consumption and five petroleum products namely crude petroleum, high speed diesel, motor spirit or petrol, aviation turbine fuel and natural gas were kept out of GST. But in the 122nd Amendment Bill, only alcoholic liquor for human consumption was kept outside GST and above mentioned five petroleum products were proposed to be brought under GST from a date to be recommended by the Council. The Central Government has also retained its power to tax tobacco and tobacco products, though these are also under GST. Thus, to ensure smooth transition and provide fiscal buffer to States, it was agreed to keep alcohol completely out of the ambit of GST.

8. CONSTITUTIONAL AMENDMENT:

8.1 As explained above, unification of Central VAT and State VAT was possible in form of a dual levy under the constitutional scheme. Power of taxation is assigned to either Union or States subject-wise under Schedule VII of the Constitution. While the Centre is empowered to tax goods up to the production or manufacturing stage, the States have the power to tax goods at distribution stage. The Union can tax services using residuary powers but States could not. Under a unified Goods and Services Tax scheme, both should have power to tax the complete supply chain from production to distribution, and both goods and services. The scheme of the Constitution did not provide for any concurrent taxing powers to the Union as well as the States and for the purpose of introducing goods and services tax amendment of the Constitution conferring simultaneous power on

Parliament as well as the State Legislatures to make laws for levying goods and services tax on every transaction of supply of goods or services was necessary.

- 8.2 The Constitution (115th Amendment) Bill, 2011, in relation to the introduction of GST, was introduced in the Lok Sabha on 11.03.2011. The Bill was referred to the Standing Committee on Finance on 29.03.2011. The Standing Committee submitted its report on the Bill in August, 2013. However, the Bill, which was pending in the Lok Sabha, lapsed with the dissolution of the 15th Lok Sabha.
- 8.3 The Constitution (122nd Amendment) Bill, 2014 was introduced in the 16th Lok Sabha on 19.12.2014. The Constitution Amendment Bill was passed by the Lok Sabha in May, 2015. The Bill was referred to the Select Committee of Rajya Sabha on 12.05.2015. The Select Committee submitted its Report on the Bill on 22.07.2015. The Bill with certain amendments was finally passed in the Rajya Sabha and thereafter by Lok Sabha in August, 2016. Further the bill was ratified by required number of States and received assent of the President on 8th September, 2016 and has since been enacted as Constitution (101st Amendment) Act, 2016 w.e.f. 16.09.2016.
- 8.4 The important changes introduced in the Constitution by the 101st Amendment Act are the following:
 - a) Insertion of new article 246A which makes enabling provisions for the Union and States with respect to the GST legislation. It further specifies that Parliament has exclusive power to make laws with respect to GST on inter-State supplies.
 - b) Article 268A of the Constitution has been omitted. The said article empowered the Government of India to levy taxes on services. As tax on

services has been brought under GST, such a provision was no longer required.

- c) Article 269A has been inserted which provides for goods and services tax on supplies in the course of inter-State trade or commerce which 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. It also provides that Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
- d) Article 270 has been amended to provide for distribution of goods and services tax collected by the Union between the Union and the States.
- e) Article 271 has been amended which restricts power of the Parliament to levy surcharge under GST. In effect, surcharge cannot be imposed on goods and services which are subject to tax under Article 246A.
- f) Article 279A has been inserted to provide for the constitution and mandate of GST Council.
- g) Article 366 has been amended to exclude alcoholic liquor for human consumption from the ambit of GST, and services have been defined.
- h) Article 368 has been amended to provide for a special procedure which requires the ratification of the Bill by the legislatures of not less than one half of the States in addition to the method of voting provided for amendment of the Constitution. Thus, any modification in GST Council

- shall also require the ratification by the legislatures of one half of the States.
- i) Entries in List I and List II have been either substituted or omitted to restrict power to tax goods or services specified in these Lists or to take away powers to tax goods and services which have been subsumed in GST.
- j) 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 five years.
- k) In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

9. GOODS & SERVICE TAX COUNCIL:

- 9.1 As provided for in Article 279A of the Constitution, the Goods and Services Tax Council (the Council) was notified with effect from 12.09.2016. The Council is comprised of the Union Finance Minister (who will be the Chairman of the Council), the Minister of State (Revenue) and the State Finance/Taxation Ministers as members. It shall make recommendations to the Union and the States on the following issues:
 - a) the taxes, cesses and surcharges levied by the Centre, the States and the local bodies which may be subsumed under GST;
 - b) the goods and services that may be subjected to or exempted from the GST;
 - c) model GST laws, principles of levy, apportionment of IGST and the principles that govern the place of supply;

- d) the threshold limit of turnover below which the goods and services may be exempted from GST;
- e) the rates including floor rates with bands of GST;
- f) any special rate or rates for a specified period to raise additional resources during any natural calamity or disaster;
- g) special provision with respect to the North- East States, J&K, Himachal Pradesh and Uttarakhand; and
- h) any other matter relating to the GST, as the Council may decide.
- 9.2 The Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel. While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services.
- 9.3 One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings. The Goods and Services Tax Council shall determine the procedure in the performance of its functions. Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:
 - a) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and
 - b) the votes of all the State Governments taken together shall have a weightage

of two-thirds of the total votes cast, in that meeting.

9.4 The Council has met for 36 times and no occasion has arisen so far that required voting to decide any matter. Till its 34th meeting, GST Council has taken 1064 decisions which include 219 decisions taken by the GST Implementation Council (GIC). As on 14.05.2019, 1006 decisions have been implemented and only a total of 58 decisions (of which 39 were unique issues) were under implementation at different stages with different sections of DoR/CBIC/GSTN. In other words, 94.5% of the decisions of the GST Council have already been implemented, which is a significant achievement, given the complicated nature and wide area of subjects/issues involved and the fact that all decisions were taken unanimously.

The following major recommendations have been made by the Council:

9.4.1 Legal/Rules:

- 9.4.1.1 Recommending GST laws, namely CGST Law, UTGST Law, IGST Law, SGST Law and GST Compensation Law paving the way for implementation of GST.
- 9.4.1.2 Rules on composition, registration, input tax credit, invoice, determination of value of supply, accounts and records, returns, payment, refund, assessment and audit, advance ruling, appeals and revision, transitional provisions, anti-profiteering, E-way Bill, inspection, search and seizure, demands and recovery and offences and penalties have been recommended.

9.4.2 Registration and Threshold:

9.4.2.1 Threshold limit of aggregate turnover for exemption from registration and payment of GST for suppliers of services would be Rs. 20 lakhs and

- Rs. 10 lakhs in the States of Manipur, Mizoram, Nagaland and Tripura.
- 9.4.2.2 Threshold limits of aggregate turnover for exemption from registration and payment of GST for the suppliers of goods would be Rs. 40 lakhs and Rs. 20 lakhs in the States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura and Uttarakhand with effect from 01.04.2019.
- 9.4.2.3 The following classes of taxpayers shall be exempted from obtaining registration:
 - a. Suppliers of services, having turnover up to Rs. 20 lakh, making inter State supplies;
 - b. Suppliers of services, having turnover up to Rs. 20 lakh, making supplies through e-commerce platforms.
- 9.4.2.4 Taxpayers may opt for multiple registrations within a State/Union territory in respect of multiple places of business located within the same State/Union territory.
- 9.4.2.5 Mandatory registration is required for only those e-commerce operators who are required to collect tax at source.
- 9.4.2.6 Registration to remain temporarily suspended while cancellation of registration is under process, so that the taxpayer is relieved of continued compliance under the law.
- 9.4.2.7 A Removal of Difficulty order has been issued to allow revocation of cancellation of those registrations, which were cancelled till 31.03.2019.The application for revocation can be filed till 22.07.2019.

9.4.3 Migration:

9.4.3.1 One more window for completion of migration process is being allowed. The due date for the taxpayers who did not file the complete **FORM GST REG-26** but received only a Provisional ID (PID) till 31.12.2017 for furnishing the requisite details to the jurisdictional nodal officer was extended till 31.01.2019. Also, the due date for furnishing **FORM GSTR-3B** and **FORM GSTR-1** for the period July, 2017 to February, 2019 / quarters July, 2017 to December, 2018 by such taxpayers was extended till 31.03.2019.

9.4.4 Composition Scheme:

- 9.4.4.1 Composition scheme has been formulated for small businessmen being supplier of goods and supplier of restaurant services. Under the scheme, person with annual turnover up to Rs. 1.5 crore (Rs. 75 lakhs in States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand) needs to pay tax equal to 1% to 5% on his turnover and needs to file his returns annually with quarterly payment from FY 2019-20.
- 9.4.4.2 Composition scheme has been made available for suppliers of services (to those who are not eligible for the presently available Composition Scheme) with a tax rate of 6% (3% CGST +3% SGST) having an annual turnover in the preceding FY up to Rs. 50 lakhs. They would be liable to file one Annual Return with quarterly payment of taxes. This has been made effective from 01.04.2019.
- 9.4.4.3 Taxpayers under Composition scheme have been allowed to pay 'self-assessed tax' on a quarterly basis till 18th of the month succeeding such

- quarter and furnish a return till 30th April for the previous financial year.
- 9.4.4.4 A taxpayer who wants to opt for Composition Scheme for a financial year or during the middle of a financial year has to inform the government about his choice by filing **FORM GST CMP-02**.
- 9.4.4.5 The GST Council in its 36th meeting held on 27.07.2019 decided that the last date for filing of intimation, in **FORM GST CMP-02**, for availing the option of payment of tax under notification No. 2/2019-Central Tax (Rate) dated 07.03.2019 (by exclusive supplier of services), be extended from 31.07.2019 to 30.09.2019.
- 9.4.4.6 The last date for furnishing statement containing the details of the self-assessed tax in **FORM GST CMP-08** for the quarter April, 2019 to June, 2019 (by taxpayers under composition scheme), has been extended from 31.07.2019 to 31.08.2019.
- 9.4.4.7 Composition scheme shall not be available to inter-State suppliers and specified category of manufacturers.

9.4.5 E-way bill system

9.4.5.1 The generation of e-way bill would be barred if a supplier or recipient does not file GST returns for 2 consecutive tax periods. This will be made applicable from 21.08.2019.

9.4.6 Tax Administration:

9.4.6.1 In order to ensure single interface, all administrative control over 90% of taxpayers having turnover below Rs. 1.5 crore would vest with State tax administration and over 10% with the Central tax administration. Further all administrative control over taxpayers having turnover above Rs.1.5 crore shall be divided equally in the ratio of 50% each for the

- Central and State tax administration.
- 9.4.6.2 Powers under the IGST Act shall also be cross-empowered on the same basis as under CGST and SGST Acts with few exceptions.
- 9.4.6.3 Power to collect GST in territorial waters shall be delegated by Central Government to the States.
- 9.4.6.4 Power to take enforcement action over entire taxpayer's base would be with both Central as well as State tax administration.

9.4.7 Compensation to States:

9.4.7.1 Formula and mechanism for GST Compensation Cess has been finalized

9.4.8 Reverse Charge Mechanism (RCM):

- 9.4.8.1 Levy of GST on reverse charge mechanism on receipt of supplies from unregistered suppliers, to be applicable to only specified goods in case of certain notified classes of registered persons, on the recommendations of the GST Council. In this regard, notification No. 07/2019- Central Tax (Rate) dated 29.03.2019 has been issued which prescribes that the promoter shall pay tax on reverse charge basis w.e.f. 01.04.2019 on following supplies received from unregistered suppliers -
 - a. such supplies which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of a project as prescribed in notification No. 11/2017-Central Tax (Rate) dated 28.06.2017;
 - b. cement which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for

- construction of project as prescribed in notification No. 11/2017-Central Tax (Rate); and
- c. capital goods supplied to a promoter for construction of a project on which tax is payable or paid at the rate prescribed in notification No. 11/2017- Central Tax (Rate).
- 9.4.8.2 Earlier the reverse charge mechanism under sub-section (4) of section 9 of the CGST Act, 2017 and under sub-section (4) of section 5 of the IGST Act, 2017 was kept under suspension till 30.09.2019.

9.4.9 Payment of Tax:

- 9.4.9.1 There shall be no requirement on payment of tax on advances received for supply of goods by all taxpayers.
- 9.4.9.2 A Group of Ministers constituted for promoting digital payment has recommended to allow cash back to an amount equal to 20% of GST paid or Rs. 100/-, whichever is lower for cases where payment is made by BHIM or Rupay card. The necessary infrastructure is being developed and soon the scheme would be implemented on pilot basis in State of Assam and few other States which volunteer for the same.
- 9.4.9.3 In principle approval has been given for amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e. interest would be leviable only on the amount payable through the electronic cash ledger. This would be implemented once the law is amended.

9.4.10 Exemption:

9.4.10.1 Supply from GTA to unregistered persons has been exempted from tax.

9.4.11 Refunds:

- 9.4.11.1 A scheme of single authority for disbursement of the refund amount sanctioned by either the Centre or the State tax authorities would be implemented soon. The modalities for the same are being finalized.
- 9.4.11.2 All the supporting documents/invoices in relation to a claim for refund in **FORM GST RFD-01A** shall be uploaded electronically on the common portal at the time of filing of the refund application itself, thereby obviating the need for a taxpayer to physically visit a tax office for submission of a refund application.
- 9.4.11.3 Fully automated refund module is being developed and will be deployed soon.

9.4.12 Return:

- 9.4.12.1 All taxpayers, except those registered under Composition scheme are required to file return **FORM GSTR-3B** & pay tax on monthly basis.
- 9.4.12.2 Taxpayers with turnover up to Rs. 1.5 crore are required to file information in **FORM GSTR-1** on a quarterly basis. Other taxpayers would have to file **FORM GSTR-1** on a monthly basis.
- 9.4.12.3 The due date for furnishing the annual returns in **FORM GSTR-9**, **FORM GSTR-9A** and reconciliation statement in **FORM GSTR-9C** for the Financial Year 2017 2018 is 31.08.2019.

9.4.13 Late Fees:

- 9.4.13.1 Late fee shall be completely waived for all taxpayers in case **FORM GSTR-1**, **FORM GSTR-3B** & **FORM GSTR-4** for the months / quarters July, 2017 to September, 2018 which are furnished after 22.12.2018 but on or before 31.03.2019.
- 9.4.13.2 From October 2017 onwards, the amount of late fee for late filing of GSTR-3B payable by a registered person is as follows:
 - a. whose tax liability for that month was 'NIL' will be Rs. 20/- per day instead of Rs. 200/- per day;
 - b. whose tax liability for that month was not 'NIL' will be Rs. 50/- per day instead of Rs. 200/- per day.

9.4.14 New Return System:

- 9.4.14.1 The new return system is simple with two main annexures. One for reporting details of outward supplies (**FORM GST ANX-1**) and the other for availing input tax credit (**FORM GST ANX-2**) based on invoices, etc. uploaded by the supplier.
- 9.4.14.2 Invoices can be uploaded continuously by the supplier and can be continuously viewed and locked by the recipient for availing input tax credit. This process would ensure that very large part of the return is auto-populated based on the invoices uploaded by the buyer and the supplier. Simply put, the process would be "UPLOAD LOCK PAY" for most tax payers.
- 9.4.14.3 Taxpayers would have the facility to create his profile based on nature

- of supplies made and received. The information which a taxpayer would be shown and would be required to fill in the return would depend on his profile.
- 9.4.14.4 NIL return filers (no purchase and no sale) shall be given facility to file return by sending SMS.
- 9.4.14.5 There shall be quarterly filing of return for the small taxpayers having turnover upto Rs. 5 crore as an optional facility. Quarterly return shall be similar to main return with monthly payment facility but for two kinds of registered persons small traders making only B2C supply or making B2B + B2C supply. For such taxpayers, simplified returns have been designed called Sahaj and Sugam. In these returns, details of information required to be filled is lesser than that in the regular return.
- 9.4.14.6 The new return design provides facility for amendment of invoice and also other details filed in the return. Amendment shall be carried out by filing of a return called amendment return. Payment would be allowed to be made through the amendment return as it will help save interest liability for the taxpayers.
- 9.4.14.7 In order to give ample opportunity to taxpayers as well as the system to adapt, the GST Council in its 35th meeting held on 21.06.2019 has decided to introduce the new return system in a phased manner, as described below:
 - a. Between July, 2019 to September, 2019, the new return system
 (FORM GST ANX-1 & FORM GST ANX-2 only) to be available
 for trial for taxpayers. Taxpayers to continue to file FORM GSTR-1
 & FORM GSTR-3B as at present;

- b. From October, 2019 onwards, FORM GST ANX-1 to be made compulsory. Large taxpayers (having aggregate turnover of more than Rs. 5 crores in previous year) to file FORM GST ANX-1 on monthly basis whereas small taxpayers to file first FORM GST ANX-1 for the quarter October, 2019 to December, 2019 in January, 2020;
- c. For October and November, 2019, large taxpayers to continue to file FORM GSTR-3B on monthly basis and will file first FORM GST RET-01 for December, 2019 in January, 2020. It may be noted that invoices etc. can be uploaded in FORM GST ANX-1 on a continuous basis both by large and small taxpayers from October, 2019 onwards. FORM GST ANX-2 may be viewed simultaneously during this period but no action shall be allowed on such FORM GST ANX-2;
- d. From October, 2019, small taxpayers to stop filing FORM GSTR-3B and to start filing FORM GST PMT-08. They will file their first FORM GST RET-01 for the quarter October, 2019 to December, 2019 in January, 2020;
- e. From January, 2020 onwards, **FORM GSTR-3B** to be completely phased out.

9.4.15 ITC:

9.4.15.1 ITC in relation to invoices issued by the supplier during FY 2017-18 may be availed by the recipient till the due date for furnishing of **FORM GSTR-3B** for the month of March, 2019, subject to specified conditions.

9.4.15.2 The due date for submitting **FORM GST ITC-04** for the period July 2017 to March 2019 was extended till 31.08.2019.

9.4.16 TDS/TCS:

- 9.4.16.1 TDS/TCS provisions shall be implemented from 01.10.2018.
- 9.4.16.2 Further, to provide some more time to TDS deductors to familiarize them with the new system, last date for furnishing return in **FORM GSTR-7** for the months of October, 2018 to December, 2018 and January, 2019 was extended up to 28.02.2019. Further, exemption from TDS for been made for supply made by Government / PSU to another Government / PSU.

9.4.17 Export:

- 9.4.17.1 E-Wallet Scheme shall be introduced for exporters from 01.04.2020 and till then relief for exporters shall be given in form of broadly existing practice.
- 9.4.17.2 Supply of services to Nepal and Bhutan shall be exempted from GST even if payment has not been received in foreign convertible currency such suppliers shall be eligible for input tax credit.
- 9.4.17.3 Supply of services to qualify as exports, even if payment is received in Indian Rupees, where permitted by the RBI.

9.4.18 Rate of Interest:

9.4.18.1 Rate of interest on delayed payments and delayed refund has been recommended.

9.4.19 MSME:

9.4.19.1 A Group of Ministers has been constituted to look into the issues being faced by MSMEs and to provide solutions for the same.

9.4.20 Revenue Mobilization:

- 9.4.20.1 A Group of Ministers has been constituted to study the revenue trend, including analyzing the reasons for structural patterns affecting the revenue collection in some of the States. The study would include the underlying reasons for deviation from the revenue collection targets vis a vis original assumptions discussed during the design of GST system, its implementation and related structural issues.
- 9.4.20.2 The Group of Ministers will be assisted by the committee of experts from Central Government, State Governments and the NIPFP (National Institute of Public Finance and Planning), who would study and share the findings with GoM. The GoM in turn would give its recommendation to the GST Council.
- 9.4.20.3 The amount of IGST not apportioned to the Centre or the States/UTs may, for the time being, on the recommendations of the Council, be apportioned at the rate of fifty per cent. to the Central Government and fifty per cent. to the State Governments or the Union territories, as the case may be, on ad-hoc basis and this amount shall be adjusted against the amount finally apportioned.
- 9.4.20.4 Fifty per cent. of such amount, as may be recommended by the Council, which remains unutilized in the Compensation Fund, at any point of time in any financial year during the transition period shall be

transferred to the Consolidated Fund of India as the share of Centre, and the balance fifty per cent. shall be distributed amongst the States in the ratio of their base year revenue.

9.4.20.5 In case of shortfall in the amount collected in the Fund against the requirement of compensation to be released for any two months' period, fifty per cent. of the same, but not exceeding the total amount transferred to the Centre and the States as recommended by the Council, shall be recovered from the Centre and the balance fifty per cent. from the States in the ratio of their base year revenue.

9.4.21 Real Estate:

- 9.4.21.1 The GST Council in its 33rd & 34th meetings held on 24.02.2019 & 19.03.2019 respectively have made following decisions with respect to the real estate sector:
- 9.4.21.2 GST shall be levied at effective rate of 5% on residential properties outside affordable segment and 1% on affordable housing properties.
- 9.4.21.3 **Definition of affordable housing**: A residential house/flat of carpet area of up to 90 sqm in non-metropolitan cities/towns and 60 sqm in metropolitan cities having value up to Rs. 45 lacs (both for metropolitan and non-metropolitan cities). Metropolitan Cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, and Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR).

9.4.21.4 **Conditions** for new tax rate:

a. Input tax credit shall not be available

- b. 80% of inputs and input services [other than capital goods, TDR/ JDA, FSI, long term lease (premiums)] shall be purchased from registered persons. On shortfall of purchases from 80%, tax shall be paid by the builder @ 18% on RCM basis. However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.
- 9.4.21.5 **GST exemption on TDR/ JDA, long term lease (premium), FSI**: Intermediate tax on development right, such as TDR, JDA, lease (premium), FSI shall be exempted only for such residential property on which GST is payable.
- 9.4.21.6 The new rate has become applicable from 01.04.2019.
- 9.4.21.7 One time transition option given to real estate firms to continue to pay tax at the old rates (effective rate of 8% or 12% with ITC) on on-going projects (buildings where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019. Real estate firms can communicate their option till 20.05.2019 to the jurisdictional officers.

9.4.22 Lottery:

9.4.22.1 The GST Council in its 32nd Meeting held on 10.01.2019 constituted a Group of Ministers to examine the GST Rate Structure on Lotteries.

9.4.23 Natural Calamity Cess:

9.4.23.1 GST Council in its 32nd Meeting held on 10.01.2019 approved levy of Cess on Intra-State Supply of Goods and Services within the State of Kerala at a rate not exceeding 1% for a period not exceeding 2 years.

- 9.4.23.2 Kerala Government has, accordingly, decided to levy one per cent. 'Kerala Flood Cess' on value of intra-state supply of goods by taxable person to an unregistered person in respect of supplies specified in TABLE under sub-clause (2) of clause 14 of the Kerala Finance Bill, 2019. The said cess has become effective from 01.08.2019.
- 9.4.23.3 The Kerala government has also decided to allow local bodies to collect entertainment tax on movie tickets up to 10 per cent.

9.4.24 Electronic Invoicing

- 9.4.24.1 The Council in its 35th meeting held on 21.06.2019 decided to introduce electronic invoicing system in a phase-wise manner for B2B transactions.
- 9.4.24.2 The Phase 1 is proposed to be voluntary and it shall be rolled out from Jan 2020.

9.4.25 Electric Vehicles

- 9.4.25.1 The Council in its 36th meeting held on 27.07.2019 decided to reduce the GST rates on electric vehicles from 12% to 5% and charger or charging stations for electric vehicles from 18% to 5% w.e.f. 01.08.2019.
- 9.4.25.2 Hiring of electric buses (of carrying capacity of more than 12 passengers) by local authorities has been exempted from GST w.e.f. 01.08.2019.

9.4.26 Recent Law amendments w.e.f. 01.02.2019:

9.4.26.1 Scope of input tax credit has been widened, and it would now be made available in respect of the following:

- a. Most of the activities or transactions specified in Schedule III;
- b. Motor vehicles for transportation of persons having seating capacity of more than thirteen (including driver), vessels and aircraft;
- c. Services of general insurance, repair and maintenance in respect of motor vehicles, vessels and aircraft on which credit is available;
- d. Goods or services which are obligatory for an employer to provide to its employees, under any law for the time being in force.
- 9.4.26.2 The order of cross-utilization of input tax credit has been rationalized.
- 9.4.26.3 Commissioner empowered to extend the time limit for return of inputs and capital sent on job work, up to a period of one year and two years, respectively.
- 9.4.26.4 Place of supply in case of job work of any treatment or process done on goods temporarily imported into India and then exported without putting them to any other use in India, would be outside India.
- 9.4.26.5 The following transactions to be treated as no supply (no tax payable) under Schedule III:
 - a. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India;
 - b. Supply of warehoused goods to any person before clearance for home consumption;
 - c. Supply of goods in case of high sea sales.
- 9.4.26.6 Registered persons may issue consolidated credit/debit notes in respect

- of multiple invoices issued in a Financial Year.
- 9.4.26.7 Amount of pre-deposit payable for filing of appeal before the Appellate Authority and the Appellate Tribunal capped at Rs. 25 crore and Rs. 50 crore respectively.
- 9.4.26.8 Recovery can be made from distinct persons, even if present in different State/Union territories.

9.4.27 Others:

- 9.4.27.1 In principle approval has been given for creation of a Centralized Appellate Authority for Advance Ruling (AAAR) to deal with cases of conflicting decisions by two or more State Appellate Advance Ruling Authorities on the same issue. This would be implemented once the law is amended.
- 9.4.27.2 Existing tax incentive schemes of Central or State governments may be continued by respective government by way of reimbursement through budgetary route. The schemes, in the present form, would not continue in GST.
- 9.4.27.3 50% of the GST paid will be refunded to CSD (Defense Canteens).
- 9.4.27.4 Centralized UIN shall be issued to every Foreign Diplomatic Mission / UN Organization by the Central Government for handling their refund related applications.
- 9.4.27.5 There would be a single cash ledger for each tax head. The modalities for implementation would be finalized in consultation with GSTN and the Accounting authorities.
- 9.4.27.6 Free Accounting and Billing Software shall be provided to Small

Taxpayers by GSTN.

9.4.27.7 A scheme for grant of refund of taxes paid on inward supply of indigenous goods by retail outlets established at departure area of the international airport beyond immigration counters when supplied to outgoing international tourist against foreign exchange has been introduced w.e.f. 01.07.2019.

10. THE DESIGN OF INDIAN GST:

- 10.1 Concurrent dual model of GST: India has adopted dual GST model because of its unique federal nature. Under this model, tax is levied concurrently by the Centre as well as the States on a common base, i.e. supply of goods or services or both. GST to be levied by the Centre would be called Central GST (Central tax / CGST) and that to be levied by the States would be called State GST (State Tax / SGST). State GST (State Tax / SGST) would be called UTGST (Union territory tax) in Union Territories without legislature. CGST & SGST / UTGST shall be levied on all taxable intra-State supplies.
- 10.2 The IGST Model: Inter-State supply of goods or services shall be subjected to integrated GST (Integrated tax / IGST). The IGST model is a unique contribution of India in the field of VAT. The IGST Model envisages that Centre would levy IGST (Integrated Goods and Service Tax) which would be CGST plus SGST on all inter-State supply of goods or services or both. The inter-State supplier will pay IGST on value addition after adjusting available credit of IGST, CGST, and SGST on his purchases. The Exporting State will transfer to the Centre the credit of SGST used in payment of IGST. The person based in the destination State will claim credit of IGST while discharging his output tax liability in his own State. The Centre will transfer to the importing State the

credit of IGST used in payment of SGST. The relevant information will also be submitted to the Central Agency which will act as a clearing house mechanism, verify the claims and inform the respective governments to transfer the funds. The major advantages of IGST Model are:

- a) Maintenance of uninterrupted ITC chain on inter-State transactions.
- b) No upfront payment of tax or substantial blockage of funds for the inter-State supplier or recipient.
- c) No refund claim in exporting State, as ITC is used up while paying the tax.
- d) Self-monitoring model.
- e) Model takes 'Business to Business' as well as 'Business to Consumer' transactions into account.
- 10.3 <u>Tax Rates</u>: Owing to unique Indian socio-economic milieu, four rates namely 5%, 12%, 18% and 28% have been adopted. Besides, some goods and services are exempt also. Rate for precious metals and affordable housing are an exception to 'four-tax slab-rule' and the same has been fixed at 3% and 1% respectively. In addition, unworked diamonds, precious stones, etc. attracts a rate of 0.25%. A cess over the peak rate of 28% on certain specified luxury and demerit goods, like tobacco and tobacco products, pan masala, aerated water, motor vehicles is imposed to compensate States for any revenue loss on account of implementation of GST. The list of goods and services in case of which reverse charge would be applicable has also been notified.
- 10.4 <u>Compensation to States</u>: The Goods and Services Tax (Compensation to States) Act, 2017 provides for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax.

Compensation will be provided to a State for a period of five years from the date on which the State brings its SGST Act into force. For the purpose of calculating the compensation amount in any financial year, year 2015-16 will be assumed to be the base year, for calculating the revenue to be protected. The growth rate of revenue for a State during the five-year period is assumed be 14% per annum. The base year tax revenue consists of the states' tax revenues from: (i) State Value Added Tax (VAT), (ii) central sales tax, (iii) entry tax, octroi, local body tax, (iv) taxes on luxuries, (v) taxes on advertisements, etc. However, any revenue among these taxes arising related to supply of alcohol for human consumption, and five specified petroleum products, will not be accounted as part of the base year revenue. A GST Compensation Cess is levied on the supply of certain goods and services, as recommended by the GST Council to finance the compensation cess.

10.5 E-Way Bill System: The introduction of e-way (electronic way) bill is a monumental shift from the earlier "Departmental Policing Model" to a "Self-Declaration Model". It envisages one e-way bill for movement of the goods throughout the country, thereby ensuring a hassle free movement for transporters throughout the country. The e-way bill system has been introduced nation-wide for all inter-State movement of goods with effect from 01.04.2018. As regards intra-State supplies, option was given to States to choose any date on or before 03.06.2018. All States have notified e-way bill rules for intra-State supplies last being NCT of Delhi where it was introduced w.e.f. 16.06.2018. New features in the e-way bill system have been introduced such as the auto calculation of distance based on PIN codes for the generation of e-way bill and blocking the generation of multiple e-way bills against one invoice.

10.6 <u>Anti-Profiteering Mechanism</u>: Implementation of GST in many countries was coupled with increase in inflation and the prices of the commodities. This

happened in spite of the availability of the tax credit. This was happening because the supplier was not passing on the benefit to the consumer and thereby indulging in illegal profiteering. Any reduction in rate of tax or the benefit of increased input tax credit should have been passed on to the recipient by way of commensurate reduction in prices.

10.6.1 National Anti-profiteering Authority (NAA) has been constituted under GST by the Central Government to examine the complaints of non-passing the benefit of reduced tax incidence. The Authority shall cease to exist after the expiry of two years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.10.6.2 The Authority may determine whether any reduction in the rate of tax or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices. It can order reduction in prices, imposition of penalty, cancellation of registration and any other decision as may deem fit, after inquiry into the case.

10.7 <u>Concept of Supply</u>: GST would be applicable on supply of goods or services as against the present concept of tax on manufacture of goods or on sale of goods or on provision of services. It includes all sorts of activities like manufacture, sale, barter, exchange, transfer etc. It also includes supplies made without consideration when such supplies are made in certain specified situations.

10.8 <u>Threshold Exemption</u>: Threshold limits of aggregate turnover for exemption from registration and payment of GST for the suppliers of goods would be Rs. 40 lakhs and Rs. 20 lakhs (in case of States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura and Uttarakhand) with effect from 01.04.2019.

Threshold limit of aggregate turnover for exemption from registration and payment of GST for suppliers of services would be Rs. 20 lakhs and Rs. 10 lakhs (in case of States of Manipur, Mizoram, Nagaland and Tripura).

A common threshold exemption applies to both CGST and SGST. The benefit of threshold exemption, however, is not available in inter-State supplies of goods.

10.9 <u>Composition Scheme</u>: Composition scheme has been formulated for small businessmen being supplier of goods and supplier of restaurant services. Under the scheme, person with turnover up to Rs. 1.5 crore (Rs. 75 lakhs in States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand) needs to pay tax equal to 1% to 5% on his turnover and needs to file his returns annually with quarterly payment from FY 2019-20.

Composition scheme has also been formulated for supplier of services (to those who are not eligible for the presently available composition scheme). Under the scheme, person with turnover up to Rs. 50 lakhs needs to pay tax equal to 6% on his turnover and needs to file his returns annually with quarterly payment from FY 2019-20.

10.10 Zero rated Supplies: Export of goods and services are zero rated. Supplies to SEZs developers and SEZ units are also zero-rated. The benefit of zero rating can be taken either with payment of integrated tax, or without payment of integrated tax under bond or Letter of Undertaking.

10.11 <u>Cross-utilization of ITC</u>: IGST credit can be used for payment of all taxes. CGST credit can be used only for paying CGST or IGST. SGST credit can be used only for paying SGST or IGST.

The credit would be permitted to be utilized in the following manner:

a) ITC of CGST allowed for payment of CGST & IGST in that order;

- b) ITC of SGST allowed for payment of SGST & IGST in that order;
- c) ITC of UTGST allowed for payment of UTGST & IGST in that order;
- d) ITC of IGST allowed for payment of IGST, CGST & SGST/UTGST in that order.

ITC of CGST cannot be used for payment of SGST/UTGST and vice versa. It has been further provided that IGST balances shall be exhausted for payment of IGST, CGST or SGST, as the case may be, before utilization of CGST or SGST.

- 10.12 <u>Settlement of Government Accounts</u>: Accounts would be settled periodically between the Centre and the State to ensure that the credit of SGST used for payment of IGST is transferred by the originating State to the Centre. Similarly, the IGST used for payment of SGST would be transferred by Centre to the destination State. Further the SGST portion of IGST collected on B2C supplies would also be transferred by Centre to the destination State. The transfer of funds would be carried out on the basis of information contained in the returns filed by the taxpayers.
- 10.13 <u>Modes of Payment</u>: Various modes of payment of tax available to the taxpayer including internet banking, debit/ credit card and National Electronic Funds Transfer (NEFT) / Real Time Gross Settlement (RTGS).
- 10.14 <u>Tax Deduction at Source</u>: Obligation on certain persons including government departments, local authorities and government agencies, who are recipients of supply, to deduct tax at the rate of 1% from the payment made or credited to the supplier where total value of supply, under a contract, exceeds two lakh and fifty thousand rupees. The provision for TDS has been operationalized w.e.f. 01st October, 2018. Exemption from the provisions of TDS has been given to certain authorities under the Ministry of Defence.

- 10.15 <u>Refunds</u>: Refund of tax to be sought by taxpayer or by any other person who has borne the incidence of tax within two years from the relevant date. Refund of unutilized ITC also available in zero rated supplies and inverted tax structure.
- 10.16 <u>Tax Collection at Source</u>: Obligation on electronic commerce operators to collect 'tax at source', at such rate not exceeding two per cent of net value of taxable supplies, out of payments to suppliers supplying goods or services through their portals. The provision for TCS has been operationalized w.e.f. 01st October, 2018.
- 10.17 <u>Self-assessment</u>: Self-assessment of the taxes payable by the registered person shall be the norm. Audit of registered persons shall be conducted on selective basis. Limitation period for raising demand is three (3) years from the due date of filing of annual return or from the date of erroneous refund for raising demand for short-payment or non-payment of tax or erroneous refund and its adjudication in normal cases. Limitation period for raising demand is five (5) years from the due date of filing of annual return or from the date of erroneous refund for raising demand for short-payment or non-payment of tax or erroneous refund and its adjudication in case of fraud, suppression or willful mis-statement.
- 10.18 <u>Recovery of Arrears</u>: Arrears of tax to be recovered using various modes including detaining and sale of goods, movable and immovable property of defaulting taxable person.
- 10.19 <u>Appellate Tribunal</u>: Goods and Services Tax Appellate Tribunal would be constituted by the Central Government for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority. States would adopt the provisions relating to Tribunal in respective SGST Act.

- 10.20 <u>Advance Ruling Authority</u>: Advance Ruling Authority would be constituted by States in order to enable the taxpayer to seek a binding clarity on taxation matters from the department. Centre would adopt such authority under CGST Act.
- 10.21 <u>Transitional Provisions</u>: Elaborate transitional provisions have been provided for smooth transition of existing taxpayers to GST regime.
- 10.21 <u>Subsuming of taxes, duties etc.</u>: Among the taxes and duties levied and collected by the Union, Central Excise duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile Products), Additional Duties of Customs (commonly known as CVD), Special Additional Duty of Customs (SAD), Service Tax and cesses and surcharges insofar as they related to supply of goods or services were subsumed. As far as taxes levied and collected by States are concerned, State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.

11. GST LEGISLATIONS:

- 11.1. Four Laws namely CGST Act, UTGST Act, IGST Act and GST (Compensation to States) Act were passed by the Parliament and since been notified on 12.04.2017. All the other States (except J&K) and Union territories with legislature have passed their respective SGST Acts. The economic integration of India was completed on 08.07.2017 when the State of J&K also passed the SGST Act and the Central Government also subsequently extended the CGST Act to J&K.
- 11.2. In its 28th meeting held in New Delhi on 21.07.2018, the GST Council

recommended certain amendments in the CGST Act, IGST Act, UTGST Act and the GST (Compensation to States) Act. These amendments have been passed by Parliament and have been enacted w.e.f. 01.02.2019, as the Central Goods and Services Tax (Amendment) Act, 2018, the Integrated Goods and Services Tax (Amendment) Act, 2018, the Union Territory Goods and Services Tax (Amendment) Act, 2018 and the Goods and Services Tax (Compensation to States) Amendment Act, 2018, respectively.

11.3. On 22.06.2017, the first notification was issued for GST and notified certain sections under CGST. Since then, 189 notifications under CGST Act have been issued notifying sections, notifying rules, amendment to rules and for waiver of penalty, etc. 19, 34 and 2 notifications have also been issued under IGST Act, UTGST Act and GST (Compensation to States) Act respectively. Further, 90, 94, 90 and 10 rate related notifications each have been issued under the CGST Act, IGST Act, UTGST Act and GST (Compensation to States) Act respectively. Similar notifications have been issued by all the States under the respective SGST Act. Apart from the notifications, 114 circulars, 18 orders and 14 Removal of Difficulty Orders have also been issued by CBIC on various subjects like proper officers, ease of exports, and extension of last dates for filling up various forms, etc.

12. ROLE OF CBIC:

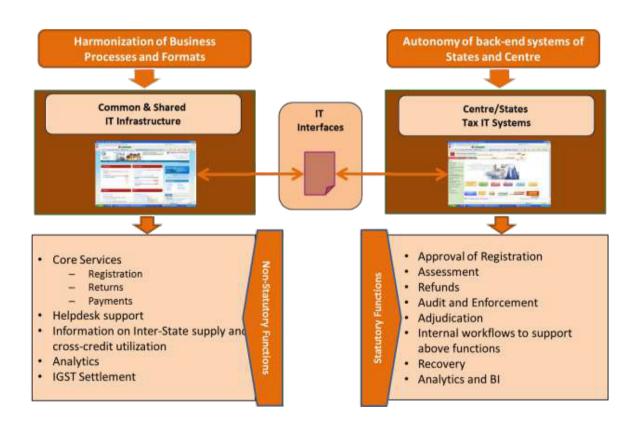
12.1 CBIC is playing an active role in the drafting of GST law and procedures, particularly the CGST and IGST law, which will be exclusive domain of the Centre. This apart, the CBIC has prepared itself for meeting the implementation challenges, which are quite formidable. The number of taxpayers has gone up significantly. The existing IT infrastructure of CBIC has been suitably scaled up to handle such large volumes of data. Based on the legal provisions and procedure

for GST, the content of work-flow software such as ACES (Automated Central Excise & Service Tax) would require re-engineering. The name of IT project of CBIC under GST is 'SAKSHAM' involving a total project value of Rs. 2,256 Cr.

- 12.2 Augmentation of human resources would be necessary to handle large taxpayers' base in GST scattered across the length and breadth of the country. Capacity building, particularly in the field of Accountancy and Information Technology for the departmental officers has to be taken up in a big way. A massive four-tier training programme has been conducted under the leadership of NACIN. This training project is aimed at imparting training on GST law and procedures to more than 60,000 officers of CBIC and Commercial Tax officers of State Governments.
- 12.3 CBIC would be responsible for administration of the CGST and IGST law. In addition, excise duty regime would continue to be administered by the CBIC for levy and collection of central excise duty on five specified petroleum products as well as on tobacco products. CBIC would also continue to handle the work relating to levy and collection of customs duties.
- 12.4 Director General of Anti-profiteering, CBIC has been mandated to conduct detailed enquiry on anti-profiteering cases and should give his recommendation for consideration of the National Anti-profiteering Authority.
- 12.5 CBIC has been instrumental in handholding the implementation of GST. It had set up the Feedback and Action Room which monitored the GST implementation challenges faced by the taxpayer and act as an active interface between the taxpayer and the Government.

13. GOODS & SERVICES TAX NETWORK:

13.1 Goods and Services Tax Network (GSTN) has been set up by the Government as a private company under erstwhile Section 25 of the Companies Act, 1956. GSTN would provide three front end services to the taxpayers namely registration, payment and return. Besides providing these services to the taxpayers, GSTN would be developing back-end IT modules for 27 States who have opted for the same. Infosys has been appointed as Managed Service Provider (MSP). GSTN has selected 73 IT, ITeS and financial technology companies and 1 Commissioner of Commercial Taxes (CCT, Karnataka), to be called GST Suvidha Providers (GSPs). GSPs would develop applications to be used by taxpayers for interacting with the GSTN. The diagram below shows the work distribution under GST.



- 13.2 Central Government holds 24.5 percent stake in GSTN while the state government holds 24.5 percent. The remaining 51 per cent are held by non-Government financial institutions, HDFC and HDFC Bank hold 20%, ICICI Bank holds 10%, NSE Strategic Investment holds 10% and LIC Housing Finance holds 10%. The GST Council in its 27th meeting held on 04.05.2018 has approved the change in shareholding pattern of GSTN. Considering the nature of 'state' function' performed by GSTN, the GST Council felt that GSTN be converted into a fully owned Government company. Accordingly, the Council approved acquisition of entire 51 per cent of equity held by non-Governmental institutions in GSTN amounting to Rs. 5.1 crore, equally by the Centre and the State Governments.
- 13.3 The design of GST systems is based on role based access. The taxpayer can access his own data through identified applications like registration, return, view ledger etc. The tax official having jurisdiction, as per GST law, can access the data. Data can be accessed by audit authorities as per law. No other entity can have any access to data available with GSTN.

14. GST: A GAME CHANGER FOR INDIAN ECONOMY:

- 14.1 GST will have a multiplier effect on the economy with benefits accruing to various sectors as discussed below.
- 14.2 <u>Benefits to the exporters:</u> The subsuming of major Central and State taxes in GST, complete and comprehensive setoff of input goods and services and phasing out of Central Sales Tax (CST) would reduce the cost of locally manufactured goods and services. This will increase the competitiveness of Indian goods and services in the international market and give boost to Indian exports. The

uniformity in tax rates and procedures across the country will also go a long way in reducing the compliance cost.

- 14.3 <u>Benefits to small traders and entrepreneurs</u>: GST has increased the threshold for GST registration for small businesses. Those units having aggregate annual turnover more than Rs 20 lakhs (Rs. 10 lakhs in certain cases) in case of supplier of services and Rs. 40 lakhs (Rs. 20 lakhs in certain cases) in case of supplier of goods have be registered under GST. Unlike multiple registrations under different tax regimes earlier, a single registration is needed under GST in one State. An additional benefit under Composition scheme has also been provided for businesses with aggregate annual turnover up to Rs 1.5 crore (Rs. 75 lakhs in certain cases) in case of supplier of goods and restaurant services and Rs. 50 lakhs in case of supplier of services. With the creation of a seamless national market across the country, small enterprises will have an opportunity to expand their national footprint with minimal investment.
- 14.4 <u>Benefits to agriculture and Industry</u>: GST will give more relief to industry, trade and agriculture through a more comprehensive and wider coverage of input tax set-off and service tax set-off, subsuming of several Central and State taxes in the GST and phasing out of CST. The transparent and complete chain of set-offs which will result in widening of tax base and better tax compliance may also lead to lowering of tax burden on an average dealer in industry, trade and agriculture.
- 14.5 <u>Benefits for common consumers</u>: With the introduction of GST, the cascading effects of CENVAT, State VAT and service tax will be more comprehensively removed with a continuous chain of set-off from the producer's point to the retailer's point than what was possible under the prevailing CENVAT and VAT regime. Certain major Central and State taxes will also be subsumed in

GST and CST will be phased out. Other things remaining the same, the burden of tax on goods would, in general, fall under GST and that would benefit the consumers.

14.6 Promote "Make in India": GST will help to create a unified common national market for India, giving a boost to foreign investment and "Make in India" campaign. It will prevent cascading of taxes and make products cheaper, thus boosting aggregate demand. It will result in harmonization of laws, procedures and rates of tax. It will boost export and manufacturing activity, generate more employment and thus increase GDP with gainful employment leading to substantive economic growth. Ultimately it will help in poverty eradication by generating more employment and more financial resources. More efficient neutralization of taxes especially for exports thereby making our products more competitive in the international market and give boost to Indian Exports. It will also improve the overall investment climate in the country which will naturally benefit the development in the states. Uniform CGST & SGST and IGST rates will reduce the incentive for evasion by eliminating rate arbitrage between neighboring States and that between intra and inter-State supplies. Average tax burden on companies is likely to come down which is expected to reduce prices and lower prices mean more consumption, which in turn means more production thereby helping in the growth of the industries. This will create India as a "Manufacturing hub".

14.7 <u>Ease of Doing Business</u>: Simpler tax regime with fewer exemptions along with reduction in multiplicity of taxes that are at present governing our indirect tax system will lead to simplification and uniformity. Reduction in compliance costs as multiple record-keeping for a variety of taxes will not be needed, therefore, lesser investment of resources and manpower in maintaining records. It will result in

simplified and automated procedures for various processes such as registration, returns, refunds, tax payments. All interaction shall be through the common GSTN portal, therefore, less public interface between the taxpayer and the tax administration. It will improve environment of compliance as all returns to be filed online, input credits to be verified online, encouraging more paper trail of transactions. Common procedures for registration of taxpayers, refund of taxes, uniform formats of tax return, common tax base, common system of classification of goods and services will lend greater certainty to taxation system.

15. EXPERIENCE OF REGISTRATION, RETURN FILING & REVNUE:

15.1 Registration & Returns Snapshot:

S. No.	Details	As on 30 th June, 2019
1.	No. of transited (migrated) taxpayers	66,25,077
2.	Total No. of new applications received for registration	85,70,881
3.	No. of applications approved	72,58,894
4.	No. of applications rejected	12,60,462
5.	Total No. of taxpayers; new + migrated (1 + 3)	1,38,83,971
6.	No. of taxpayers who have opted for composition scheme	17,60,779
7.	No. of GSTR-3B returns filed for July, 2017	65,91,592

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S. No.	Details	As on 30 th June, 2019
8.	No. of GSTR-3B returns filed for August, 2017	71,81,706
9.	No. of GSTR-3B returns filed for September, 2017	75,31,709
10.	No. of GSTR-3B returns filed for October, 2017	72,90,864
11.	No. of GSTR-3B returns filed for November, 2017	73,86,672
12.	No. of GSTR-3B returns filed for December, 2017	74,73,816
13.	No. of GSTR-3B returns filed for January, 2018	75,94,141
14.	No. of GSTR-3B returns filed for February, 2018	77,21,477
15.	No. of GSTR-3B returns filed for March, 2018	78,34,743
16.	No. of GSTR-3B returns filed for April, 2018	79,13,649
17.	No. of GSTR-3B returns filed for May, 2018	80,59,421
18.	No. of GSTR-3B returns filed for June, 2018	81,66,076
19.	No. of GSTR-3B returns filed for July, 2018	82,63,212
20.	No. of GSTR-3B returns filed for August, 2018	83,59,366
21.	No. of GSTR-3B returns filed for September, 2018	84,35,694
22.	No. of GSTR-3B returns filed for October, 2018	84,89,963

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S. No.	Details	As on 30 th June, 2019
23.	No. of GSTR-3B returns filed for November, 2018	84,07,516
24.	No. of GSTR-3B returns filed for December, 2018	84,59,155
25.	No. of GSTR-3B returns filed for January, 2019	84,71,583
26.	No. of GSTR-3B returns filed for February, 2019	84,80,221
27.	No. of GSTR-3B returns filed for March, 2019	83,90,708
28.	No. of GSTR-3B returns filed for April, 2019	81,40,641
29.	No. of GSTR-3B returns filed for May, 2019	80,13,501
30.	No. of GSTR-3B returns filed for June, 2019	75,79,038
31.	No. of GSTR 1 returns filed for July, 2017	61,22,716
32.	No. of GSTR 1 returns filed for August, 2017	25,77,170
33.	No. of GSTR 1 returns filed for September, 2017	69,59,392
34.	No. of GSTR 1 returns filed for October, 2017	26,62,397
35.	No. of GSTR 1 returns filed for November, 2017	27,08,655
36.	No. of GSTR 1 returns filed for December, 2017	70,75,096
37.	No. of GSTR 1 returns filed for January, 2018	27,21,864

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

S. No.	Details	As on 30 th June, 2019
38.	No. of GSTR 1 returns filed for February, 2018	27,36,103
39.	No. of GSTR 1 returns filed for March, 2018	73,10,507
40.	No. of GSTR 1 returns filed for April, 2018	28,74,669
41.	No. of GSTR 1 returns filed for May, 2018	29,04,310
42.	No. of GSTR 1 returns filed for June, 2018	75,34,721
43.	No. of GSTR 1 returns filed for July, 2018	29,41,650
44.	No. of GSTR 1 returns filed for August, 2018	29,46,818
45.	No. of GSTR 1 returns filed for September, 2018	76,90,704
46.	No. of GSTR 1 returns filed for October, 2018	29,51,630
47.	No. of GSTR 1 returns filed for November, 2018	29,34,152
48.	No. of GSTR 1 returns filed for December, 2018	76,20,357
49.	No. of GSTR 1 returns filed for January, 2019	28,99,216
50.	No. of GSTR 1 returns filed for February, 2019	28,47,353
51.	No. of GSTR 1 returns filed for March, 2019	70,19,590
52.	No. of GSTR 1 returns filed for April, 2019	26,69,680

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S. No.	Details	As on 30 th June, 2019
53.	No. of GSTR 1 returns filed for May, 2019	25,30,548
54.	No. of GSTR 1 returns filed for June, 2019	50,79,328
55.	No. of GSTR 2 returns filed for July, 2017	25,72,552
56.	No. of GSTR 4 returns filed for quarter July-September, 2017	10,15,580
57.	No. of GSTR 4 returns filed for quarter October- December, 2017	15,25,609
58.	No. of GSTR 4 returns filed for quarter January-March, 2018	15,83,499
59.	No. of GSTR 4 returns filed for quarter April-June, 2018	15,58,692
60.	No. of GSTR 4 returns filed for quarter July-September, 2018	15,20,285
61.	No. of GSTR 4 returns filed for quarter September- December, 2018	14,67,106
62.	No. of GSTR 4 returns filed for quarter January-March, 2019	13,78,433

15.2 **Revenue Collection Snapshot:**

	S. No.	Revenue Collected in the Month of	Amount (in Rs. Thousand crore)
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S. No.	Revenue Collected in the Month of	Amount (in Rs. Thousand crore)
1.	July, 17	21,572
2.	August, 17	95,633
3.	September, 17	94,064
4.	October, 17	93,333
5.	November, 17	83,780
6.	December, 17	84,314
7.	January, 18	89,825
8.	February, 18	85,962
9.	March, 18	92,167
10.	April, 18	1,03,458
11.	May, 18	94,016
12.	June, 18	95,610
13.	July, 18	96,483
14.	August, 18	93,960
15.	September, 18	94,442
16.	October, 18	1,00,710
17.	November, 18	97,637
18.	December, 18	94,726
19.	January, 19	1,02,503
20.	February, 19	97,247
21.	March, 19	1,06,577
22.	April, 19	1,13,865
23.	May, 19	1,00,289

S. No.	Revenue Collected in the Month of	Amount (in Rs. Thousand crore)
24.	June' 19	99,939
25.	July' 19	1,02,083
26.	Total	23,34,195

16. CHALLENGES & FUTURE AHEAD:

- 16.1 Any new change is accompanied by difficulties and problems at the outset. A change as comprehensive as GST is bound to pose certain challenges not only for the government but also for business community, tax administration and even common citizens of the country. Some of these challenges relate to the unfamiliarity with the new regime and IT systems, legal challenges, return filing and reconciliations, passing on transition credit. Lack of robust IT infrastructure and system delays makes compliance difficult for the taxpayers. Many of the processes in the GST are new for small and medium enterprises in particular, who were not used to regular and online filing of returns and other formalities.
- 16.2 Based on the feedback received from businesses, consumers and taxpayers from across the country, attempt has been made to incorporate suggestions and reduce problems through short-term as well as long-term solutions. After rectifying system glitches, E-way bill for inter-State movement of goods has been successfully implemented from 01.04.2018. As regards intra-State supplies, option was given to States to choose any date on or before 03.06.2018. All States have notified e-way bill rules for intra-State supplies last being NCT of Delhi where it was introduced w.e.f. 16.06.2018. A total of 37.12 crore e-way bills for inter-State movement and 3.17 crore for intra-State movement have been generated till 31.05.2019.

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16.3 NAA has initiated investigation into various complaints of anti-profiteering

and has passed orders in some cases to protect consumer interest.

16.4 To expedite sanction of refund, electronic filing of refunds, along with all

supporting documents/invoices, has been enabled on the common portal.

Clarificatory Circulars and notifications have been issued to guide field formations

of CBIC and States in this regard. The government has put in place an IT grievance

redressal mechanism to address the difficulties faced by taxpayers owing to

technical glitches on the GST portal.

16.5 The introduction of GST is truly a game changer for Indian economy as it

has replaced multi-layered, complex indirect tax structure with a simple,

transparent and technology-driven tax regime. It will integrate India into a single,

common market by breaking barriers to inter-State trade and commerce. By

eliminating cascading of taxes and reducing transaction costs, it will enhance ease

of doing business in the country and provide an impetus to "Make in India"

campaign. GST will result in "ONE NATION, ONE TAX, ONE MARKET".

Note: This write-up is for education purposes only

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BRIEF HISTORY OF GST

Genesis

The idea of moving towards GST was first mooted by the then Union Finance Minister in his Budget speech for 2006-07. Initially, it was proposed that GST would be introduced from 1st April 2010. The Empowered Committee of State Finance Ministers (EC) which had formulated the design of State VAT was requested to come up with a roadmap and structure for GST. Joint Working Groups of officials having representatives of the States as well as the Centre were set up to examine various aspects of GST and draw up reports specifically on exemptions and thresholds, taxation of services and taxation of inter-State supplies. Based on discussions within and between it and the Central Government, the EC released its First Discussion Paper (FDP) on the GST in November, 2009. This spelt out features of the proposed GST and has formed the basis for discussion between the Centre and the States so far.

The introduction of the Goods and Services Tax (GST) is a very significant step in the field of indirect tax reforms in India. By amalgamating a large number of Central and State taxes into a single tax, GST will mitigate ill effects of cascading or double taxation in a major way and pave the way for a common national market. From the consumers point of view, the biggest advantage would be in terms of reduction in the overall tax burden on goods, which is currently estimated to be around 25%-30%. It would also imply that the actual burden of indirect taxes on goods and services would be much more transparent to the consumer. Introduction of GST would also make Indian products competitive in the domestic and international markets owing to the full neutralization of input taxes across the value chain of production and distribution. Studies show that this would have a boosting impact on economic growth. Last but not the least, this tax, because of its transparent and self-policing character, would be easier to administer. It would also encourage a shift from the informal to formal economy. The government proposes to introduce GST with effect from 1st July 2017.

GST and Centre-State Financial Relations

Currently, fiscal powers between the Centre and the States are clearly demarcated in the Constitution with almost no overlap between the respective domains. The Centre has the powers to levy tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics etc.) while the States have the powers to levy tax on sale of goods. In case of inter-states sales, the Centre has the powers to levy a tax (the Central Sales Tax) but, the tax is collected and retained entirely by the originating States. As for services, it is the Centre alone that is empowered to levy Service Tax. Since the States are not empowered to levy any tax on the sale or purchase of goods in the course of their importation into or exportations from India, the Centre levies and collects this tax in addition to the Basic Customs Duty. This additional duty of customs (commonly known as CVD and SAD) counterbalance excise duty, sales tax, State VAT and other taxes levied on the like domestic product. Introduction of GST required amendments in the Constitution so as to empower the Centre and the States concurrently to levy and collect GST.

The assignment of concurrent jurisdiction to the Centre and the States for the levy of GST required a unique institutional mechanism that would ensure that decisions about the structure, design and operation of GST are taken jointly by the two. To address all these and other issues, the Constitution (122nd Amendment) Bill was introduced in the 16th Lok Sabha on 19.12.2014. The Bill provides for a levy of GST on supply of all goods or services except alcohol for human consumption. The tax shall be levied as Dual GST separately, but concurrently the Union (CGST) and the States (SGST). The Parliament would have exclusive power to levy GST (IGST) on inter state trade or commerce (including imports) in goods and services. The Central Government will have the power to levy excise duty in addition to GST, on tobacco and tobacco products.

The constitution Amendment Bill was passed by the Lok Sabha in May, 2015. The Bill with certain amendments was finally passed in the Rajya Sabha and thereafter by the Lok Sabha in August, 2016. Further, the Bill has been ratified by the required number of States and has since received the assent of the President on 8th September, 2016 and has been enacted as the 101st Constitution Amendment Act, 2016. The GST Council has also been notified w.e.f. 12th September, 2016. GST Council is being assisted by a Secretariat.

The Goods and Service Tax Council (hereinafter referred to as, "GSTC") comprises of the Union Finance Minister, the Minister of State(Revenue) and the State Finance Ministers to recommend on the GST rate, exemption and thresholds, taxes to be subsumed and other matters. One-half of the total number of members of GSTC form

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

votes cast. Centre has one-third weightage of the total votes cast and all the states taken together have two-third of weightage of the total votes cast.

All decisions taken by the GST Council has been arrived at through consensus. The option of exercising a vote has not been resorted to till date.

To ensure smooth roll-out of the GST, various Committees and Sectoral groups has been formed comprising of members from both Centre and States.

Salient features of GST

The salient features of GST are as under:

- (i)GST is applicable on 'supply' of goods or services as against the present concept on the manufacture of goods or on sale of goods or on provision of services.
- (ii) GST is based on the principle of destination-based consumption taxation as against the present principle of origin-based taxation.
- (iii) It is a dual GST with the Centre and the States simultaneously levying tax on a common base. GST to be levied by the Centre would be called Central GST(CGST) and that to be levied by the States would be called State GST (SGST).
- (iv) An Integrated GST (IGST) would be levied an inter-state supply (including stock transfers) of goods or services. This 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 recommendation of the GST Council.
- (v) Import of goods or services would be treated as inter-state supplies and would be subject to IGST in addition to the applicable customs duties.
- (vi) CGST, SGST & IGST would be levied at rates to be mutually agreed upon by the Centre and the States. The rates would be notified on the recommendation of the GST Council. In a recent meeting, the GST Council has decided that GST would be levied at four rates viz. 5%, 12%, 16% and 28%. The schedule or list of items that would fall under each of these slabs has been worked out. In addition to these rates, a cess would be imposed on "demerit" goods to raise resources for providing compensation to States as States may lose revenue owing to the implementation of GST.
- (vii) GST would replace the following taxes currently levied and collected by the Centre:
 - a) Central Excise Duty
 - b) Duties of Excise (Medicinal and Toilet Preparations)
 - c) Additional Duties of Excise (Goods of Special Importance)
 - d) Additional Duties of Excise (Textiles and Textile Products)
 - e) Additional Duties of Customs (commonly known as CVD)
 - f) Special Additional Duty of Customs(SAD)
 - g) Service Tax
 - h) Cesses and surcharge in so far as they relate to supply of goods and services.
- (viii) State taxes that would be subsumed within the GST are:
 - a) State VAT
 - b) Central Sates Tax
 - c) Purchase Tax

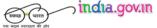
JUDICIAL ACADEMY, JHARKHAND

- d) Luxury Tax
- e) Entry Tax (All forms)
- f) Entertainment Tax and Amusement Tax (except those levied by the local bodies)
- g) Taxes on advertisements
- h) Taxes on lotteries, betting and gambling
- i) State cesses and surcharges in so far as they relate to supply of goods and services.
- (ix) GST would apply on all goods and services except Alcohol for human consumption.
- (x) GST on five specified petroleum products (Crude, Petrol, Diesel, ATF & Natural Gas) would by applicable from a date to be recommended by the GSTC.
- (xi) Tobacco and tobacco products would be subject to GST. In addition, the Centre would have the power to levy Central Excise duty on these products.
- (xii) A common threshold exemption would apply to both CGST and SGST. Tax payers with an annual turnover not exceeding Rs.20 lakh (Rs.10 Lakh for special category States) would be exempt from GST. For small taxpayers with an aggregate turnover in a financial year upto 50 lakhs, a composition scheme is available. Under the scheme a taxpayer shall pay tax as a percentage of his turnover in a State during the year without benefit of Input Tax Credit. This scheme will be optional.
- (xiii) The list of exempted goods and services would be kept to a minimum and it would be harmonized for the Centre and the States as well as across States as far as possible.
- (xiv) Exports would be zero-rated supplies. Thus, goods or services that are exported would not suffer input taxes or taxes on finished products.
- (xv) Credit of CGST paid on inputs may be used only for paying CGST on the output and the credit of SGST paid on inputs may be used only for paying SGST. Input Tax Credit (ITC) of CGST cannot be used for payment of SGST and vice versa. In other words, the two streams of Input Tax Credit (ITC) cannot be cross-utilised, except in specified circumstances of inter-state supplies for payment of IGST. The credit would be permitted to be utilised in the following manner:
 - a) ITC of CGST allowed for payment of CGST & IGST in that order;
 - b) ITC of SGST allowed for payment of SGST & IGST in that order;
 - c) ITC of IGST allowed for payment of IGST, CGST & SGST in that order.
- (xvi) Accounts would be settled periodically between the Centre and the States to ensure that the credit of SGST used for payment of IGST is transferred by the Exporting State to the Centre. Similarly, IGST used for payment of SGST would be transferred by the Centre to the Importing State. Further, the SGST portion of IGST collected on B2C supplies would also be transferred by the Centre to the destination State. The transfer of funds would be carried out on the basis of information contained in the returns filed by the taxpayers.
- (xvii) The laws, regulations and procedures for levy and collection of CGST and SGST would be harmonized to the extent possible.

The whole GST system will be backed by a robust IT system. In this regard, Goods and Services Tax Network (GSTN) has been set up by the Government. It will provide front end services and will also develop back end IT modules for States who opted for the same.













HISTORY, CONSTITUTIONAL FRAMEWORK AND EVOLUTION OF INDIAN TAX SYSTEM AND GOODS AND SERVICES TAX – A STUDY

Naseema P K*

Abstract

The strength of a nation's economy depends upon the system of taxation. If correct approaches are taken it keeps revenue consistent and manages growth in our economy. Our tax structure has a three-tier federal structure consisting of the Union Government, the State Governments and the Local Bodies. Any tax levied not backed by law or is beyond the powers of the legislating authority is unconstitutional. The basic framework for the tax system in independent India was provided in the constitutional assignment of tax powers. The principle of separation in tax powers between the central and state governments is adopted as the basis of policy. Schedule VII enumerates the subject matters of taxation with the use of three lists. Until 2003 India's constitution did not explicitly recognize and assign to any level of government the power to tax services. As all residuary tax powers were assigned to the central government, in 1994 this authority became the basis for levying a tax on selected services and the 88th Amendment to the Constitution of India assigned the power to tax services to the central government. Tax policy was employed as a principal instrument to correct severe budgetary pressures and significant changes were brought by many countries across the globe. Another motivation for reform was provided bv internationalization of economic activities arising from increasing globalization. This paper analyzes the structure of Indian tax system, its constitutional framework and the current changes in the system in the light of recent change to introduce GST.

Introduction

The strength of a nation's economy depends upon the system of taxation which if taken correct approaches, can keeps revenue consistent, stimulates industrial activity and manages growth in our economy. Through efficient measures, the tax system can lead to revenue mobilization in response to growth and result in revenue grows slightly faster than GDP. India's well developed tax structure has a three-tier federal structure consisting of the Union

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Government, the State Governments and the Local Bodies. These three bodies are authorized with the imposition of the different duties and taxes, which are prevalent in the country. In most cases, these local bodies include the local councils and the municipalities. According to the Constitution of India, the government has the right to levy taxes on individuals and organizations. However, the constitution states (Article 265)¹ that no one has the right to levy or charge taxes except the authority of law. Whatever tax is being charged has to be backed by the law passed by the legislature or the parliament. Any tax levied by the government which is not backed by law or is beyond the powers of the legislating authority may be struck down as unconstitutional. The Indian Constitution²distributes legislative powers including taxation, between the Parliament and the State Legislature.

This paper analyzes the structure of Indian tax system, its constitutional framework and the current changes in the system. Though it is difficult to achieve the ideal objective, reforms helps us to keep the focus on further reforms. The impact of historical and institutional factors in shaping Indian tax policy is also noted.

Tax- Meaning and Implications

A tax may be defined as a "pecuniary burden laid upon individuals or property owners to support the government, a payment exacted by legislative authority.3 It is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. It may be direct tax or indirect tax, and may be paid in money or as its labor equivalent A Direct tax is a kind of charge, which is imposed directly on the taxpayer and paid directly to the government by the persons (juristic or natural) on whom it is imposed. A direct tax is one that cannot be shifted by the taxpayer to someone else. Whereas an indirect tax is a tax collected by an intermediary (such as a retail store) from the person who bears the ultimate economic burden of the tax (such as the consumer). The intermediary later files a tax return and forwards the tax proceeds to government with the return. Thus the term indirect tax is contrasted with a direct tax, which is collected directly by government from the persons (legal or natural) on whom it is imposed.

Article 265 of Constitution of India.

² Article 246 (Seventh Schedule)

http://mospi.nic.in/mospi_new/upload/statistical_year_book_2011/SECTOR-1-INDIA%20AN%20OVERVIEW/CH-06-DIRECT%20&%20INDIRECT%20TAXES/DIRECT-INDIRECT%20TAX-WRITEUP.pdf on 2110 16

History, Constitutional Framework, and Evolution of Indian Tax System

The traditional taxation has been in force in India in different forms from ancient times. Manu, the ancient law giver, lay down that traders and artisans should pay one-fifth of their profits in silver and gold, while agriculturists, depending upon their circumstances, were to pay one-sixth, one eighth or one-tenth of their produce. Kalidasa in the Raghuvansha says⁴ thus of King Dileepa: 'It was only for the good of his subjects that he collected taxes from them, just as the Sun draws moisture from the Earth to give it back a thousand fold'. The word 'kara', which refers to taxes, finds mention in the SrimadBhagvatam⁵. The Sanskrit word 'danda', is the manifest form of a government's identity and consciousness. Chanakya mentions in the ArthaShastra, about 'Koshamoolodanda' and comments that the treasury and its inflows are the sources of a government's might. Most of the taxes of Ancient India were highly productive and the combination of direct taxes with indirect taxes secured flexibility in the tax system. In the medieval period, the Sultans of Delhi collected taxes under five main categories. The Mughal emperors granted land revenue rights to a mansabdar in exchange of promises of soldiers during wartime. The Treaty of Allahabad of 1765 empowered the British and the French with the right to collect taxes on behalf of the Emperor. Thus, the British system of collectors of land revenues was firmly established well before the disintegration of the Mughal Empire after 1857. During the latter half of the 19th century large shifts and overhauls took place. In July 1860, James Wilson, the first Finance Member of the Governor General in Council, quoted thus from the authority of Manu while introducing the act for levying income tax in the country, "As the leech, the calf and the bee take their food little by little, even so must the King draw from his realm, moderate annual taxes." 6

As the financial obligations increased and there was a need to revamp the tax system. In 1919, with the introduction of the federal structure through 'Diarchy' taxes on income and some

⁴ T. N Pande, *The evolution of Income Tax*, http://www.thehindubusinessline.com/2000/02/14/stories/211464tn.htmOn 23 10 16.

P.Amarjothi .P and C. Azhakarraja, A Study on Indian Revenue Generators,12 IOSR Journal Of Humanities And Social Science 2, 2013), http://iosrjournals.org/iosr-jhss/papers/Vol12-issue2/A01220107.pdf. on21 10 2016

⁶ http://www.ssrshetty.co.in/income-tax-return-itr.html on 23 10 16

other taxes were made a central subject. In 1922 historic enactment of a new Income Tax Act led to the setting up of a comprehensive taxation system with its own administrative machinery. The Income-tax Act, 1922, gave, for the first time, a specific nomenclature to various Income-tax authorities. In 1924, a Central Board of Revenue was created to administer central taxes. The attainment of Independence marked another paradigm shift for taxation. Now the objective of collecting revenues was no longer the preservation or advancement of British interests, but their own welfare. The major direct taxes levied by the Centre are on personal and corporate income excluding tax on agricultural income for which the authority to levy tax is with the states and wealth tax. The indirect taxes levied and collected by the Centre are Central Excise Duty, customs duty and service tax. A fixed proportion of the taxes collected by the Centre devolve to the states, based on the recommendations of the Central Finance Commission, which is set up every five years to review this sharing mechanism.

The basic framework for the tax system in independent India was provided in the constitutional assignment of tax powers. The principle of separation in tax powers between the central and state governments is adopted as the basis of policy. Schedule VII enumerates the subject matters of taxation with the use of three lists. List - I mentioning the areas on which only the parliament is competent to makes laws, List - II dealing with the areas on which only the state legislature can make laws, and List - III Listing the areas on which both the Parliament and the State Legislature can make laws upon concurrently is provided in Schedule VII. While there are separate heads of taxation provided under lists I and II of Seventh Schedule of Indian Constitution, there is no head of taxation in the Concurrent List.

As stated earlier the central government has the power to levy the major broad-based and mobile tax bases, which include taxes on nonagricultural incomes and wealth, corporate income taxes, customs duties, and excise duties on manufactured products. Over the years the last item has evolved into a manufacturers' VAT on goods. Similarly tax powers assigned to the states include taxes on agricultural incomes and wealth, sales taxes, and excises on alcoholic products, taxes on motor vehicles and on transport of passengers and goods, stamp duties and registration fees on

⁷ Income Tax Department, Government of India, http://www.incometaxindia.gov.in/Pages/about-us/history-of-directtaxation.aspx on 23 10 16

transfers of property, and taxes and duties on electricity. States also have powers to levy taxes on entertainment and on income earned by engaging in a profession, trade or employment; some states have retained these powers for themselves, while others have assigned them to local bodies

Although the state list also includes property taxes and taxes on the entry of goods into a local area for consumption, use, or sale, these have been assigned to local bodies. It was 73rd Constitutional Amendment, enforced from 24th April, 1993 empowered to levy taxes by the Panchayat. A State may by law authorize a Panchayat to levy, collect and appropriate taxes, duties, tolls etc. Also 74th Constitutional Amendment, enforced from 1st June, 1993 empowered to levy the taxes by the Municipalities. A State Legislature may by law authorize a Municipality to levy, collect and appropriate taxes, duties, tolls etc.

Until 2003 India's constitution did not explicitly recognize and assign to any level of government the power to tax services. As all residuary tax powers were assigned to the central government, in 1994, this authority became the basis for levying a tax on selected services. In 2003 an amendment to the constitution specifically assigned the power to tax services to the central government and the 88th Amendment to the Constitution of India (Article 268 A) 8 assigns the power to levy a service tax to the central government, with the proceeds being collected and appropriated by the central and state governments, in accordance with principles formulated by the Parliament.

Reforms Carried Out -A Description

The last 20 years had witnessed significant changes and many countries across the globe have undertaken reforms. Tax policy was employed as a principal instrument to correct severe budgetary pressures⁹. In many developing countries, pressing fiscal imbalance was the driving force. In others, the transition from plan to market necessitated wide ranging tax reforms. Efficiency as well as the addressing of the issue of replacing public enterprise profits with taxes as a principal source of revenue was the objectives behind these tax reforms. Another motivation was

⁸ This Article provides for the insertion of a new article 268A which states that taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the government of India and the States in the manner provided in clause (2).

⁹ Ehtisham Ahmad and Stern Nicholas (eds.) Theory and Practice of Tax Reform in Developing Countries, (Cambridge: Cambridge University Press, 1991).

provided by the internationalization of economic activities arising from increasing globalization¹⁰. Tax policy in India has evolved as an important component of fiscal policy that played a central role in the planned development strategy. In particular, tax policy was the principal instrument for transferring private savings to public consumption and investment¹¹ by India's Constitution. Inevitably tax policy in the country has responded to changing development strategy over the years. In the initial years tax policy was guided by a large number of demands placed on the government 12 and effort was put to raise taxes from those with an ability to pay, without paying attention to the efficiency factors of the instruments for the purpose. Because of the size of the country, its multilevel fiscal framework, the unique reform experience, and calibrating reforms posed by institutional difficulties in constraints, the Indian tax reform experience can provide useful lessons for many countries.¹³

The evolution of the tax system in independent India started with the implementation of the report of the Taxation Enquiry Commission.¹⁴In fact, this was the first comprehensive attempt to review the existing tax system and design a system that would cover central, state, and local taxes and was intended to fulfill a variety of objectives such as raising the level of savings and investment, transferring resources from the private sector to public sector, etc. On the indirect taxes side, a major simplification exercise was attempted by the Indirect Taxes Enquiry Committee¹⁵, but recommendations of this committee. until 1986.Systematic not initiated comprehensive attempts to reform the tax system at the central level started only after market-based economic reforms were initiated in 1991, when the Tax Reforms Committee (TRC) laid out a framework and a road map for reforming both direct and

M.GovindaRao & R. KavitaRao, Trends and issues in tax policy and reform in India. Paper presented at the India Policy Forum, New Delhi, 25 July 2005, https://www.brookings.edu/wp-content/uploads/2016/07/2005_rao.pdf on 21 10 16

AMARESH BAGCHI AND STERN NICHOLAS, TAX POLICY AND PLANNING IN DEVELOPING COUNTRIES, (Oxford University Press, 1994).

AMARESH BAGCHI AND PULIN NAYAK, A Survey of Public Finance and the Planning Process: The Indian Experience." IN TAX POLICY AND PLANNING IN DEVELOPING COUNTRIES, (Amaresh Bagchi and Nicholas Stern ed., Oxford University Press, 1994)

¹³ M.GovindaRaoRao,& R. Kavita Rao , Supra n.10

¹⁴ Government of India. 1953. Report of the Taxation Enquiry Commission. (New Delhi: Ministry of Finance, 1953).

¹⁵ Government of India 1977. Report of the Indirect Taxation Enquiry Committee. New Delhi: Ministry of Finance

indirect taxes. 16The reforms since 1991 with their emphasis on simplicity and efficiency, are a marked departure from the past. The Tax Reforms Committee combined economic principles with conventional wisdom in recommending comprehensive tax system reforms dealt with restructuring the tariff structure. The TRC recommended a number of measures to broaden the tax base by minimizing exemptions and concessions, drastically simplifying laws and procedures, building a proper information system, and thoroughly computerizing tax returns. and modernizing administrative and enforcement machinery. The tax system at the central level was considerably simplified and rationalized by 2005. although these reforms were neither uniform nor consistent and the system was far from perfect.¹⁷Tax reforms at the state level were not coordinated with those at the center and practice was that individual state governments tried to appoint committees from time to time and reform their tax structures even after 1991.

To persuade the states to rationalize their tax systems along the lines recommended by the study group, the government of India appointed a State Finance Ministers' Committee to make recommendations to phase in the VAT within a given timeframe. This was later transformed into the Empowered Committee of State Finance Ministers and it was recommended that the states shall adopt floor rates to minimize the "race to the bottom." The committee's recommendation that the VAT be implemented in 2003 was postponed repeatedly, until April 2005. The major landmark in tax reform at the state level was in simplifying and rationalizing the sales tax system the introduction of value added tax in 21 states from 1 April 2005.18 The introduction of the VAT was a major reform exercise, even if it may cause some confusion and uncertainty. The VAT tax base has strengthened the information base for tax administration, resulting in improved compliance for other taxes and thereby enhancing the overall productivity of the tax system.¹⁹Thus, although a VAT is not necessarily a "money machine, "the conventional conclusion holds

¹⁶ Government of India 1991. Tax Reforms Committee, Interim Report. New Delhi: Ministry of Finance.

¹⁷ Shankar Acharya. 2005. Thirty Years of Tax Reform in India. Economic and Political Weekly 40 (May 14 2005): pp. 2061–69 Reprinted in Shankar Acharya, 2006, Essays on Macroeconomic Policy and Growth in India, Oxford University Press.

¹⁸ M. Govinda Rao, *Tax system reform in India: Achievements and challenges ahead*, Journal of Asian Economics, Elsevier, vol. 16(6), 993-1011(2005).

¹⁹ Indira Rajaraman, Fiscal Developments and Outlook in India. NIPFP Working Paper No. 15. (National Institute of Public Finance and Policy, New Delhi 2004)

that a properly administered VAT is the best way to make up for the revenue loss from trade liberalization²⁰.

Though evolution of the Indian tax system shares concerns similar to other countries it is different and even unique. In developing countries tax reforms were led by the International Monetary Fund or like agencies, whereas Indian one borne a domestic brand. Though some assistance from multilateral financial institutions was there, they were not deciding the agenda for tax reform. But at the same time, the reforms were broadly in conformity with international trends and with international best practices.²¹

Thus since the year 1991, the Indian tax system has undergone some significant change and these changes were initiated in accordance with the country's W. T. O. commitments as well as the liberal financial policies. Some of the major changes in the structure of taxation in the nation are discussed above .Indian tax system has come a long way from the narrow based, complicated and confusing to the one that is far more efficient. The various reforms have been done to improve revenue productivity and also to minimize distortions. The reforms that converted the state level sales tax into VAT are noteworthy here. Even after the reforms of 1991, the steps to make the tax system broad-based, productive and efficient continued which resulted in the present GST.

The latest reform reaches an innovative idea of GST with motives to subsume all indirect taxes at the center and the state level, to make one-country-one-tax, to reduce the cascading effect of taxes on taxes and thus to increase productivity and transparency, increase tax-GDP ratio and to reduce/eliminate tax evasion and corruption. GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the subsequent stage of value addition. GST essentially is a tax only on value addition at each stage. The final consumer will bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages. Under GST, there would be only one tax from the manufacturer to the consumer, leading to transparency of taxes paid to the final consumer. So there will be relief in overall tax burden. This is because under the GST regime, the entire supply chain will be efficient leading to gains and

²⁰ Richard M Bird., and Eric M. Zolt., Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries, (International Studies, 2005)

²¹ Richard Bird. 1993, Federal Provincial Taxation in Turbulent Times. ,Canadian Public Administration36, 479–96.

prevention of leakages. It is expected that it will result in the overall tax burden on most commodities to come down, which will benefit consumers.

Conclusion

Tax administration, has progressed and more to be covered in reforming the tax system. It is a continuous exercise for improving revenue productivity and minimizing distortions. Coordinated reforms should be undertaken at the central, state, and local levels. A major objective should be minimization of distortions and compliance costs. These new changes to form a new direct tax code had been planned expecting that lower taxes and simpler rules will ensure compliance and more revenue. Having no space for complicated clauses, sub-clauses and caveats and saying good bye to unnecessary exemptions, the new direct tax code will have an impact on all including common man to the big corporate organizations. It is expected that it will disincentivise tax evasion because if a person don't pay tax on what he sell, he don't get credit for taxes on his inputs. Moreover, people will buy only from those who have already paid taxes on what they are supplying and all these will make a lot of currently underground transactions will come over ground²²brightening India's future more.

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http://economictimes.indiatimes.com/wealth/personal-finance-news/gst-bill-likely-to-benefit-common-man-in-long-run/articleshow/53570923.cms on 23 9 2016.

IMPACT OF GST LAWS ON THE FEDERAL STRUCTURE OF THE INDIAN CONSTITUTION

Arvind P Datar*

Introduction:

The Government of India introduced the Goods and Service Tax ("GST") after a long wait of nearly 16 years. It was in 2000 that the discussion to introduce GST in the country was first mooted. The new tax required a complete overhaul of not only several indirect tax legislations but also required several amendments to the Constitution of India as well. Finally, the GST was announced with great fanfare at the midnight session of Parliament on July 1, 2017. Arguably, this was one of the largest tax reforms attempted in human history. The new GST is an amalgam of several Union and State levies and was announced as "one nation, one tax". The present article is confined to the constitutional aspects of the new tax and does not deal with the statutory provisions of the Central or State GST enactments.

2. A long constitutional journey¹:

In 2000, the then Prime Minister² initiated discussions on GST by setting up an empowered committee. Thereafter, in 2003, the Kelkar Task Force on indirect taxes suggested a comprehensive GST based on the principles of Value Added Tax ("VAT"). A proposal to introduce a national level GST by April 1, 2010 was mooted in the Budget speech for the financial year 2006-07.

Since the proposal involved restructuring of not only indirect taxes levied by the Centre but also the States, the responsibility of preparing a Design and Road Map for the implementation of GST was assigned to an Empowered Committee of State Finance Ministers. Based on the inputs from the Government of India and all the States, the Empowered Committee released its First Discussion Paper on GST in November, 2009.

In order to take the GST related work further, a Joint Working Group consisting of officers from Central as well as State Governments was constituted in September, 2009. Thereafter,

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¹ Ref: http://pib.nic.in/newsite/PrintRelease. aspx?relid=148240.

² Shri Atal Bihari Vajpayee.

to implement the GST, the Constitution (One Hundred and Fifteenth Amendment) Bill, was introduced in the Lok Sabha in March, 2011 and referred to a Standing Committee of Parliament for further examination.

Meanwhile, in pursuance of the decision taken at a meeting ³ between the Union Finance Minister and the Empowered Committee of State Finance Ministers. a "Committee on GST Design" consisting of officials of the Government of India, State Governments and the Empowered Committee was constituted. This Committee made a detailed examination on the GST design including the Constitution (One Hundred and Fifteenth Amendment) Bill and submitted its report in January, 2013. Based on this Report, the Empowered Committee recommended certain changes in the Bill at their meeting at Bhubaneswar in January, 2013. The Parliamentary Standing Committee submitted its Report in August, 2013 to the Lok Sabha. The recommendations of the Empowered Committee and the recommendations of the Parliamentary Standing Committee were examined by the Ministry in consultation with the Legislative Department. Most of the recommendations made by the Empowered Committee and the Parliamentary Standing Committee were accepted and the draft amendment bill was suitably revised. The final draft incorporating the above changes was sent to the Empowered Committee for consideration in September, 2013. The Empowered Committee, once

again, made certain recommendations on the Bill held in November, 2013. After incorporating certain recommendations of the Empowered Committee, the revised draft Constitution (One Hundred and Fifteenth Amendment) Bill was introduced in the Lok Sabha on March, 2011 but this Bill lapsed with the dissolution of the 15th Lok Sabha. In June, 2014, a draft Bill was sent to the Empowered Committee after the approval of the new Government⁴. The Cabinet, on 17th December, 2014, approved the proposal for introduction of a Bill in Parliament for amending the Constitution of India to facilitate the introduction of GST in the country. The Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 was introduced in the Lok Sabha on 19th December, 2014 and was finally passed on 6th May, 2015. It was then referred to the Select Committee of Rajya Sabha, which submitted its report on 22nd July, 2015. The Bill was passed by Raiya Sabha on 3rd August, 2016, and the amended Bill was passed by the Lok Sabha on 8th August, 2016. The Bill, after ratification⁵ by the States⁶ received the assent

^{4 16}th Lok Sabha

⁵ Article 368(2) of the Constitution of India.

⁶ Assam (12th August), Bihar (16th August), Jharkhand (17th August), Himachal Pradesh (22nd August), Chhattisgarh (22nd August), Gujarat, (23rd August), Madhya Pradesh (24th August), Delhi (24th August), Nagaland (26th August), Maharashtra (29th August), Haryana (29th August), Telangana (30th August), Sikkim (30th August), Mizoram (30th August), Goa (31st August), Odisha (1st September), Puducherry (2nd September), Rajasthan (2nd September), Andhra Pradesh (8th September), Arunachal Pradesh (8th September), Meghalaya (9th September), Punjab (12th September), Tripura (26th September).

^{3 8}th November, 2012

of the President of India⁷ on 8th September, 2016. The Constitutional (One Hundred and First Amendment), Act 2016 was notified in the Gazette of India on the same date. This amendment not only inserted several new articles but amended several other provisions which are referred to later. The stage was now set to introduce the GST.

3. GST Model:

India adopted a dual system of GST i.e. the Central Goods and Service Tax ("CGST") and the State Goods and Service Tax ("SGST"). Apart from India, Canada and Australia are the only two countries which have adopted the dual system of GST. A total of 16 Union and State taxes have been subsumed in the GST. The new tax regime also prescribed multiple rates on different products which created confusion and there was difficulty in complying with various procedures. There is now a proposal to reduce the multiple rates to fewer rates by a process of rationalisation and to simplify the procedural provisions.

The new GST is primarily an amalgamation of certain Union and State levies. Mainly, there is a merger of central excise and service tax levied by the Union with VAT levied by the States. Earlier central excise duty was levied on manufacture of goods under Entry 84 of List – I of Schedule VII, whereas sales tax was levied on sale or purchase of goods under Entry 54 of List – II of Schedule VII. Both these

levies have now been replaced by a levy on the "supply of goods". Therefore, the levies on manufacture and on sale are now replaced by a levy on supply of goods. The service tax continues as a supply of services. The net result is that the new levy is on the "supply of goods and services".

4. Constitutional amendments and distribution of taxing power:

The imposition of GST required major constitutional changes which were incorporated by the Constitution (101st Amendment) Act, 2016. As India had adopted the federal model for the Constitution, the power to levy taxes was distributed amongst Parliament and the States in Schedule VII of the Constitution. The distribution of taxing powers is substantially similar to that which prevailed under the Government of India Act, 1935. Entries 82 to 92C of List Lof Schedule VII. empowers Parliament to levy taxes on various subjects mentioned therein. For example, income tax, central excise, customs duty are in the Union list i.e. List I. On the other hand, agricultural income tax, sales tax or VAT, excise duty on potable alcohol and so on are in the State List (List II). Entries 46 to 62 in the State List give the States the power to levy taxes on the subjects mentioned therein. Significantly, no tax is mentioned in List III which is the Concurrent List. This has led to the constitutional principle that there can be no overlapping of taxes: a tax must either be

⁷ Pranab Mukherjee.

within the legislative competence of the States or of the Centre⁸.

GST is an exception to this rule and is levied both by the Centre and the States. Interestingly, no amendment was made to Schedule VII to insert a new entry to levy GST. It would have been possible to insert a new entry in List III which would enable both Parliament and the States to levy GST subject to certain limitations. However, the absence of GST in List III does not in any manner affect its constitutional validity.

The constitutional amendments have conferred sufficient power and legislative competence to both Parliament and the States to levy GST. Before proceeding further, it would be useful to set out a summary of the amendments that have been made to the Constitution and these can be subdivided as follows:

- (i) **Articles inserted:** 246A, 269A, 279A, 366 (12A), 366 (26A).
- (ii) **Articles amended:** 248, 249, 250, 268, 270, 271, 286, 366, 368, Schedule VI, Schedule VII, List I, Entry 84; List II, Entries 5, 4 and 62.
- (iii) **Articles omitted:** 268A, Schedule VII, List I, Entries 92 & 92C; Schedule VII, List II, Entries 52, 55.

Article 246A is the most important article which enables Parliament and the State legislatures to make laws with respect to the goods and services tax imposed by the Union and the respective States. Article 246A (2) confers exclusive power on Parliament to make laws with respect to GST that takes place in the course of inter-state trade or commerce. Theoretically, nothing prevents each state to make its own law with regard to GST. At present, however, Parliament has enacted the Central Goods and Services Tax Act, 2017 and each State Government has enacted their respective goods and services tax act for that State. Thus, Maharashtra has the Maharashtra Goods and Services Tax Act, 2017 and West Bengal has the West Bengal Goods and Services Tax Act 2017. Fortunately, almost all State laws relating to GST are identical thereby avoiding inconsistent provisions amongst

Thus, there is a complete demarcation of powers between the Union and the States *visà-vis* levy of GST. Parliament is vested with the right to make laws with respect to GST or any matter enumerated in the State List if the Council of States declares, by a resolution supported by not less than two thirds of the members present and voting, if it is necessary or expedient in national interest⁹. Parliament is also empowered to make laws in respect of GST during the period when a proclamation of emergency is in operation¹⁰.

different States.

⁸ Godfrey Phillips India Ltd. v. State of Uttar Pradesh, (2005) 2 SCC 515: AIR 2005 SC 1103.

⁹ Article 249.10 Article 250.

Goods and Services tax, services defined: Article 366(12A) defines "Goods and Service Tax"¹¹ to mean "any tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption". The term "goods" refers to include all materials, commodities and articles¹². Under Article 366(26A) "services" has been defined to mean "anything other than goods"¹³. The definitions in the statutory provisions are so wide that virtually every transaction involving consideration is now taxable unless specifically exempt. The statutory provisions by which the GST is levied by the Centre and the States is discussed in the next sub-heading.

5. GST- Co-operative Federalism:

The levy of GST would not have been possible without the cooperation of the State Legislatures. The States have voluntarily given up their power to levy VAT on goods. However, in most States, the maximum revenue is generated by the levy of VAT on petroleum products and on alcohol for human consumption. The constitutional amendment reserves the right of the States to continue to levy Sales Tax (VAT) on these commodities. This has been achieved by substituting Entry 54 of List II. Similarly, a substantial revenue for the Centre is generated by excise duty on petroleum products and Entry 84 of List I

has been substituted whereby excise duty on petroleum products will continue to be levied by the Centre. In effect, a major portion of the revenue of the States will continue to be collected in the manner prior to the constitutional amendment. However, the States cannot levy VAT on sale of petroleum products or potable alcohol sold in inter-state transactions.

Although GST is claimed to be "one nation, one tax", it is really a levy made possible by numerous enactments. Broadly speaking the Central Goods and Services Tax Act, 2017 and individual State GST Acts levy this tax on intra-state supply of goods and services. The levy is split equally and an invoice for a local sale where GST is 18% will show a CGST levy of 9% and SGST levy of 9%. For interstate supply of goods and services, the levy is under the Integrated Goods and Services Tax Act, 2017 (IGST). This levy is akin to the erstwhile central sales tax insofar as goods are concerned. As service tax was a central levy, there was no question of inter-state levy. It is important to note that IGST is also levied on import and export of goods and the levy of GST is an addition to the levy of basic customs duty. The provisions of IGST lead to complex questions relating to location of supply and recipient and also may lead to issues of extraterritorial operation. For Union Territories, there is the Union Territory Goods and Services Tax Act, 2017.

Apart from all the above, section 18 of the Constitution (101st Amendment) Act, 2016 enables an additional levy to compensate

¹¹ Article 366 (12A).

¹² Article 366 (12).

¹³ Article 366 (26A).

7.

Council:

the States for loss of revenue on account of implementation of GST. This levy can be made for a period of 5 years. In pursuance of this power, Parliament has enacted the Goods and Services Tax (Compensation to States) Act, 2017. Section 8 of this Act levies a cess on specified intra-state and inter-state supplies of goods and services. The schedule to the Act levies this cess on pan masala, tobacco products, coal, aerated waters and specified motor vehicles. This cess is levied in addition to the other kinds of GSTs.

6. GST Council:

Article 279A establishes Goods and Service Tax Council ("GST Council") within sixty days from the date of its commencement. This was established on 15th September, 2016.14 The GST Council comprises of the Union Finance Minister, the Union Finance Minister of State in charge of Revenue or Finance, and the Finance Minister or any other Minister of each State. The Union Finance Minister acts as the Chairperson of the GST Council and the members shall, amongst themselves, appoint a Vice-Chairperson. The composition of GST Council is laudable as there is equal participation from the Centre and the States to make policy decisions on tax. It is a matter of immense pride that the GST Council has responded to the difficulties faced by industries with promptness and unanimity.

Functions of the GST

The function of the GST Council is, inter alia, to make recommendations to the Union and the States on taxes, cesses and surcharges levied by the Union, the States and the local bodies which has to be subsumed under GST; goods and services that may be subjected to. or exempted from the GST; the model GST Law, principles of levy, apportionment of GST levied on inter-state supplies, 15 principles that govern the place of supply; the threshold limit of turnover below which goods and services may be exempted from GST; the rates including floor rates with bands of GST; any special rate(s) for a specified period, to raise additional resources during any natural calamity or disaster; special provision with respect to certain States¹⁶ and any other matter as the GST Council may deem fit.

Every decision of the GST Council shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting. The vote of Union Government shall have a weightage of one-third of the total votes cast and the votes of all the State Governments taken together shall have a weightage of two thirds of total votes cast.¹⁷

The function of the CST Council is in

¹⁵ Article 269A.

¹⁶ Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

¹⁷ Article 279A(9).

¹⁴ Notification: S.O.2957 (E).

Articles 279A and 131:

Disputes 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 arising out of the recommendations of the GST Council shall be adjudicated by a mechanism to be established by the GST Council. 18 Article 131 confers original jurisdiction on the Supreme Court to decide disputes between States or between the Government of India and any State or States. However, Article 131 starts with the expression "Subject the provisions of this Constitution......" and, therefore, the mechanism contemplated by Article 279A (11) is a valid provision. Consequently, all disputes relating to GST that may arise in terms of Article 279A (11) will not be decided by the Supreme Court; to this extent, the original jurisdiction of the Supreme Court is curtailed.

9. Amendments to GST Council:

Any variation, addition or repeal of any provisions pretaining to the functions of the GST Council, the constitutency of the GST Council, the voting structure of the GST Council, or any other provisions under Article 297A will have to go through the rigmarole of ratification by legislatures of not less than one-half of the total States of India¹⁹. This is perhaps

the Council is maintained.

10. Other Constitutional issues:

- (i) Omission of entry tax: Entry 52 of List II of Schedule VII levied the controversial entry tax which was equivalent to octroi and resulted in extensive litigation. With the levy of GST, the entry tax has been abolished and this is expected to promote the free flow of goods not only from one State to another but also between local areas within the States.
- (ii) Entertainment tax: Entry 62 of List II of Schedule VII enabled the levy of entertainment tax on entertainments, amusements, betting and gambling has now been amended to enable panchayats, municipalities, Regional or District Council to levy taxes on entertainments and amusements. The words betting and gambling have been omitted. This tax can now be levied only by the bodies mentioned in the amended provisions.
- (iii) Residuary power curtailed: Article 248, which conferred exclusive residuary power to make any law with respect to matters not mentioned in Lists II and III has now been made subject to Article 246A.

11. Conclusion:

The enactment of GST has resulted in major changes in the federal structure of the Constitution. The strict division of taxing

¹⁸ Article 279A(11).

¹⁹ Article 368(2)(a).

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

powers between the Union and the States is now removed permitting the simultaneous levy of GST by both the Centre and the States. At the same time, GST does not eliminate the taxing powers of the States completely. To do so, would destroy the federal structure which has been held to be part of the basic features of the Constitution²⁰. The States continue to have powers of taxation with regard to petroleum products and potable alcohol thus saving a substantial portion of their revenue. As mentioned above, each State is entitled to pass

its own GST and, technically, there is nothing in Article 246A which prevents one State from taking a deviant path which may threaten the unified structure of the GST edifice. The extent to which Article 279A can resolve a dispute arising on this account remains to be tested.

In fine, the GST regime has been implemented without damaging the federal structure of the Constitution. The States have agreed to part with their taxing powers in the hope that the new levy will be in the national interest.

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²⁰ S.R. Bommai v. Union of India,(1994) 3SCC 1; AIR 1994 SC 1918

Registration, Returns, ITC and <u>Assessment Procedure</u> <u>under GST</u>

REGISTRATION UNDER GST LAW

Introduction

In any tax system registration is the most fundamental requirement for identification of tax payers ensuring tax compliance in the economy. Registration of any business entity under the GST Law implies obtaining a unique number from the concerned tax authorities for the purpose of collecting tax on behalf of the government and to avail Input tax credit for the taxes on his inward supplies. Without registration, a person can neither collect tax from his customers nor claim any input tax credit of tax paid by him.

Need and advantages of registration

Registration will confer the following advantages to a taxpayer:

- He is legally recognized as supplier of goods or services.
- He is legally authorized to collect tax from his customers and pass on the credit of the taxes paid on the goods or services supplied to the purchasers/ recipients.

- He can claim input tax credit of taxes paid and can utilize the same for payment of taxes due on supply of goods or services.
- Seamless flow of Input Tax Credit from suppliers to recipients at the national level.

Liability to register

GST being a tax on the event of "supply", every supplier needs to get registered. However, small businesses having all India aggregate turnover below Rupees 20 lakh (10 lakh if business is in Assam, Arunachal Pradesh, Himachal Pradesh, Uttarakhand, Manipur, Mizoram, Sikkim, Meghalaya, Nagaland or Tripura) need not register. The small businesses, having turnover below the threshold limit can, however, voluntarily opt to register.

The aggregate turnover includes supplies made by him on behalf of his principals, but excludes the value of job-worked goods if he is a job worker. But persons who are engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax or an agriculturist, to the extent of supply of produce out of cultivation of land are not liable to register under GST. Also, if all the supplies being made by a supplier are taxable under reverse charge, there is no requirement for such a supplier to register in light of Notification No. 5/2017-Central Tax dated 19.06.2017.

Nature of Registration

The registration in GST is PAN based and State specific.

Supplier has to register in each of such State or Union territory from where he effects supply. In GST registration, the supplier is allotted a 15-digit GST identification number called "GSTIN" and a certificate of registration incorporating therein this GSTIN is made available to the applicant on the GSTN common portal. The first 2 digits of the GSTIN is the State code, next 10 digits are the PAN of the legal entity, the next two digits are for entity code, and the last digit is check sum number. Registration under GST is not tax specific which means that there is single registration for all the taxes i.e. CGST, SGST/UTGST, IGST and cesses.

A given PAN based legal entity would have one GSTIN per State, that means a business entity having its branches in multiple States will have to take separate State wise registration for the branches in different States. But within a State an entity with different branches would have single registration wherein it can declare one place as principal place of business and other branches as additional place of business. However, a business entity having separate business verticals (as defined in section 2 (18) of the CGST Act, 2017) in a state may obtain separate registration for each of its business verticals. Further a unit in SEZ or a SEZ developer needs to necessarily obtain separate registration.

• Generally, the liability to register under GST arises when you are a supplier within the meaning of the term, and also if your aggregate turn over in the financial year is above the exemption threshold of 20 lakh rupees (10 lakh rupees in special category states except J & K). However, the GST law enlists

certain categories of suppliers who are required to get compulsory registration irrespective of their turnover that is to say, the threshold exemption of 20 lakh rupees or 10 lakh rupees as the case may be is not available to them. Some of such suppliers who need to register compulsorily irrespective of the size of their turnover are those who are, -

- Inter-state suppliers; However, persons making inter-state supplies of taxable services and having an aggregate turnover, to be computed on all India basis, not exceeding an amount of twenty lakh rupees (ten lakh rupees for special category States except J & K) are exempted from obtaining registration vide Notification No. 10/2017-Integrated Tax dated 13.10.2017.
- A person receiving supplies on which tax is payable by recipient on reverse charge basis
- Casual taxable person who is not having fixed place of business in the State or Union Territory from where he wants to make supply. However casual taxable persons making supplies of specified handicraft goods need not take compulsory registration and are entitled to the threshold exemption of Rs. 20 Lakh. Handicraft goods are specified in Notification no. 33/2017-Central Tax dated 15.09.2017 as amended by Notification no. 38/2017-Central Tax dated 13.10.2017.
- non-resident taxable persons who is not having fixed place of business in India

- A person who supplies on behalf of some other taxable person (i.e. an Agent of some Principal)
- E-commerce operators, who provide platform to the suppliers to make supply through it
- Suppliers of goods who supply through such e-commerce operator who are liable to collect tax at source. Persons supplying services through e-commerce operators need not take compulsory registration and are entitled to avail the threshold exemption of Rs. 20 Lakh as per Notification No. 65/2017-Central tax dated 15.11.2017.
- Those ecommerce operators who are notified as liable for GST payment under Section 9(5) of the CGST Act, 2017
- TDS Deductor
- Input service distributor
- Those supplying online information and data base access or retrieval services from outside India to a non-registered person in India.

A casual taxable person is one who has a registered business in some State in India, but wants to effect supplies from some other State in which he is not having any fixed place of business. Such person needs to register in the State from where he seeks to supply as a casual taxable person. A non-resident taxable person is one who is a foreigner and occasionally wants to effect taxable supplies from any State in India, and for that he needs GST registration. GST

law prescribes special procedure for registration, as also for extension of the operation period of such casual or non-resident taxable persons. They have to apply for registration at least five days in advance before making any supply. Also, registration is granted to them or period of operation is extended only after they make advance deposit of the estimated tax liability.

In respect of supplies to some notified agencies of United Nations organisation, multinational financial institutions and other organisations, a centralised unique identification number (UIN) is issued.

Standardisation of procedures

A total of 30 forms / formats have been prescribed in the GST registration rules. For every process in the registration chain such as application for registration, acknowledgment, query, rejection, registration certificate, show cause notice for cancellation, reply, cancellation, amendment, field visit report etc., there are standard formats. This will make the process uniform all over the country. The decision making process will also be fast. Strict time lines have been stipulated for completion of different stages of registration process.

An application has to be submitted on line through the common portal (GSTN) within thirty days from the date when liability to register arose. The casual and non-resident taxable persons need to apply at least five days prior to the commencement of the business. For transferee of a business as going concern, the liability to register arises on the date of transfer.

The Proper Officer has to either raise a query or approve the grant of registration within three working days failing which registration would be considered as deemed to have been approved. The applicant would have to respond within seven working days starting from the fourth day of filing the original application. The proper officer would have to grant or reject the application for registration within seven working days thereafter.

Amendment of Registration

Except for the changes in some core information in the registration application, a taxable person shall be able to make amendments without requiring any specific approval from the tax authority. In case the change is for legal name of the business, or the State of place of business or additional place of business, the taxable person will apply for amendment within 15 days of the event necessitating the change. The proper officer, then, will approve the amendment within next 15 days. For other changes like name of day to day functionaries, e-mail Ids, Mobile numbers etc. no approval of the proper officer is required, and the amendment can be affected by the taxable person on his own on the common portal.

Generally, the amendments take effect from the date of application for amendment. Commissioner, however, has been given powers to permit amendments with retrospective effect.

Cancellation of Registration

The GST law provides for two scenarios where cancellation

of registration can take place; the one when the taxable person no more requires it (voluntary cancellation), and another when the proper officer considers the registration liable for cancellation in view of certain specified defaults (Suo-motu cancellation) like when the registrant is not doing business from the registered place of business or if he issues tax invoice without making the supply of goods or services. The taxable person desirous of cancellation of Registration will apply on the common portal within 30 days of event warranting cancellation. He will also declare in the application the stock held on the date with effect from which he seeks cancellation. He will also work out and declare the quantum of dues of payments and credit reversal, and the particulars of payments made towards discharge of such liabilities. In case of voluntary registration (taken despite not being liable for obtaining registration), no cancellation is allowed until expiry of one year from the effective date of registration. If satisfied, the proper officer has to cancel the registration within 30 days from the date of application or the date of reply to notice (if issued, when rejection is concluded by the officer).

Revocation of Cancellation

In case where registration is cancelled suo-motu by the proper officer, the taxable person can apply within 30 days of service of cancellation order, requesting the officer for revoking the cancellation ordered by him. However, before so applying, the person has to make good the defaults (by filing all pending returns, making payment of all dues and so) for which the registration was cancelled by the officer.

If satisfied, the proper officer will revoke the cancellation earlier ordered by him. However, if the officer concludes to reject the request for revocation of cancellation, he will first observe the principle of natural justice by way of issuing notice to the person and hearing him on the issue.

Physical verification in connection with registration

Physical verification is to be resorted to only where it is found necessary in the subjective satisfaction of the proper officer. If at all, it is felt necessary, it will be undertaken only after granting the registration and the verification report along with the supporting documents and photographs shall have to be uploaded on the common portal within fifteen working days.

CANCELLATION OF REGISTRATION IN GST

Introduction:

The registration granted under GST can be cancelled for specified reasons. The cancellation can either be initiated by the department on their own motion or the registered person can apply for cancellation of their registration. In case of death of registered person, the legal heirs can apply for cancellation. In case the registration has been cancelled by the department there is a provision for revocation of the cancellation. On cancellation of the registration the person has to file a return which is called the final return.

Reason for cancellation:

The registration can be cancelled for the following reasons:

- a) a person registered under any of the existing laws, but who is not liable to be registered under the GST Act;
- a) the business has been discontinued, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise

disposed of;

- a) there is any change in the constitution of the business;
- a) the taxable person (other than the person who has voluntarily taken registration under sub-section (3) of section 25 of the CGST Act, 2017) is no longer liable to be registered;
- a) a registered person has contravened such provisions of the Act or the rules made thereunder;
- a) a person paying tax under Composition levy has not furnished returns for three consecutive tax periods;
- a) any registered person, other than a person paying tax under Composition levy has not furnished returns for a continuous period of six months;
- a) any person who has taken voluntary registration under sub-section (3) of section 25 has not commenced business within six months from the date of registration;
- a) registration has been obtained by means of fraud, willful misstatement or suppression of facts

Procedure for cancellation:

i. A person already registered under any of the existing laws (Central excise, Service tax, VAT etc.), but who now is not liable to be registered under the GST Act has to submit an application electronically by 31ST December 2017, in FORM GST REG-29 at the common portal for the cancellation of registration granted to him. The Superintendent of Central Tax

- shall, after conducting such enquiry as deemed fit, cancel the said registration.
- ii. The cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a cancellation of registration under Central Goods and Services Tax Act.
- iii. In the event, the Superintendent of Central Tax has reasons to believe that the registration of a person is liable to be cancelled, a notice to such person in FORM GST REG-17, requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled; will be issued.
- iv. The reply to the show cause notice issued has to be furnished by the registered person in FORM REG—18 within a period of seven working days.
- v. In case the reply to the show cause notice is found to be satisfactory, the Superintendent of Central Tax will drop the proceedings and pass an order in FORM GST REG –20.
- vi. However, when the person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the Superintendent of Central Tax will issue an order in FORM GST REG-19, within a period of thirty days from the date of application or, as the case may be, the date of the reply to

the show cause issued, cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing him to pay arrears of any tax, interest or penalty.

- vii. The registered person whose registration is cancelled shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock or capital goods or plant and machinery on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher.
- viii. In case of capital goods or plant and machinery, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery, reduced by such percentage points as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery under section 15, whichever is higher.
- ix. The cancellation of registration shall not affect the liability of the person to pay tax and other dues for any period prior to the date of cancellation whether or not such tax and other dues are determined before or after the date of cancellation.

Final Returns:

When the registration of a registered person other than an Input Service Distributor or a non-resident taxable person

or a person paying tax under the composition scheme or TDS/TCS; has been cancelled, the person has to file a final return within three months of the date of cancellation or date of order of cancellation, whichever is later, electronically in FORM GSTR-10 through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

Revocation of Cancellation:

- i. When the registration has been cancelled by the Proper Officer (Superintendent of Central Tax) on his own motion and not on the basis of an application ,then the registered person, whose registration has been cancelled, can submit an application for revocation of cancellation of registration, in FORM GST REG-21, to the Proper Officer (Assistant or Deputy Commissioners of Central Tax), within a period of thirty days from the date of the service of the order of cancellation of registration at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:
- ii. However, if the registration has been cancelled for failure to furnish returns, application for revocation shall be filed, only after such returns are furnished and any amount due as tax, in terms of such returns, has been paid along with any amount payable towards interest, penalty and late fee in respect of the said returns.

- iii. On examination of the application if the Proper Officer (Assistant or Deputy Commissioners of Central Tax) is satisfied, for reasons to be recorded in writing, that there are sufficient grounds for revocation of cancellation of registration, then he shall revoke the cancellation of registration by an order in FORM GST REG-22 within a period of thirty days from the date of the receipt of the application and communicate the same to the applicant.
- iv. However, if on examination of the application for revocation, if the Proper Officer (Assistant or Deputy Commissioners of Central Tax) is not satisfied then he will issue a notice in FORM GST REG–23 requiring the applicant to show cause as to why the application submitted for revocation should not be rejected and the applicant has to furnish the reply within a period of seven working days from the date of the service of the notice in FORM GST REG-24.
- v. Upon receipt of the information or clarification in FORM GST REG-24, the Proper Officer (Assistant or Deputy Commissioners of Central Tax) shall dispose of the application within a period of thirty days from the date of the receipt of such information or clarification from the applicant. In case the information or clarification provided is satisfactory, the Proper Officer (Assistant or Deputy Commissioners of Central Tax) shall dispose the application as per para (iii) above. In case it is not satisfactory the ap-

plicant will be mandatorily given an opportunity of being heard, after which the Proper Officer (Assistant or Deputy Commissioners of Central Tax) after recording the reasons in writing may by an order in FORM GST REG- 05, reject the application for revocation of cancellation of registration and communicate the same to the applicant.

vi. The revocation of cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a revocation of cancellation of registration under Central Goods and Services Tax Act

INPUT TAX CREDIT MECHANISM IN GST

Uninterrupted and seamless chain of input tax credit (hereinafter referred to as, "ITC") is one of the key features of Goods and Services Tax. ITC is a mechanism to avoid cascading of taxes. Cascading of taxes, in simple language, is 'tax on tax'. Under the present system of taxation, credit of taxes being levied by Central Government is not available as set-off for payment of taxes levied by State Governments, and *vice versa*. One of the most important features of the GST system is that the entire supply chain would be subject to GST to be levied by Central and State Government concurrently. As the tax charged by the Central or the State Governments would be part of the same tax regime, credit of tax paid at every stage would be available as set-off for payment of tax at every subsequent stage.

Let us understand how 'cascading' of taxes takes place in the present regime. Central excise duty charged on inputs used for manufacture of final product can be availed as credit for payment of Central Excise Duty on the final product. For example, to manufacture a pen, the manufacturer requires, plastic granules, refill tube, metal clip, etc. All

these 'inputs' are chargeable to central excise duty. Once a 'pen' is manufactured by using these inputs, the pen is also chargeable to central excise duty. Let us assume that the cost of all the above mentioned inputs is say, Rs.10/- on which central excise duty @10% is paid, means Re.1. The cost of the manufactured pen is say Rs.20/-, the central excise duty payable on the pen @10% will be Rs.2/- . Now the manufacturer of the pen can use the duty paid on inputs, i.e. Re.1/- for payment of duty on the pen. So he will use Re.1 paid on inputs and he will pay Re.1/- through cash (1+1=2), the price of the pen becomes Rs. 22/-. In effect he actually pays duty on the 'value added' over and above the cost of the inputs. This mechanism eliminates cascading of taxes. However, when the pen is sold by the manufacturer to a trader he is required to levy VAT on such sale. But under the present system, the manufacturer cannot use the credit of central excise duty paid on the pen for payment of VAT, as the two levies are being levied by Central and State government respectively with no statutory linkage between the two. Hence he is required to pay VAT on the entire value of the pen, i.e. Rs.22/-, which actually includes the central excise duty to the tune of Rs.2/-. This is cascading of taxes or tax on tax as now VAT is not only paid on the value of pen i.e. Rs.20/- but also on tax i.e. Rs.2/-.

Goods and Services Tax (GST) would mitigate such cascading of taxes. Under this new system most of the indirect taxes levied by Central and the State Governments on supply of goods or services or both would be combined together under a single levy. The major taxes/levies which are going to be clubbed together or subsumed in the GST

regime are as under:

Central Taxes	State Taxes
Central Excise duty	State VAT / Sales Tax
Additional duties of excise	Central Sales Tax
Excise duty levied	Purchase Tax
under Medicinal & Toilets Preparation Act	 Entertainment Tax (other than those levied by local bod-
Additional duties of	ies)
customs (CVD & SAD)	• Luxury Tax
Service Tax	• Entry Tax (All forms)
Surcharges &Cesses	• Taxes on lottery, betting & gambling
	Surcharges &Cesses

GST comprises of the following levies:

- a) Central Goods and Services Tax (CGST)[also known as Central Tax] on intra-state or intra-union territory without legislature supply of goods or services or both.
- b) State Goods and Services Tax (SGST) [also known as State Tax] on intra-state supply of goods or services or both.
- c) Union Territory Goods and Services Tax (UTGST)

- [also known as Union territory Tax] on intra-union territory supply of goods or services or both.
- d) Integrated Goods and Services Tax (IGST)[also known as Integrated Tax] on inter-state supply of goods or services or both. In case of import of goods also the present levy of Countervailing Duty (CVD) and Special Additional Duty (SAD) would be replaced by Integrated tax.

The protocol to avail and utilise the credit of these taxes is as follows:

Credit of	To be utilised first for payment of	May be utilised fur- ther for payment of
CGST	CGST	IGST
SGST/UTGST	SGST/UTGST	IGST
IGST	IGST	CGST, then SGST/ UTGST

Credit of CGST cannot be used for payment of SGST/UTGST and credit of SGST/UTGST cannot be utilised for payment of CGST.

Some of the technical aspects of the scheme of Input Tax Credit are as under:

- a) Any registered person can avail credit of tax paid on the inward supply of goods or services or both which is used or intended to be used in the course or furtherance of business.
- b) The pre-requisites for availing credit by registered person are:

- a) He is in possession of tax invoice or any other specified tax paying document.
- b) He has received the goods or services. "Bill to ship" scenarios also included.
- c) Tax is actually paid by the supplier.
- d) He has furnished the return.
- e) If the inputs are received in lots, he will be eligible to avail the credit only when the last lot of the inputs is received.
- f) He should pay the supplier the value of the goods or services along with the tax within 180 days from the date of issue of invoice, failing which the amount of credit availed by the recipient would be added to his output tax liability, with interest [rule 2(1) & (2) of ITC Rules]. However, once the amount is paid, the recipient will be entitled to avail the credit again. In case part payment has been made, proportionate credit would be allowed.
- a) Documents on the basis of which credit can be availed are:
 - a) Invoice issued by a supplier of goods or services or both
 - Invoice issued by recipient alongwith proof of payment of tax
 - c) A debit note issued by supplier
 - d) Bill of entry or similar document prescribed under

Customs Act

- e) Revised invoice
- f) Document issued by Input Service Distributor
- a) No ITC beyond September of the following FY to which invoice pertains or date of filing of annual return, whichever is earlier
- b) The Input Service Distributor (ISD) may distribute the credit available for distribution in the same month in which it is availed. The credit of CGST, SGST, UTGST and IGST shall be distributed as per the provisions of Rule 4(1)(d) of ITC Rules. ISD shall issue invoice in accordance with the provisions made under Rule 9(1) of Invoice Rules.
- c) ITC is not available in some cases as mentioned in section 17(5) of CGST Act, 2017. Some of them are as follows:
 - a) motor vehicles and other conveyances except under specified circumstances.
 - b) goods and / or services provided in relation to
 - i. food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, except under specified circumstances;
 - ii. membership of a club, health and fitness center;
 - iii. Rent-a-cab, life insurance, health insur-

- ance except where it is obligatory for an employer under any law;
- iv. travel benefits extended to employees on vacation such as leave or home travel concession;
- a) Works contract services when supplied for construction of immovable property, other than plant &machinery, except where it is an input service for further supply of works contract;
- b) Goods or services received by a taxable person for construction of immovable property on his own account, other than plant & machinery, even when used in course or furtherance of business;
- c) goods and/or services on which tax has been paid under composition scheme;
- d) goods and/or services used for private or personal consumption, to the extent they are so consumed;
- e) Goods lost, stolen, destroyed, written off, gifted, or free samples;
- f) Any tax paid due to short payment on account of fraud, suppression, mis-declaration, seizure, detention.
- a) Special circumstances under which ITC is available:
 - a) A person who has applied for registration within 30 days of becoming liable for registration is entitled to ITC of input tax in respect of goods held in stock (inputs as such and inputs contained in

- semi-finished or finished goods) on the day immediately preceding the date from which he becomes liable to pay tax.
- b) A person who has taken voluntary registration under section 23(3) of the CGST Act, 2017 is entitled to ITC of input tax in respect of goods held in stock(inputs as such and inputs contained in semi-finished or finished goods) on the day immediately preceding the date of registration.
- c) A person switching over to normal scheme from composition scheme under section 10 is entitled to ITC in respect of goods held in stock (inputs as such and inputs contained in semi-finished or finished goods) and capital goods on the day immediately preceding the date from which he becomes liable to pay tax as normal taxpayer.
- d) Where an exempt supply of goods or services or both become taxable, the person making such supplies shall be entitled to take ITC in respect of goods held in stock (inputs as such and inputs contained in semi-finished or finished goods) relatable to exempt supplies. He shall also be entitled to take credit on capital goods used exclusively for such exempt supply subject to reductions for the earlier usage as prescribed in the rules.
- e) ITC, in all the above cases, is to be availed within 1 year from the date of issue of invoice by the supplier

- f) In case of change of constitution of a registered person on account of sale, merger, demerger etc, the unutilised ITC shall be allowed to be transferred to the transferee.
- g) A person switching over from composition scheme under section 10to normal scheme or where a taxable supply become exempt, the ITC availed in respect of goods held in stock (inputs as such and inputs contained in semi-finished or finished goods) as well as capital goods will have to be paid.
- h) In case of supply of capital goods or plant and machinery, on which ITC is taken, an amount equivalent to ITC availed minus the reduction as prescribed in rules (5% for every quarter or part thereof0 shall have to be paid. In case the tax on transaction value of the supply is more, the same would have to be paid.

ASSESSMENT PROCEDURE IN GST WITH BRIEF OF ACT, RULES & FORMS

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https://taxguru.in/goods-and-service-tax/assessment-procedure-gst-act-rules-forms.html

Assessment under GST

A simple meaning of assessment is 'determine to accurate tax liability', so in every law it is common meaning of assessment to find out liability. In GST Law main object of assessment procedures are to effectively, efficiently and accurately collection of revenue.

Assessment is very small word, but it is very important for both department and taxpayer because unless and until actual liability is not determined then object of law cannot be achieved.

Whole Assessment procedure is a mechanism to find out actual liability payable by taxpayer and in this it is determined either as self-assessed by taxpayer or by department, which is resulted by following mechanism defined in law.

Section 2(11) of CGST "assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;

Self Assessment: -

Self assessment is a very knowing assessment by everyone if we are discuss about it then in this assessment taxpayer himself calculating their liability and declared by respective returns, every assessment procedure start with self assessment, also we can conclude self assessment as declared assessment in which assessee declared liability and department accept as it without any inquiry and cross check.

Sec 59 of CGST Act: – Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39.

Provisional Assessment: -

We can define provisional Assessment is a conditional Assessment, when assessee unable to find actual Value, Rate and liability then he approach to Assessing officer with written application and AO pass an order on provisional and conditional basis, assessee deposit tax liability as specified in order on provisional basis.

Sec 60 of CGST Act: -

(1) Subject to the provisions of sub-section (2), where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto, he may request the proper officer in writing giving reasons for payment of tax on a provisional basis and the proper officer shall pass an order, within a period not later than ninety days from the date of receipt of such request, allowing

payment of tax on provisional basis at such rate or on such value as may be specified by him.

- (2) The payment of tax on provisional basis may be allowed, if the taxable person executes a bond in such form as may be prescribed, and with such surety or security as the proper officer may deem fit, binding the taxable person for payment of the difference between the amount of tax as may be finally assessed and the amount of tax provisionally assessed.
- (3) The proper officer shall, within a period not exceeding six months from the date of the communication of the order issued under sub-section (1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment: Provided that the period specified in this sub-section may, on sufficient cause being shown and for reasons to be recorded in writing, be extended by the Joint Commissioner or Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding four years.
- (4) The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under sub-section (7) of section 39 or the rules made thereunder, at the rate specified under sub-section (1) of section 50, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual payment, whether such amount is paid before or after the issuance of order for final assessment.
- (5) Where the registered person is entitled to a refund consequent to the order of final assessment under sub-section (3), subject to the provisions of sub-section (8) of <u>section 54</u>, interest shall be paid on such refund as provided in section 56.

Departmental Procedure for GST Assessment

- **GST ASMT-01:** Every registered person requesting for payment of tax on provisional basis with document support by electronically in FORM GST ASMT-01.
- **GST ASMT-02:** Proper officer issue a notice in FORM GST ASMT-02 for furnish the additional information or document in support and may appear in person if he so desires.
- **GST ASMT-03:** Applicant shall file a reply to notice in FORM GST ASMT-03 with proper information and supporting documents.
- **GST ASMT-04:** Proper officer issue an order in FORM GST ASMT-04 after allowing the payment of tax on a provisional basis and indicating value, rate or both also amount of security mention in order which the bond is to be executed.
- **GST ASMT-05:** When order will be passed then assessee shall furnish a bond in the FORM GST ASMT-05 in form of bank guarantee with amount mention in order.
- GST ASMT-06 & GST ASMT-07: If Proper officer need any more details for finalization of Assessment then he shall issue a notice in FORM GST ASMT-06 for calling information and record, after getting all required information and records, proper officer issue a final assessment order by specifying amount in FORM GST ASMT-07, if any amount payable by assessee, then he must pay with interest and if any amount refundable then amount refunded with interest rate specified under this Act & Rules.
- GST ASMT-08 & GST ASMT-09: When final assessment order issued then assessee may file application in form ASMT-08 for release the security furnished and the proper officer after ensuring that any balance tax has been deposited shall release same and pass an order in FORM GST ASMT-09 within seven days from receipt of application.

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

Type of Form	Purpose	User	Rules
ASMT-01	Application for requesting provisional assessment	Registered Person	Rule 98
ASMT-02	Issue notice for furnish the additional information or document in support	Proper officer	Rule 98
ASMT-03	Reply to notice with proper information and supporting documents.	Registered person	Rule 98
ASMT-04	Issue a provisional order and indicating value, rate or both also amount of security mention in order which the bond is to be executed.	Proper officer	Rule 98
ASMT-05	Furnish a bond in the form of bank guarantee with amount mention in order.	Registered person	Rule 98
ASMT-06	For need any more details for finalization of Assessment then calling information and record.	Proper officer	Rule 98
ASMT-07	Issue final Assessment order by specifying amount payable or refundable.	Proper officer	Rule 98
ASMT-08	Application for release the security furnished.	Registered person	Rule 98
ASMT-09	Order for release security with any adjustment within seven days from receipt of application.	Proper officer	Rule 98

Scrutiny Assessment: -

Scrutiny means a crosscheck and verification, for ensuring the correctness of return submitted by registered person, in the process of scrutiny if any discrepancies found in return, then proper officer-initiated scrutiny process and crosscheck and verify that registered person has follow the process define under this act or not also ensure that assessee submitted correct information in proper manner or not.

In scrutiny process, proper officer served a notice to submit correct particulars and rectify discrepancy, if satisfactory reply and corrective action is not taken by registered person in specified time period then appropriate action may taken by assessing officer.

Scrutiny of Returns (Sec 61 of CGST Act): -

(1) the proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

JUDICIAL ACADEMY, JHARKHAND

- (2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.
- (3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

Some important points for practical dealing

- 1. Provision of this assessment is applicable only on registered person and if return is filed by him.
- 2. Scrutiny assessment only deals for verification of correctness of the return on the basis of information available by him and does not have any scope for investigation beyond return.

Departmental Procedure for GST Assessment

- **GST ASMT-10:** In the scrutiny process proper officer has satisfactory with records then drop the process, and if not satisfy and found any discrepancy then serve a notice in FORM GST ASMT-10 to get information and explanation within 30 days or further period as may be permitted for such discrepancy, and whereas possible proper officer also quantifying tax, interest and any other sum payable.
- **GST ASMT-11:** Registered person after receiving notice in ASMT-10 accept the discrepancy and pay the tax, interest and any other sum payable as mention in it, also furnish a reply with explanation in FORM GST ASMT-11 to the proper office for such discrepancy.
- **GST ASMT -12:** After furnishing the reply with explanation by registered person and if it is found to be acceptable then proper officer stops any further inquiry and inform him accordingly in FORM GST ASMT-12.

Type of Form	Purpose	User	Rule
ASMT-10	Service of a notice to get information and explanation within 30 days or further period as may be permitted for such discrepancy, and where possible also quantifying tax, interest and any other sum payable.	Proper officer	Rule 99(1
ASMT-11	Reply with explanation for such discrepancy with payment details if any	Registered person	Rule 99(2
ASMT-12	Intimation of accepting reply after considering explanation and inform.	Proper officer	Rule 99(3

Best Judgment Assessment Failure to file Return:-

Every registered person liable to file return, if when registered person have not furnish return under sec 39 (GSTR 3B/4) or sec 45 (GSTR-10) even after service of notice then proper officer has only one way to complete assessment after considering information, data and records available with him, which means proper officer shall pass an order in their best judgment and if registered person furnish a valid return then proper officer drop the assessment only if all tax and any sum payable has been deposited in full.

Best judgment assessment does not deal with sec 37 and 44 of Act if any registered person did not file GSTR-1 and GSTR-9 then proper officer may not take appropriate action in sec 62 of CGST ACT.

Assessment of non filers of returns (Sec 62 of CGST Act). (1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual

return for the financial year to which the tax not paid relates.

(2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.

Departmental Procedure for Assessment

- **GSTR-3A**, (**Rule 68**): Notice in form GSTR-3A in a manner prescribed for furnishing return within 15 days for completing assessment.
- **GST ASMT-13**, **Rule 100 (1):** After considering all information and record available him proper officer issue an order with summary uploaded electronically in FORM DRC-07.

Assessment of Unregistered Person: -

In this assessment proper officer assess in case where a taxable person is liable to obtain registration but he fails to obtain or a person whose registration has been cancelled but liable to pay tax, proper officer may initiate Suo moto proceedings on the basis of information obtained, during inspection or survey, through any information available intelligence unit, or any other means.

Section 63 of CGST Act:- Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under sub-section (2) of section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgment for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.

Departmental Procedure for Assessment

• **GST ASMT-14**, **Rule 100(2)**: – Proper officer shall issue a notice to a taxable person in FORM GST ASMT-14 with containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in FORM GST DRC-01.

• **GST ASMT-14, Rule 100(2)**: – After allowing a time of fifteen days to such person to furnish his reply and pass an order in FORM GST ASMT-15 and summary thereof shall be uploaded electronically in FORM GST DRC-07.

Assessment in certain special cases (Summary Assessment): -

Whenever proper officer has come to know and also has reason to believe that an assessment order must be passed to taxable person for protect the interest of revenue then with prior permission of additional commissioner and joint commissioner, he shall assess the tax liability of such person and issue an assessment order.

Also, if taxable person not ascertainable then person in charge of such goods shall be deemed to taxable person and liable to be assessed and pay.

Summary assessment in certain special cases (Section 64 of CGST Act): – (1) The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue:

Provided that where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.

(2) On an application made by the taxable person within thirty days from the date of receipt of order passed under sub-section (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or section 74.

Departmental Procedure for Assessment

- GST ASMT-16, Rule 100(3): Under this assessment, order shall be issued in FORM GST ASMT-16 and a summary of the order shall be uploaded electronically in FORM GST DRC-07.
- **GST ASMT-17**, **Rule 100(4):** Taxable person may file an application for withdrawal of the assessment order in **FORM GST ASMT-17**.
- GST ASMT-18, Rule 100(5): The order of withdrawal or, as the case may be, rejection of the application shall be issued in FORM GST ASMT-18.

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Disclaimer: The content of this Article is for information purpose only. We shall not accept any liability for any decision taken based on the advice. You should carefully study and take instruction under respective Act, Rules, Notification and circular before taking any decision.

RETURNS IN GST

The basic features of the return mechanism in GST includes electronic filing of returns, uploading of invoice level information, auto-population of information relating to input tax credit from returns of supplier to that of recipient, invoice level information matching and auto-reversal of input tax credit in case of mismatch. The returns mechanism is designed to assist the taxpayer to file returns and avail ITC.

Under GST, a regular taxpayer needs to furnish monthly returns and one annual return. There are separate returns for a taxpayer registered under the composition scheme, non-resident taxpayer, taxpayer registered as an Input Service Distributor, a person liable to deduct or collect the tax (TDS/TCS), a person granted Unique Identification Number. It is important to note that a taxpayer is NOT required to file all the types of returns. In fact, taxpayers are required to file returns depending on the activities they undertake. The GST Council has however recommended to ease the compliance requirements for small tax payers by allowing taxpayers with annual aggregate turnover up to Rs. 1.5 Crore to file details of outward supplies in FORM GSTR-1 on a quarterly basis and on monthly basis by taxpayers with annual aggregate turnover greater than

Rs. 1.5 Crore. Further, GST Council has recommended to postpone the date of filing of Forms GSTR-2 and GSTR-3 for all normal tax payers, irrespective of turnover, till further announcements are made in this regard.

All the returns are to be filed online. Returns can be filed using any of the following methods:

- 1. GSTN portal (<u>www.gst.gov.in</u>)
- 2. Offline utilities provided by GSTN
- 3. GST Suvidha Providers (GSPs). If a tax payer is already using the services of an ERP providers such as Tally, SAP, Oracle etc, there is a high likelihood that these ERP providers would provide inbuilt solutions in the existing ERP systems.

Following table lists the various types of returns under GST Law.

Return	Description	Who Files?	Standard
			Date for fil-
			ing
GSTR-	Statement of	Normal Reg-	10 th of the
1*	Outward sup-	istered Person	next month
	plies of Goods		
	or Services		
GSTR-	Statement of	Normal Reg-	15 th of the
2*	Inward sup-	istered person	next month
	plies of Goods		
	or services		

G S T R - 3*		Normal Registered Person	
GSTR- 3B	_	Normal Reg- istered Person	
GSTR-4	Quarterly Return	Taxable Person opting for Composition Levy	month suc-
GSTR-5	Monthly return for a non-resident taxpayer	taxpayer	20th of the month succeeding tax period & within 7 days after expiry of registration

GSTR-	Monthly re-	Supplier of	20th of the
5A		OIDAR Ser-	
311	turn for a per-	Visco	ilext illolltil
	son supply-	vices	
	ing OIDAR		
	services from		
	a place out-		
	side India to		
	a non-taxable		
	online recipi-		
	ent		
GSTR-6	Monthly re-	Input Service	13 th of the
		Distributor	next month
	Input Service		
	Distributor		
	(ISD)		
GSTR-7	Monthly re-	Tax Deductor	10 th of the
	turn for au-		next month
	thorities de-		
	ducting tax at		
	source		
GSTR-8	Monthly	E-Commerce	10 th of the
	statement for		next month
	E-Commerce	1	
	Operator de-		
	picting sup-		
	plies effecting		
	through it.		

GSTR-9	Annual Re-	Registered	31st Decem-
	turn	Person other	ber of next
		than an ISD,	Financial Year
		TDS/TCS	
		Taxpayer, ca-	
		sual taxable	
		person and	
		Non-resident	
		taxpayer.	
GSTR-		Taxable Per-	
9A		son opting for	
		Composition	Financial Year
	Composition	Levy	
	Scheme		
GSTR-	Final Return	Taxable per-	Within three
10		son whose	months of the
		registration	
		has been sur-	
		rendered or	
		cancelled.	of cancella-
			tion, which-
			ever is later.

GSTR-	Details of in-	Persons who	28 th of the
11	ward supplies	have been	next month
	to be fur-	issued a	
	nished by a	Unique Iden-	
	person having	tity Num-	
	UIN	ber(UIN)	

^{*} Registered persons having aggregate turnover of up to 1.5 Crore rupees in the preceding financial year or the current financial year shall furnish GSTR-1on a quarterly basis. Other Registered persons having aggregate turnover of more than 1.5 Crore rupees shall furnish these returns on a monthly basis. Filing of GSTR-2 and GSTR-3 has been postponed till a further announcement in this regard is made.

Calendar for Return filing

The due dates for filing various GST returns may vary from the Standard dates mentioned in the table above. Various notifications are issued from time to time in this regard and as per the notifications issued till 29/12/2017.

	Category of Taxpayer	Time Period	Due Date
GSTR-	All taxpayers to	Every month	20 th of the
3B	file along with	till March	succeeding
	payment of tax	2018	month

	Taxpayers with annual aggre-	2017	10 th 2018	Jan
	gate turnover up to Rs 1.5 Crore to file on	2017	15 th 2018	Feb
	Quarterly basis		30 th 2018	April
	Taxpayers with annual aggre-	2017	10 th 2018	Jan
	of more than	Nov 2017	10 th 2018	Jan
GSTR-1	Rs 1.5 Crore to file on Monthly	Dec 2017	10 th 2018	Feb
	basis	Jan 2018	10 th 2018	Mar
		Feb 2018	10 th 2018	April
		Mar 2018	10 th 2018	May
GSTR-4	Taxpayers who have opted for	Jul-Sep 2017	24 th 2017	Dec
	Composition scheme to file every quarter			

GSTR-5	Non Resident Taxable Person to file every month		31 st Jan 2018
GSTR- 5A	Taxpayers supplying OIDAR services from a place outside India to a non-taxable online recipient	Jul-Dec 2017	31st Jan 2018
GSTR-6	Input Service Distributor	Jul 2017	31 st Dec 2017

Note: Due dates have not been notified for **GSTR-2** and **GSTR-3** for any of the months. That is, a taxpayer need not file **GSTR-2** and **GSTR-3** for any of the months from July 2017 until a notification is issued in this regard mentioning the due dates. Till such time, Form GSTR-3B is required to be filed by tax payers instead of Form GSTR-3.

Revision of Returns:

The mechanism of filing of revised returns for any correction of errors/omissions has been done away with. The rectification of errors/omissions is allowed in the return for subsequent month(s). However, no rectification is allowed after furnishing of the return for the month of

September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, whichever is earlier.

Interest on Late GST Payment

An interest of 18 percent is levied on the late payment of taxes under the GST regime. The interest would be levied for the days for which tax was not paid after the due date.

Penalty for non-filing of GST Returns

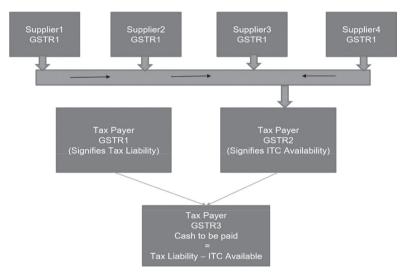
In case a taxpayer does not file his/her return within the due dates, he/she shall have to pay a late fee of Rs. 200/- i.e. Rs.100/- for CGST and Rs.100/- for SGST per day (up to a maximum of Rs. 5,000/-) from the due date to the date when the returns are actually filed.

Note: In case of GSTR-3B,

- For the months July to September, 2017, the late fee payable for failure to furnish the return has been waived completely.
- From the month of October 2017 onwards, the GST Council has recommended that the amount of late fee payable by a taxpayer whose tax liability for that month is 'NIL' is Rs. 20/- per day (Rs. 10/- per day each under CGST & SGST Acts). However, if the tax liability for that month is not 'NIL', the amount of late fee is Rs 50/- per day (Rs. 25/- per day each under CGST & SGST Acts)

An overview of GSTR-1, GSTR-2 and GSTR-3

The population of these returns is explained by the following graphic:



NOTE:

- 1. Taxpayer's GSTR2 is auto-populated from the Suppliers' GSTR-1s
- 2. Taxpayer's GSTR3 is significantly auto-populated from his/her's GSTR1 and GSTR2

ReturnFilingMilestones:

ITC Matching and Auto-Reversal:

1. It is a mechanism to prevent revenue leakage and to facilitate availment of eligible and rightful ITC by taxpayers.

- 2. The process of ITC Matching begins after the due date for filing of the return (20th). This is carried out by GSTN.
- 3. The details of every inward supply furnished by the taxable person (i.e. the "recipient" of goods and/or services) in form **GSTR-2** shall be matched with the corresponding details of outward supply furnished by the corresponding taxable person (i.e. the "supplier" of goods and / or services) in his valid return. A return may be considered to be a valid return only when the appropriate GST has been paid in full by the taxable person as shown in such return for a given tax period.
- 4. In case the details match, then the ITC claimed by the recipient in his valid returns shall be considered as finally accepted and such acceptance shall be communicated to the recipient. Failure to file valid return by the supplier may lead to denial of ITC in the hands of the recipient.
- 5. In case the ITC claimed by the recipient is in excess of the tax declared by the supplier or where the details of outward supply are not declared by the supplier in his valid returns, the discrepancy shall be communicated to both the supplier and the recipient. Similarly, in case, there is duplication of claim of ITC, the same shall be communicated to the recipient.
- 6. The recipient will be asked to rectify the discrepancy of excess claim of ITC and in case the Supplier has not rectified the discrepancy communicated in his valid returns for the month in which discrepancy is

- communicated then such excess ITC as claimed by the recipient shall be added to the output tax liability of the recipient in the succeeding month.
- 7. Similarly, duplication of ITC claimed by the recipient shall be added to the output tax liability of the recipient in the month in which such duplication is communicated.
- 8. The recipient shall be liable to pay interest on the excess or duplicate ITC added back to the output tax liability of the recipient from the date of availing of ITC till the corresponding additions are made in their returns.
- 9. Re-claim of ITC refers to taking back the ITC reversed in the Electronic Credit Ledger of the recipient by way of reducing the output tax liability. Such re-claim can be made by the recipient only in case the supplier declares the details of invoice and/or Debit Notes in his valid return within the prescribed timeframe. In such case, the interest paid by the recipient shall be refunded to him by way of crediting the amount to his Electronic Cash Ledger.

Note: It may be noted that the return process is being examined by a Committee of officers and has not been finalised so far.

Circular Trading, Fake Invoicing and E-Way Bill

CIRCULAR TRADING IN GST

AUTHOR: HEMANT P. VASTANI

https://taxguru.in/goods-and-service-tax/circular-trading-gst.html

Circular Trading is not a new concept in India, it has been ever existing in the Indian Market, but many tend to believe that it only takes place in the stock market. However, that is not the case, Circular Trading can also take place into companies or trading businesses. Before we further get into the depth and analysis of circular trading, let's start with the basics and try to understand the following aspects.

What is Circular Trading in GST?

Circular trading refers to issuing of invoices in transactions among multiple companies without actual supply of goods. This is done to use input tax credit in the GST regime, meaning Circular Trading is a type of cycle that takes place when a company tries to create a flow of fake sales transaction with its collusioned parties by producing fake invoices.

Circular Trading: It's ill- effects

This type of cycle basically creates a huge financial impact on companies' accounts. This approach of fraud helps companies to inflate their turnover, gain larger loans from financial institutions or banks and also avail GST credits on every lap of transactions done, ultimately raising the black money.

Understanding of Circular trading:

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

There is no clear definition of Circular trading in GST, we will try to understand the concept under different circumstances and try to seek the answer whether in the below examples, Circular trading happens or not?

Example 1: Let's say Company A is into trading of Gold and supplies, and sells goods to Company B, and Company B sells the same goods to Company C, Company C sells the same goods to Company D and Company D sells to Company E and finally E sells the goods to company A, or Company A purchases the exact goods from Company E, hence completing the cycle.

Here before deciding whether the above flow of transaction in example 1 is a circular transaction or not we have to answer the following unanswered question

- 1) Whether the company A was having the physical goods in his inventory before he sells to Company B?
- 2) Whether in the journey of flow of transaction from Company A to Company E, whether any third party Logistic services provider are deployed to collect and deliver the goods to Company B, C, D, or E?
- 3) Whether in reality the goods are moved from one company to another?

Example 2 : Suppose Company A sells goods to company B -100 Kgs, Company B sells goods to Company C - 85 Kgs, Company C sells goods to Company D -70 Kgs , and Company D sells to Company E -65 Kgs, and Company E sells goods to Company A - 65 Kgs . Now the unanswered question

- 1) The same goods came back to A but the quantity is not the same, so whether this can be treated as circular trading?
- 2) Simlarly, out of the total purchases of Company A, the purchases from Company E is only 10 to 20 %, and the remaining purchases of Company A are from other institutions such as banks, Exchange and imports from abroad so whether this transactions falls under the ambit of Circular Trading and can be treated as circular trading?

Example 3 : Suppose Company A sells goods to company B at Rs 1000, Company B sells goods to Company C at Rs 1010, Company C sells goods to Company D at Rs 1070 and Company D sells to Company E at Rs 990 and Company E sells goods to Company A at Rs 1000.

1) From the above example it is imperative that there is a value addition at each level, but if the item of trade is such (like gold) where the price is determined on the basis of cost plus small margin or market price which level is low, so whether this tantamount to Circular trading?

In all the three examples, sale of goods has taken place and the title in the goods are transferred in the hands of the buyer. As per section 4 of Sale of Goods Act, 'A contract of **sale of goods** is a contract whereby the seller either transfers or agrees to transfer the property in **goods** to the buyer for a decided price.

Consequence: Since the provision of GST for circular trading are very harsh and are covered under serious offense as non-bailable and cognizable offense, where a police department has the authority to arrest without a warrant and can begin an investigation without any permission of a court if the amount surpasses beyond INR 5 Crs.

In February and April, 2019, the Indirect tax department has raided in different states to unearth the transaction of circular trading. It is said that some companies prepared doctored invoices of INR 25,000 crore to avail advantage of GST credit or input tax credit.

JUDICIAL ACADEMY, JHARKHAND

Input Tax Credit is a mechanism where a company at the time of paying tax on output, can claim the tax that have already paid on inputs. For instance, a company A has a tax payable on output (Final product) is INR 5000 and tax paid on inputs (Purchases) is INR 4000. Here, this company can claim input credit of INR 4000 and will be taxed only the difference amount that is INR 1000.

Conclusion: In the absences of the clear cut definition of circular trading there is lot of confusion in the trade and industry. The government (GST Council) should come out with the clear policy, FAQs and DO and DON'T as when the transactions are to be treated as Circular Trading.

When there are no clear guidelines on Circular Trading, the harsh provisions of imprisonment cannot be left at the discretionary of the GST officers, which has a very big and direct impact on the reputation of the businessman in particular and the business community at large, and such provisions should be either diluted or deleted from the act.

ELECTRONIC WAY (E-WAY) BILL IN GST

Introduction

A waybill is a receipt or a document issued by a carrier giving details and instructions relating to the shipment of a consignment of goods and the details include name of consignor, consignee, the point of origin of the consignment, its destination, and route.

Electronic Way Bill (E-Way Bill) is basically a compliance mechanism wherein by way of a digital interface the person causing the movement of goods uploads the relevant information prior to the commencement of movement of goods and generates e-way bill on the GST portal.

Rule 138 of the CGST Rules, 2017 provides for the e-way bill mechanism and in this context it is important to note that "information is to be furnished prior to the commencement of movement of goods" and "is to be issued whether the movement is in relation to a supply or for reasons other than supply".

E-Way Bill under GST

E-way bill is an electronic document generated on the GST portal evidencing movement of goods. It has two

Components - Part A comprising of details of GSTIN of recipient, place of delivery (PIN Code), invoice or challan number and date, value of goods, HSN code, transport document number (Goods Receipt Number or Railway Receipt Number or Airway Bill Number or Bill of Lading Number) and reasons for transportation; and Part B comprising of transporter details (Vehicle number).

As per Rule 138 of the CGST Rules, 2017, every registered person who causes movement of goods (*which may not necessarily be on account of supply*) of consignment value more than Rs. 50000/- is required to furnish above mentioned information in part A of e-way bill. The part B containing transport details helps in generation of e-way bill.

Who should generate the e-way bill and Why?

E-way bill is to be generated by the consignor or consignee himself if the transportation is being done in own/hired conveyance or by railways, by air or by Vessel. If the goods are handed over to a transporter for transportation by road, E-way bill is to be generated by the Transporter. Where neither the consignor nor consignee generates the e-way bill and the value of goods is more than Rs.50,000/- it shall be the responsibility of the transporter to generate it.

Further, it has been provided that where goods are sent by a principal located in one State to a job-worker located in any other State, the e-way bill shall be generated by the principal irrespective of the value of the consignment.

Also, where handicraft goods are transported from one State to another by a person who has been exempted from the requirement of obtaining registration, the e-way bill shall be generated by the said person irrespective of the value of the consignment.

How is it generated?

An e-way bill contains two parts-Part A to be furnished by the person who is causing movement of goods of consignment value exceeding Rs. 50,000/- and part B (transport details) to be furnished by the person who is transporting the goods. Where the goods are transported by a registered personwhether as consignor or recipient, the said person shall have to generate the e-way bill by furnishing information in part B on the GST common portal. Where the e-way bill is not generated by registered person and the goods are handed over to the transporter for transportation by road, the registered person shall furnish the information relating to the transporter in Part B of FORM GST EWB-01 on the common portal and the e-way bill shall be generated by the transporter on the said portal on the basis of the information furnished by the registered person in **Part A of** FORM GST EWB-01.

A registered person may obtain an Invoice Reference Number from the common portal by uploading, on the said portal, a tax invoice issued by him in **FORM GST INV-1** and produce the same for verification by the proper officer in lieu of the tax invoice and such number shall be valid for a period of thirty days from the date of uploading.

In the above case, the registered person will not have to upload the information in Part A of FORM GST EWB-

01 for generation of e-way bill and the same shall be auto-populated by the common portal on the basis of the information furnished in **FORM GST INV-1**.

Upon generation of the e-way bill on the common portal, a unique e-way bill number (EBN) generated by the common portal, shall be made available to the supplier, the recipient and the transporter on the common portal.

The details of e-way bill generated shall be made available to the recipient, if registered, on the common portal, who shall communicate his acceptance or rejection of the consignment covered by the e-way bill. In case, the recipient does not communicate his acceptance or rejection within seventy-two hours of the details being made available to him on the common portal, it shall be deemed that he has accepted the said details.

Purpose of E-Way Bill

E-way bill is a mechanism to ensure that goods being transported comply with the GST Law and is an effective tool to track movement of goods and check tax evasion.

Validity of E-Way Bill

The validity of e-way bill depends on the distance to be travelled by the goods. For a distance of less than 100 Km the e-way bill will be valid for a day from the relevant date. For every 100 Km thereafter, the validity will be additional one day from the relevant date. The "relevant date" shall mean the date on which the e-way bill has been generated and the period of validity shall be counted from the time

at which the e-way bill has been generated and each day shall be counted as twenty-four hours. In general, the validity of the e-way bill cannot be extended. However, Commissioner may extend the validity period only by way of issue of notification for certain categories of goods which shall be specified later.

Further, if under circumstances of an exceptional nature, the goods cannot be transported within the validity period of the e-way bill, the transporter may generate another e-way bill after updating the details in **Part B of FORM GST EWB-01**.

Cancellation of E-Way Bill

Where an e-way bill has been generated under this rule, but goods are either not transported or are not transported as per the details furnished in the e-way bill, the e-way bill may be cancelled electronically on the common portal, either directly or through a Facilitation Centre notified by the Commissioner, within 24 hours of generation of the e-way bill. However, an e-way bill cannot be cancelled if it has been verified in transit in accordance with the provisions of rule 138B of the CGST Rules, 2017.

The facility of generation and cancellation of e-way bill will also be made available through SMS.

Finer Points

An e-way bill has to be prepared for every consignment where the value of the consignment exceeds Rs. 50,000/-. Where multiple consignments of varying values (per consignment) are carried in a single vehicle, e-way bill needs to be mandatorily generated only for those consignments whose value exceeds Rs. 50,000/-. This does not however preclude the consignor/consignee/transporter to generate e-way bills even for individual consignments whose value is less than Rs. 50000/- per consignment. For multiple consignments being carried in the same vehicle, the transporter to prepare a consolidated e-way bill by indicating serial number of each e-way bill, on the common prior to commencement of transport of goods.

There is always a possibility that multiple vehicles are used for carrying the same consignment to its destination or unforeseen exigencies may require the consignments to be carried in a different conveyance than the original one. For such situations, the rules provide that any transporter transferring goods from one conveyance to another in the course of transit shall, before such transfer and further movement of goods, update the details of the conveyance in the e-way bill on the common portal in **FORM GST EWB-01**.

The person in charge of a conveyance has to carry the invoice or bill of supply or delivery challan, as the case may be; and a copy of the e-way bill or the e-way bill number, either physically or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner. However, where circumstances so warrant, the Commissioner may, by notification, require the person-in-charge of the conveyance to carry the following documents instead of the e-way bill-

- a) tax invoice or bill of supply or bill of entry; or
- b) a delivery challan, where the goods are transported for reasons other than by way of supply.

It is also be noted that the Commissioner may, by notification, require a class of transporters to obtain a unique Radio Frequency Identification Device and get the said device embedded on to the conveyance and map the e-way bill to the Radio Frequency Identification Device prior to the movement of goods.

E-Way bill to be issued whether for supply or otherwise

E-way bill is to be issued irrespective of whether the movement of goods is caused by reasons of supply or otherwise. In respect of transportation for reasons other than supply, movement could be in view of export/import, job-work, SKD or CKD, recipient not known, line sales, sales returns, exhibition or fairs, for own use, sale on approval basis etc.

Exceptions to e-way bill requirement

No e-way bill is required to be generated in the following cases

- a) Transport of goods as specified in Annexure to Rule 138 of the CGST Rules, 2017
- b) goods being transported by a non-motorised conveyance;
- c) goods being transported from the port, air cargo complex and land customs station to an inland con-

- tainer depot or a container freight station for clearance by Customs;
- d) in respect of movement of goods within such areas as are notified under rule 138(14) (d) of the SGST Rules, 2017 of the concerned State; and
- e) Consignment value less than Rs. 50,000/-

Consequences of non-conformance to E-way bill rules

If e-way bills, wherever required, are not issued in accordance with the provisions contained in Rule 138 of the CGST Rules, 2017, the same will be considered as contravention of rules. As per Section 122 of the CGST Act, 2017, a taxable person who transports any taxable goods without the cover of specified documents (e-way bill is one of the specified documents) shall be liable to a penalty of Rs. 10,000/- or tax sought to be evaded (wherever applicable) whichever is greater. As per Section 129 of CGST Act, 2017, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure.

Enforcement

The Commissioner or an officer empowered by him in this behalf may authorise the proper officer to intercept any conveyance to verify the e-way bill or the e-way bill number in physical form for all inter-State and intra-State movement of goods.

The physical verification of conveyances may also be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf. Physical verification of a specific conveyance can also be carried out by any officer, on receipt of specific information on evasion of tax, after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf.

A summary report of every inspection of goods in transit shall be recorded online by the proper officer in **Part A of FORM GST EWB-03** within twenty-four hours of inspection and the final report in **Part B of FORM GST EWB-03** shall be recorded within three days of such inspection.

Once physical verification of goods being transported on any conveyance has been done during transit at one place within the State or in any other State, no further physical verification of the said conveyance shall be carried out again in the State, unless a specific information relating to evasion of tax is made available subsequently.

Where a vehicle has been intercepted and detained for a period exceeding thirty minutes, the transporter may upload the said information in **FORM GST EWB-04** on the common portal.

Recent Developments in respect of the E-Way Bill mechanism under GST.

Decision of GST Council: Inter-State e-way Bill to be

made compulsory from 1 st of February, 2018; system to be ready by 16th of January, 2018.

The 24th meeting of the GST Council held on 16.12.2017 discussed about the implementation of e-way Bill system in the country. Till such time as National e-way Bill is ready, the States were authorized to continue their own separate e-way Bill systems. However, it was represented by the trade and transporters that this is causing undue hardship in inter-State movement of goods and therefore, bringing in an early all India system of e-way Bill has become a necessity. The GST Council reviewed the progress of readiness of hardware and software required for the introduction of nationwide e-way Bill system. After discussions with all the states, the following decisions are taken:-

- i. The nationwide e-way Bill system will be ready to be rolled out on a trial basis latest by 16th January, 2018.
 Trade and transporters can start using this system on a voluntary basis from 16th January, 2018.
- ii. The rules for implementation of nationwide e-way Bill system for inter-State movement of goods on a compulsory basis will be notified with effect from 1st February, 2018. This will bring uniformity across the States for seamless inter-State movement of goods. Notification no. 74/2017-Central Tax dated 29.12.2017 has been issued which notifies 1st February, 2018 from which E-Way Bill Rules will come into force.
- iii. While the system for both inter-State and in-

tra-State e-way Bill generation will be ready by 16th January, 2018, the States may choose their own timings for implementation of e-way Bill for intra-State movement of goods on any date before 1st June, 2018. There are certain States which are already having system of e-way Bill for intra-State as well as inter-State movement and some of those States can be early adopters of national e-way Bill system for intra-State movement also. But in any case uniform system of e-way Bill for inter-State as well as intra-State movement will be implemented across the country by 1st June, 2018.

Conclusion

The e-way bill provisions aim to remove the ills of the erstwhile way bill system prevailing under VAT in different states, which was a major contributor to the bottlenecks at the check posts. Moreover, different states prescribed different e-way bill rules which made compliance difficult. The e-way bill provisions under GST will bring in a uniform e-way bill rule which will be applicable throughout the country. The physical interface will pave way for digital interface which will facilitate faster movement of goods. It is bound to improve the turnaround time of vehicles and help the logistics industry by increasing the average distances travelled, reducing the travel time as well as costs.

STANDARD OPERATING PROCEDURE (SOP) FOR TACKLING FAKE INVOICE CASES

F.No. GST/INV/FAKE INVOICES/18-19 **Ministry of Finance** Department of Revenue Central Board of Indirect Taxes and Customs **GST-Investigation Wing**

> Room No.01, 10th Floor, Tower-2, 124, Jeevan Bharti Building, Connaught Circus, New Delhi- 110001.

> > Dated the May, 2019

OFFICE MEMORANDUM

Subject:- Standard Operating Procedure(SOP) for utilising the fake invoice Issuers dataset by SGST authorities -reg...

Please refer to GST Council letter F. No. 96/GCG-Offence Data/GSTC/2019 dated 18.03.2019 wherein guideline(s) about how the data of fake invoice issuer(s) supposed to be used by SGST authorities was requested. In the said context, the Standard Operating Procedure(SOP) for State GST authorities is herewith enclosed/attached.

This issue with the approval of CHAIRMAN, CBIC

(Neeraj Prasad) (Neeraj Prasad

To,

The Joint Secretary, GST Council (KIND ATTN: SHRI DHEERAJ RASTOGI) New Delhi

Standard Operating Procedure (SOP) for Tackling Fake Invoice Cases

1. <u>Background:</u>

1.1 Large number of GST fraud cases involving the use of fake invoices for wrong availment of input tax credit (ITC), which is further used to pay GST on outward supply have been detected since the rollout of GST by the Central GST authorities as well as State GST authorities. Whereas the *mens rea* for the use of such fake invoices appears to be fraudulent availment/encashment of ITC credit, the unscrupulous entities engaged in this also defraud other authorities such as Banks by inflating turnovers, laundering of money etc.

2. What is a fake invoice?

- 2.1 The "Invoices" that are usually treated as 'fake' are those wherein the GST invoices are raised by an entity without actual supply of goods or services or payment of GST. There are three ways in which such fake invoices could be misused in the GST regime.
 - i. Issue of invoices without supply of goods or services where payment of tax is made by way of Input Tax Credit which is not available to the issuer of invoice. In such cases, there is no receipt of goods or credit by the issuer of invoice. He merely issues invoices and shows payment of tax by nonexistent input tax credit. This results in actual loss of revenue where the buyer of the invoice avails inadmissible credit which is used for payment of tax. There has also been instance where no GST has been paid even by ITC by the issuers of the fake invoice
 - ii. Issue of invoices by persons where the invoice is issued to one person and the goods are diverted to some other person. The person who purchases invoices may utilize the credit for payment of taxes at the time of export of goods and claim refund of the said tax paid, resulting in loss of revenue.
 - iii. Routing of invoices through a series of shell companies/dummy companies and transfer of input tax credit from one company to another in a circular fashion to increase the turnover. In such cases, there is no supply of goods or services and thereby availment of credit based on such invoices gets hit by the provisions of Rule 16 of the CGST Act, 2017, which stipulates that the conditions that to avail credit, the buyer should have an invoice on which tax has been paid and he should have received the goods. In such cases, availment of credit without receipt of goods is inadmissible and utilization of such credit for actual regular supplies results in loss of revenue and financial accommodation. In such cases, unscrupulous traders are utilizing the GSTN

System to create invoices, fake e-way bills showing movement of goods etc., to defraud the revenue and the banking system.

3. <u>Potential motives for using fake invoices:</u>

- 3.1 An illustrative list of motives that drive unscrupulous entities to generate of use fake invoices is as follows:
 - i. Evasion of GST on taxable output supplies by:
 - a) Availing undue ITC
 - b) Saving GST (cash) by payment of tax liability using undue ITC
 - c) Clandestine supply without invoices and without payment of taxes
 - ii. Converting excess ITC into cash by:
 - a) Transferring of ITC to those who can utilize it
 - b) Shifting ITC from exempted supplies to taxable supplies\
 - c) Encashment of ITC by way of IGST refund or unutilized ITC refunds
 - iii. Inflatingturnover for the purpose of:
 - a) Availing higher Credit Limit/ Overdraft from Banks
 - b) Obtaining bank loans
 - c) Improving valuations for IPO or sale of stake
 - d) Obtaining contracts including Government contracts
 - iv. Booking fake purchases for getting Income-tax benefits by:
 - a) Showing reduced profit margins and higher expenses
 - b) Avoiding payment of Income-tax by reducing net profit
 - v. Cash generation/ diversion of company funds
 - vi. Laundering of money

4. Salient features of GST frauds involving fake invoices:

- 4.1 Some salient features that have emerged from the GST fraud cases already detected are as follows:
 - a) The ITC involved in the fraud cases usually reaches a large sum in a short timeframe. Some reported frauds are in hundreds of crores.

- b) Fake invoice cases involve fabrication of invoices which is an offence under IPC. The Investigating Authority has to take call regarding how to get this part of the case investigated. Issues of legality, jurisdiction are involved
- c) In a number of cases, E-way bills have been generated without the corresponding filling of returns. The lack of real time connect between E Way Bill system and GSTN is being exploited by fraudsters
- d) The frauds usually involve a large number of GSTIN entities spread over States.
- e) Some of the entities would fall under the jurisdiction of the CGST authorities while the connected entities fall under the jurisdiction of the State authorities.
- f) Data adequacy and availability has become another challenge. The capability of invoice matching is yet to be provided. In multi-jurisdictional investigations, Tax administration do not have access to supplies in other jurisdictions, even though data resides in the GSTN.
- g) In many cases, dummy firms are created/floated to commit the fraud. The addresses are often incorrect/incomplete and the details revealed in the registration forms are often false. As entry barrier is very low, and there is a lack of a proper system of scrutiny and verification of registration data, fraudsters are able to commit frauds with impunity.
- h) There is another class of dummy companies with verifiable facts but no assets or means to do business; they act as surrogate for other large companies to camouflage their activities.
- i) Connivance with transporters to get bogus bilty/consignment note to show movement of goods on paper and creating fake e-Way billswith fake/wrong vehicle registration details without the supply of any goods. There is no system in place to see if vehicle registration data is correct or not.
- j) Fly-by-night operators are used to get GSTIN and generate large number of tax invoices and e-Way bills in the first few months and disappear. In this way the fly-by-night operators help other large companies to supply and transport their goods without invoice and paying taxes.
- k) Encashment of ITC availed on fake invoices by obtaining IGST/ITC refunds.especially in case of free shipping bills raises the issue of valuation of export goods. Further Customs-GST coordination with regard to such fake invoice cases requires to be looked into.
- Supplies made and GST collected but not paid i.e. GSTR-1 is filed but GSTR-3B is not filed. In some cases both GSTR-1 and GSTR-3B are not filed.

5. Suggested strategy to tackle "fake invoice" fraud in GST:

- 5.1 The frauds in question need to be tackled by putting in place a regime that enables to the extent possible the identification of suspect entities at the initial stage itself and in other cases the detection of GST frauds at the earliest. The former becomes especially important as the past experience is that many of such operators have a tendency to operate through impersonation in the name of dummy persons who have no real assets making it virtually impossible to recover any amounts from them, if a case is detected at a later stage. In this direction the following safeguards are suggested as key elements of risk profiling to check such GST frauds:
 - a) Scrutiny/Verification of registered taxpayers through risk profiling and verification for early identification of fraudsters indulging in fake invoices.
 - b) Historically tax evasion prone sectors.
 - c) Maintenance of offence database of those figuring in frauds to prevent their reentry in the System.
 - d) Some of the risk indicators of such persons or activities done by them or commodities traded by them or patterns behind their activities are as under:
 - 1. Multiple registrations on same PAN.
 - 2. Common email, common mobile numbers, common address, common authorised signatory, common promoters etc.
 - 3. A person whose registration application is rejected or a person whose registration is cancelled may apply again for registration.
 - 4. Live registration against the said PAN with the CGST jurisdiction where offence has been booked by SGST authorities.

6. <u>Standard Operating Procedure for detecting and tackling "Fake invoice" fraud in GST</u>

The standard operating procedure to detect and tackle "fake invoice" fraud involve the following steps.

- 6.1 **Identification:** Identification of entities who generate "fake invoices" is the first step in curbing this menace. This method also involves identification of generators and users. To identify the generators of fake invoices the following risk parameters can be used.
 - a) Multiple GSTIN registrations for a given address
 - b) Multiple GSTIN for a given PAN
 - c) GSTIN using incomplete or wrong addresses
 - d) Tax payers using sensitive commodities.

- e) Common e mail, common mobile nos, common address, common authorised signatories, common promoters for multiple GSTIN.
- f) Mismatch between the premises declared and the volume of goods transacted.
- g) Mis-match between the quantum or transactions and the e-way bills generated. If there are no e-way bills or less e-way bills generated compared to the details of transactions as per the GST returns.
- h) PAN involved in any "fake invoice" fraud or any other GST frauds appear as either in GSTR1A or GSTR 2A.
- i) Abnormal ITC utilisation (for example above 95%).

Identification also involves the users of fake invoices because, this where the real concern rests. The user can utilise the fraudulent credit for payment of supply of goods or services. The item number "h and i" above will help in identifying the potential users of credit accumulated through fake invoices.

- 6.2 **Investigation:** The primary aim of investigation is to establish that there was actual supply of goods or services by the supplier to prove that they issued "fake invoices". This can be achieved by following steps.
 - a) Search of all premises declared to prove the lack of or inadequacy of manufacturing facility of the declared goods.
 - b) Other indicators like consumption of electricity, water etc mis match with the declared quantum of goods manufactured.
 - c) Lack of facility and space to handle the quantum of goods traded.
 - d) Suppliers of invoices do not have any premise for dealing with the goods
 - e) The inputs and input services required for provision of certain services not existing.
 - f) Lack of valid clearances / licences / permissions from any other authorities which are required to deal in any manner with either inputs or final products or intermediate products, input services or output services.
 - g) Lack of required agreements between the entities.
 - h) Lack of e-way bills
 - i) Fake vehicle nos shown in e e-way bills or invoices.
 - j) Comparing the details supplied to other agencies like Income Tax, Registrar of companies
 - k) Mismatch with the details available for vehicles from RTO office

7 Action after detection:

Once it is completely investigated resulting in the issue of SCN or any other penal actions, steps to be taken to prevent the same entities indulging again in the same fraud. This can be achieved through the following steps.

- a) Creation of an offence database" module in the GST Application wherein the GSTIN of the entity shall be flagged for "fake invoice" or any other fraud. This will enable automatic identification of buyers of fake invoices from these entities and automatic alerts can be given in GST Application for further verification by the officers.
- b) Post cancellation of registration, the re-registration of such persons should be dealt with differently than normal registration. Such applications for re-registration should be flagged to alert the officers concerned and there should be no deemed registration in such cases. Physical verification should be a must for such cases.
- c) The entities which have availed ITC on the basis of fake invoices need to be identified and recovery made from them as per law. Their previous transactions with other entities also need to be studied on sample basis in view of their detected propensity.
- d) Provisions for provisional attachment of property including the bank accounts are contained in Section 83 of the CGST Act, 2017 read with Rule 159 of the CGST Rules, 2019. These provisions should invariably be invoked in such cases.
- e) If there are prima-facie reasons showing criminal involvement of Directors in effecting GST evasion, then Section 89 of the CGST Act 2017 can be invoked read with Section 83 of the said Act, bank accounts/properties of even directors may be liable for attachment.
- f) Blocking of ITC of such persons including their beneficiaries (who might fall within the jurisdiction of the other GST authorities as well) so as to not allow the person to get away with undue credit.

Offences and Penalties under GST Act

OFFENCES AND PENALTIES UNDER GST LAWS

CMA R. K. KHURANA ADVOCATE TAXATION AND CORPORATE LAWS ADVISER

Introduction to offences penalties

The word offence has not been defined under the Central Goods and Service Tax Act, 2017 or under any other GST laws. As per the dictionary meaning, the word offence may mean a crime or an illegal action, something that outrages the moral or physical senses. An offence is a breach of a law or rule, i.e., an illegal act. Similarly, an offence under GST is a breach of the provisions of CGST Act and the rules made thereunder.

Penalty, fine and prosecution

Penalty: In criminal and civil law, penalties are punishments imposed as a result of breaking laws, contracts or rules. The punishments imposed may be in physical and monetary forms, and are imposed either for the performance of an act or failure to perform an act.

In civil law, however, penalties are imposed on contracts. Parties who fail to fulfil set conditions as per contract, are ordered to pay the penalties in form of damages.

Fine: Fine is a form of monetary punishment for a crime or an offence committed. In the context of criminal law, fines are used in instances involving minor crimes such as trafficviolations.

For instance, a person who exceeds driving speed limits, is subjected to a fine. Other examples of fines include settlement of claims against the accused person. Although fines are monetary punishments, they may be imposed along with trials and imprisonment. The amount paid as a fine is determined by the type of offences and law of the state.

Prosecution: Prosecution is the initiation or institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender. Section 198 of the Criminal Procedure Code, 1973 defines "prosecution" as the initiation or institution and carryingon of the legal proceedings against a person accused of any charge.

Offences under GST laws

A number of chapters/sections of the CGST Act, 2017require compliances by the registered taxable persons and in some cases even by persons not registered under this Act..Non-compliance with the provisions of these sections may lead to imposition of penalties/fines and prosecution under this act. An illustrative list of these chapters is given as under:

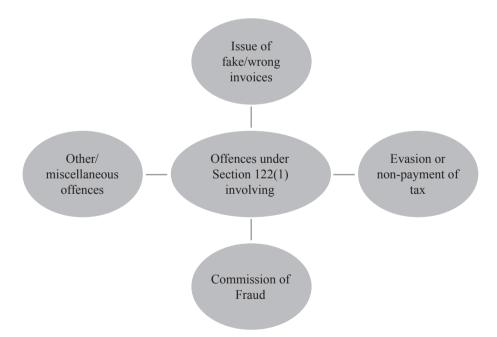
1. Chapter III involving Sections 7 to 11 provide for levy and collection of tax.

- 2. Chapter V provides for provisions relating to availing of input tax credit
- 3. Chapter VI obliges the taxable person(s) to get themselves registered under the GST laws
- 4. Chapter VII provides for rules relating to issue of tax invoices, debit notes and credit notes
- 5. Chapter VIII obliges the registered taxable person(s) to maintain books of accounts
- 6. Chapter IX obliges the registered taxable person(s) to file certain periodical returns
- 7. Chapter X obliges the registered taxable person(s) to pay tax. The chapter also provides for obligations to deduct/collect tax at sourceand deposit the same with government.

Non-compliance with the provisions of any of these chapters or the rules made thereunder, may lead to levy of interest, imposition of fine/penalty and prosecution of the defaulting taxable persons. In particular, Chapter XIX, Sections 122 to 138 of the CGST Act, 2017 read with Rule 162of the CGST Rules, give details of various offences penalties prescribed for these offences. These provisions also apply to State/UT Goods and Service laws and Integrated Goods and Service Tax Act, 2017.

Chapter XIX: Offences and penalties of CGST Act, 2017

Section122 of the CGST Act, 2017 gives a list of 21 offences which are liable to penalty. For the sake of convenience, these offences can be divided under four broad categories such as issue of fake/wrong invoices, evasion or non-payment of tax liability, commission of fraud involving supply goods or services in contravention of the provisions of GST laws and others miscellaneous provision. These offences are depicted as under:



The non-compliance of these provisions may lead to imposition of fines/penalties and prosecution under the GST laws. Each of the above-mentioned categories of offences are described as under;

Offences involving issue of fake/wrong invoices:

(1) Where a taxable person:

- Supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply,
- ii. **Issues any invoice or billwithout supply of goods or services** or both in violation of the provisions of this Act or the rules made thereunder,
- iii. avails input tax credit using such invoice or bill referred to in (ii) above ITC
- iv. issues invoices using the GST identification number of another bonafide taxable person

Offences involving evasion and/or non-payment of tax

- v. Collects any amount as tax, but **fails to pay the same to the Government** beyond a period of three months from the date on which such payment becomes due;
- vi. evades tax, fraudulently avails ITC or fraudulently obtains refund, where such offence or refund is not covered under (i) to (iv) above.
- vii. **collects any tax in contravention** of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due:
- viii. **fails to deduct the tax** in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax:
- ix. **fails to collect tax** in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52:
- x. **takes or utilises input tax credit without actual receipt of goods or services** or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
- xi. **takes or distributes input tax credit in contravention** of Section 20 (distribution of ITC by Input Service Distributor) or rules made thereunder

Offences involving commission of fraud

- xii. **fraudulently obtains refund** of tax under this Act or f**alsifies or substitutes financial records** or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under the GST laws.
- xiii. **suppresses his turnover** leading to evasion of tax under this Act
- xiv. **supplies, transports or stores any goods** which he has reasons to believe are **liable to confiscation** under this Act;
- xv. tampers with, or destroys any material evidence or document
- xvi. disposes off or tampers with any goods that have been detained, seized, or attached under this Act liable to be registered under this Act but fails to obtain registration;
- xvii. furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently

Other miscellaneous provisions

- xviii. obstructs or prevents any officer in discharge of his duties under this Act
- xix. transports any taxable goods without the cover of documents as may be specified in this behalf
- xx. fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
- xxi. fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

Penalties, fines and prosecutionunder GST laws

The penalties leviable under the CGST Act, 2017 are summarised as under:

1. Penalty for supply of goods/service for non/short payment of tax etc.

As per Section 122 (2) any registered person who supplies any goods or services or both on which tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised:—

- (a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;
- (b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

2. Penalty for aiding or abetting of offences

As per Section 122(3), any person who commits any of the following offences shall be liable to a penalty which may **extend to twenty-five thousand rupees:-**

- i. aids or abets any of the 21 offences specified in clauses (a) to (l) of sub-section (1) of Section 122 (at (i) to (xxi) above) or
- ii. acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any othermanner deals with any goods which he knows or has reasons to believe are liable toconfiscation under this Act or the rules made thereunder;
- iii. receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are incontravention of any provisions of this Act or the rules made thereunder;
- iv. fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

v. fails to issue invoice in accordance with the provisions of this Act or the rulesmade thereunder or fails to account for an invoice in his books of account,

3. Penalty for failure to furnish or return

Section 150 of the CGST Act, 2017 provides for obligations of the taxable person(s) to furnish information/return. As per Section 123 of the Act, if a person who is required to furnish an information return under section 150, fails to do so within the period specified in the notice issued under sub-section (3) thereof, the proper officer may direct that such person shall be liable to pay a penalty of **one hundred rupees for each day** of the period during which the failure to furnish such return continues. The penalty imposed under this section, however, shall not exceed five thousand rupees.

4. Fine for failure to furnish statistics:

Section 151 of the CGST Act, 2017 empowers the Commissioner of CGST Act, 2017 that if he considers that it is necessary so to do, he may by notification, direct that statistics may be collected relating to any matters dealt by or in connection with this Act. Section 124 provides that if any person required to furnish any information or return under section 151,—

- a. without reasonable cause fails to furnish such information or return as may be required under that section, or
- b. wilfully furnishes or causes to furnish any information or return which he knows to be false,

he shall be punishable with a **fine which may extend to ten thousand rupees** and in case of a continuing offence to a further fine which may extend to **one hundred rupees for each day** after the first day during which the offence continues subject to a **maximum** limit of twenty-five thousand rupees.

5. General penalty i.e. offences for which no other penalty is provided under this Act:

As per Section 125 of the CGST Act, 2017, any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for under this Act, shall be **liable to a penalty which may extend to twenty-five thousand rupees**.

6. General discipline relating to penalty:

As per sub-section (1) of Section 126 of the CGST Act 2017, no officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural require-ments and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

For the purpose of this sub-section, —

- a breach shall be considered a 'minor breach', if the amount of tax involved is less than five thousand rupees;
- b. an omission or mistake in documentation shall be considered to be easily rectifiable, if the same is **an error apparent on the face of record**.

The following provisions have to be kept in mind by the proper officer while imposing penalty:

- 1. The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.
- 2. No penalty shall be imposed on any person without giving him an opportunity of being heard.
- 3. The officer under this Act shall, while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for thebreach has been specified.
- 4. When a person voluntarily discloses to an officer under this Act the circums-tances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.
- 5. The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.
- 7. **Power to waive penalty or fee or both:** As per Section 128, the Government may, by notification, waive in part or full, any penalty referred to in section 122 (i.e. 21 specified offences) or section 123 (penalty for failure to furnish informa-tion/return) or section 125 (general penalty) or any late fee referred to in section 47 (levy of late fee for delay in filing of return) for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.
- 8. **Detention, seizure and release of goods and conveyances in transit:** Section 129, of the CGST Act, 2017, provides for levy of penalty on any person who transports any goods orstores any goods while they are in transit in contravention of the provisions of this Act orthe rules made thereunder. All such goods and conveyance used as a means of transportfor carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released only on payment of such tax and penalty, depending upon whether the owner of goods comes forward or does not or on furnishing of such security as provided under subsections 2 to 6 of Section 129 of the CGST Act, 2017.
- 9. Confiscation of goods or conveyances and levy of penalty.—

Section 130 provides for confiscation of goods or conveyances and levy of penalty. The provisions of this section are summarised as under:

If any person—

- (i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (ii) does not account for any goods on which he is liable to pay tax under this Act; or
- (iii) supplies any goods liable to tax under this Act without having applied for registration; or
- (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

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(v) uses any conveyance as a means of transport for carriage of goods in contravene-tion of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it, shall give to the owner of the goods, an option to pay in lieu ofconfiscation, such fine as the said officer thinks fit. However, such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon.

10. Punishment for certain offences:

Whoever commits, or causes to commit and retain the benefits arising out of, any of the following 12 offences mentioned in clauses (a) to (l) of Sub-section 1 of Section 132, shall be liable to penalty given in the matrix below:

- (a) **supplies any goods or services** or both **without issue of any invoice**, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;
- (b) **issues any invoice or bill without supply of goods or services** or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
- (c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;
- (d) collects any amount as tax, but fails to pay the same to the government beyond a period of three months from the date on which such payment becomes due;
- (e) **evades tax or fraudulently obtains refund** and where such offence is not covered under clauses (*a*) to (*d*) above;
- (f) **falsifies or substitutes financial records** or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;
- (g) **obstructs or prevents any officer in the discharge** of his duties under this Act;
- (h) **acquires possession of, or in any way concerns himself in transporting**, removing, depositing, keeping, concealing, supplying, or purchasing or in any othermanner deals with, any goods which he knows or has reasons to believe are liable toconfiscation under this Act or the rules made thereunder;
- (i) **receives or is in any way concerned with the supply of**, or in any other manner deals with any supply of services which he knows or has reasons to believe are in **contravene-tion of any provisions of this Act** or the rules made thereunder;
- (j) tampers with or destroys any material evidence or documents;

- (k) **fails to supply any information** which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief the burden of proving which shall be upon him that the information supplied by him is true) supplies false information; or
- (l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,

Person(s) committing any of the offences mentioned at (a) to (l) above, shall be punishable:

Sr. No.	Description of offence	Period of imprisonment
(i)	in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees (Rs 5 crore);	with imprisonment for a term which may extend to five years and with fine;
(ii)	in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees (Rs 2 crore), but does not exceed five hundred lakh rupees (Rs 5 crore),	with imprisonment for a term which may extend to three years and with fine;
(iii)	in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wronglytaken exceeds one hundred lakh rupees (Rs 1 crore), but does not exceed two hundred lakh rupees (Rs 2 crore),	with imprisonment for a term which may extend to one year and with fine;
(iv)	in cases where he commits or abets the commission of an offence specified in clause (f: falsification of substitution of financial records or production of fake account or document) or clause (g: obstruction or prevention of any officer in the discharge of his duties under this Act;) or clause (j:tampering with or destruction of any material evidence or documents;	he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

11. Person convicted of an offence under this Act is again convicted:

As per the provision of Section 132 (2), where any person convicted of an offence under this section is again convicted of an offence under this section, then he shall be punishable for the second andfor every subsequent offence with imprisonment for a term which may extend to **fiveyears and with fine**.

12. Cognizable and non-bailable offences:

The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 and punishable under clause (i) (i.e. in cases where the amount of tax evaded or the

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amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees **(Rs 5 crore)** of that sub-section shall be cognizable and non-bailable. The list of cognizable and non-bailable offences is given below:

- (a) Supply of any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention toevade tax;
- (b) Issues of any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
- (c) Availing of input tax credit using the invoice or bill referred to in clause (b) or fraudulently availing input tax credit without any invoice or bill;
- (d) Collection of any amount as tax but failing to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

Except for these four offences involving tax fraud of five crore rupee or more, all other offences under this Act, shall be non- cognizable and bailable. This is notwithstanding anything contained in the Code of Criminal Procedure. 1973.

13. Power to order prosecution:

A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

14. Offences under GST by Companies, LLPs, HUFs and others

For any offence committed by a company, both the officer in charge (such as director, manager, secretary) as well as the company will be held liable. For LLPs, HUFs, trust, the partner/karta/managing trustee will be held liable.

$Role\ of\ professionals\ in\ avoiding\ prosecution\ and\ payment\ of\ penalties\ and\ fines:$

As is evident from the above, contravention the taxable persons have to face severe prosecution pay. CMA professionals have two way role in helping their clients to overcome compliance issues.

- The professionals should guide their client in preventing violation of any of the GST law so that the clients are saved from having to reply to show cause notices and from undergoing penalties fines and prosecution.
- 2. In case despite all efforts, some of the client still face the problems mentioned in the abovementioned paragraph, the CMAs should help the clients in preparing appropriate replies, providing representational services so as to help reduce the levy of fines, penalties prosecutions
- 3. The CMA professionals can also help the clients in preparing analysis of the financial information so that the case could be better represented before the Appellate Authorities.

INSPECTION, SEARCH, SEIZURE AND ARREST

In any tax administration the provisions for Inspection, Search, Seizure and Arrest are provided to protect the interest of genuine tax payers (as the Tax evaders, by evading the tax, get an unfair advantage over the genuine tax payers) and as a deterrent for tax evasion. These provisions are also required to safeguard Government's legitimate dues. Thus, these provisions acts as a deterrent and by checking evasion provide a level playing field to genuine tax payers.

2. It may be mentioned that the options of Inspection, Search, Seizure and Arrest are exercised, only in exceptional circumstances and as a last resort, to protect the Government Revenue. Therefore, to ensure that these provisions are used properly, effectively and the rights of tax payers are also protected, it is stipulated that Inspection, Search or Seizure can only be carried out when an officer, of the rank of Joint Commissioner or above, has reason to believe the existence of such exceptional circumstances. In such cases the Joint Commissioner may authorise, in writing, any other officer to cause inspection, search and seizure.

However, in case of arrests the same can be carried out only where the person is accused of offences specified for this purpose and the tax amount involved is more than specified limit. Further, the arrests under GST Act can be made only under authorisation from the Commissioner.

3. The circumstances which may warrant exercise of these options are as follows: -

(i) Inspection

'Inspection' is a softer provision than search which enables officers to access any place of business or of a person engaged in transporting goods or who is an owner or an operator of a warehouse or godown. As discussed above the inspection can be carried out by an officer of CGST/SGST only upon a written authorization given by an officer of the rank of Joint Commissioner or above a Joint Commissioner or an officer higher in rank can give such authorization only if he has reasons to believe that the person concerned has done one of the following actions:

- (a) Suppression of any transaction relating to supply of goods or services or stock in hand;
- (b) Claimed excess input tax credit;
- (c) Contravention of any provisions of the Act or the Rules to evade tax;
- (d) Transporting or keeping goods which escaped

payment of tax or manipulating accounts or stocks which may cause evasion of tax;

Inspection can also be done of the conveyance, carrying a consignment of value exceeding specified limit. The person in charge of the conveyance has to produce documents / devices for verification and allow inspection. Inspection during transit can be done even without authorisation of Joint Commissioner.

(ii) Inspection in movement

- (a) Any consignment, value of which is exceeding Rs. 50,000/-, may be stopped at any place for verification of the documents /devices prescribed for movement of such consignments.
- (b) If on verification of the consignment, during transit, it is found that the goods were removed without prescribed document or the same are being supplied in contravention of any provisions of the Act then the same can be detained or seized and may be subjected to penalties as prescribed.
- (c) To ensure transparency and minimise hardships to the trade the law provides that if during verification, in transit, a consignment is held up beyond 30 minutes the transporter can feed details on the portal. This will ensure accountability and transparency for all such

verifications. Moreover, for verification during movement of consignment will also be done through Digital interface and therefore the physical intervention will be minimum and as has already been mentioned that in case of a delay beyond 30 minutes the transporter can feed the details on the portal.

(iii) Search& Seizure

The provisions of search and seizure also provides enough safeguards and the GST Law stipulates that search of any place of business etc. can be carried out only under authorisation from an officer of the rank of Joint Commissioner and if he has a reason to believe that the person concerned has done at least one of the following:-

- (a) Goods liable to confiscation or any documents /books/record/things, which may be useful for or relevant to any proceedings, are secreted in any place then all such places can be searched;
- (b) All such goods/documents/books/record/ things may be seized, however, if it is not practicable to seize any such goods then the same may be detained. The person from whom these are seized shall be entitled to take copies/ extracts of seized records;
- (c) The seized documents/books/things shall be retained only till the time the same are required

for examination /enquiry/proceedings and if these are not relied on for the case then the same shall be returned within 30 days from the issuance of show cause notice;

- (d) The seized goods **shall be** provisionally released on execution of bond and furnishing a security or on payment of applicable tax, interest and penalty;
- (e) In case of seizure of goods, a notice has to be issued within six months, if no notice is issued within a period of six months then all such goods shall be returned. However, this period of six months can be extended by Commissioner for another six months on sufficient cause;
- (f) An inventory of the seized goods/documents/ records is required to be made by the officer and the person, from whom the same are seized, shall be given a copy of the same.
- (g) To ensure that the provisions for search and seizure are implemented in a proper and transparent manner, the Act stipulates that the searches and seizures shall be carried out in accordance with the provisions of Criminal Procedure Code, 1973. It ensures that any search or seizure should be made in the presence of two or more independent witnesses, a record of entire proceedings is

made and forwarded to the Commissioner forthwith.

(iv) Arrests

In the administration of taxation the provisions for arrests are created to tackle the situations created by some unscrupulous tax evaders. To some these may appear very harsh but these are necessary for efficient tax administration and also act as a deterrent and instil a sense of discipline. The provisions for arrests under GST Law have sufficient inbuilt safeguards to ensure that these are used only under authorisation from the Commissioner. Besides this, the GST Law also stipulates that arrests can be made only in those cases where the person is involved in offences specified for the purposes of arrest and the tax amount involved in such offence is more than the specified limit. The salient points of these provisions are:-

- (a) Provisions for arrests are used in exceptional circumstance and only with prior authorisation from the Commissioner.
- (b) The law lays down a stringent criteria and procedure to be followed for arresting a person. A person can be arrested only if the criteria stipulated under the law for this purpose is satisfied i.e. if he has committed specified offences (not any offence) and the tax amount is exceeding rupees 200 lakhs. However, the

monetary limit shall not be applicable if the offences are committed again even after being convicted earlier i.e. repeat offender of the specified offence scan be arrested irrespective of the tax amount involved in the case.

(c) Further, even though a person can be arrested for specified offences involving tax amount exceeding Rs.200 lakhs, however, where the tax involved is less than Rs. 500 lakhs, the offences are classified as non-cognizable and bailable and all such arrested persons shall be released on Bail by Deputy/Assistant Commissioner. But in case of arrests for specified offences where the tax amount involved is more than Rs. 500 lakhs, the offence is classified as cognizable and non-bailable and in such cases the bail can be considered by a Magistrate only.

<u>Articles</u>

GOODS AND SERVICES TAX: AN OVERVIEW

By Tarun Jain±

1. Introduction

The Goods and Services Tax (GST) law came into force in India from 1-7-2017. GST is described a major reform and advancement through the popular slogan — one nation one tax. This essentially means that GST reforms the indirect tax landscape to introduce similar legal and practical design for levy and collect of indirect taxes across the territory of India, which was not the case before GST. This is because GST has replaced a number of indirect taxes earlier levied and collected by the Union and the States, such as sales tax, excise duty, entry tax, service tax, etc. The introduction of GST was complex and took many decades as it required change in the constitutional scheme of tax. This article attempts an overview of the landscape of the legal framework of GST in India.

2. Genesis

In order to appreciate the rationale for introduction of the GST in India, one has to traverse through the pre-GST constitutional scheme for levy of indirect taxes and the disputes which arose in the seven decades of this scheme. This is required because GST is designed as a reform to obviate the ills of the earlier scheme and give impetus to a constitutional aspiration of achieving a common national market for goods and services. The detailed reasons for this reform have been enlisted in multiple official documents, such as (a) July 2004 Report of the Task Force on the Implementation of the Fiscal Responsibility and Budget Management Act, 2003½; (b) November 2009 First Discussion Paper on GST of the Empowered Committee of State Finance Ministers;² (c) December 2009 Report of the Task Force on GST constituted by the 13th Finance Commission;² and (d) 73rd Report of August 2013 of the Parliamentary Standing Committee on Finance,⁴ etc. For our purpose, the enlisting of the following two reasons for introduction of GST will suffice:⁵

- (a) In the original constitutional scheme, in line with the federal principle, the power to levy indirect taxes vested with both the Centre and the States. The Centre could levy taxes such as central excise duty, inter-State sales tax, consignment taxes, customs duties, etc. The States could levy taxes such as sales tax, electricity duty, advertisement tax, entry tax, luxury tax, entertainment tax, tax on betting and gambling, etc. This resulted into a criss-cross and entangled web of indirect tax laws in the country owing to different laws and regulations being applicable in different areas.
- (b) The Central and State laws were not aligned. Besides compliance issues, this resulted into cascading effect of taxes. For example, goods manufactured in India were subject to excise duty. This excise duty was added to the value of goods for the purpose of levying sales tax. Thus, sales tax was levied and collected on excise duty as well. The non-alignment also resulted into situation of tax overlap (i.e. double taxation), opportunities for evasion, local priorities overwhelming national goals, etc.

The need for reform was commonly acknowledged by the citizens and the lawmakers alike. For this reason, the Union and the States came together to introduce the necessary constitutional amendments for subsuming existing tax fields and creating a unified and harmonised indirect tax system. This understanding of the Union and the States was set out in a policy document released in the year entitled First Discussion

Paper on Goods and Services Tax in India which formed the basis of the Constitution (Amendment) Bill, 2011. This Bill underwent scrutiny of the Parliamentary Standing Committee on Finance and the Thirteenth Finance Commission, whose recommendations led to a refined Constitution (Amendment) Bill, 2014. This Bill was passed by Parliament leading to the enactment of the Constitution (One Hundred and First Amendment) Act, 2016 which introduced GST in India by amending the provisions of the Constitution.

3. Salient features of the post-GST constitutional scheme

The 2016 Amendment made significant changes to the constitutional scheme regarding taxes, most of which were made through omission or modification of the entries in the Seventh Schedule of the Constitution. The significant changes in the taxation framework are as follows:

- (a) The exclusive power of the Union to impose service tax on intra-State supply stands modified. Now, the States have also been empowered to levy tax on intra-State supplies of services. However, the Union still exercises the exclusive right to impose taxes on inter-State supply of services and inter-State supply of goods.
- (b) In respect of the States, the exclusive power to impose sales tax is pruned by confining its ambit to petroleum products and potable alcohol. In respect of other goods, the States now share their right to impose sales tax on intra-State sales with the Union.
- (c) The power of the Union to impose excise duty has been pruned to limit its imposition to petroleum and tobacco products.
- (d) The power of the States to impose certain indirect taxes, such as entry tax, advertisement tax, luxury tax, taxes on betting and gambling, etc., have been omitted.

Besides such omission and modification of taxing powers, GST has been instituted as a new legislative field as a tax on "supply". The constitutional definition of GST, in terms of Article 366(12-A) defines GST as "any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption".

4. GST Council: A new constitutional institution

In order to facilitate the formulation and implementation of GST policy, a constitutional body called Goods and Services Tax Council, or the GST Council, was also established by the 2016 Amendment. 6 The GST Council carries compulsory membership of representatives of both the Union and the States. The chairperson of the GST Council is the Union Finance Minister. The members are - (a) the Union Minister of State in charge of finance; and (b) the Finance Ministers of every State or any other minister so nominated by the State.

The GST Council is the authority for making recommendations on important matters relating to GST such as (a) identifying the taxes, cesses and surcharges levied that may be subsumed in the GST; (b) enumerating the goods and services that are taxable and exempt from GST; (c) model GST laws, principles of levy; (d) the threshold limit of turnover below which goods and services may be exempted from GST; (e) the rates including floor rates with bands of GST; (f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster; (g) special provision with respect to identified States; and (h) any other matter relating to GST as the GST Council may decide. Additionally, the date on which GST is to be introduced on petroleum crude, high speed diesel, motor spirit/petrol, natural gas and aviation turbine fuel is also to be recommended by the GST Council. The Constitution impresses upon the GST Council that it must be "guided by the need for a harmonised structure of the goods and services tax and for the development of a harmonised national market for goods and services".

The meetings in which decisions of the GST Council are to be taken must have a quorum of one-half of the total number of members. The voting structure of the GST

Council gives varying weightage to the votes by the Union and the States. The vote of the Union carries one-third of weightage while the collective vote of the States accounts for the remaining two-thirds. Decisions are taken if three-fourth of the members present and voting favour a motion. Thus, in practice, majority of the States and the Union must agree before a decision can be taken by the GST Council. As on 30-9-2021, the GST Council has met 45 times and made a wide variety of recommendations to the Union and the States which have resulted in the GST structure in the current form.

5. GST structure

The GST structure has various salient features. For ease of appreciation of the GST structure, this part provides an overview of the key features.

(A) Dual levy

GST is conceived as a dual levy which means that generally there are two limbs of GST levy. Each of the limb is enforced simultaneously by the Union and the States. Accordingly, every intra-State supply is subject to both Union and State GST. To this end, the Union has enacted the Central Goods and Services Tax Act, 2017 (CGST Act) which imposes the Central GST on intra-State supplies and the States have enacted their respective State GST legislations.

However, an inter-State or cross-border supply is subject to a tax by Union, which is then shared by the Union and the States. The Union has enacted the Integrated Goods and Services Tax Act, 2017 (IGST Act) which imposes the tax on inter-State and cross-border supplies. The IGST Act further prescribes the mechanism for sharing of its proceeds between the Union and the States.

(B) GST as a tax on "supply"

"Supply" is the foundational principle of GST. The GST laws stipulate that supply includes (i) all forms of supply of goods or services in the course or furtherance of business; (ii) import of services for a consideration whether or not in the course or furtherance of business; and (iii) certain enumerated activities even if without consideration. Practically, (i) all supplies by business; (ii) all service imports; and (iii) certain free supplies, are covered under the GST laws.

The provisions of the GST laws are largely common for goods and services. However, there are a few material differences in their tax rates and application of place of supply rules, etc. It is therefore crucial to differentiate whether the supply is of goods or services. For this purpose, the GST laws provide certain tie-breaker rules to ascertain whether the supply is of goods or services. To illustrate, complete transfer of rights in goods is considered a supply of goods whereas a partial transfer of rights in goods is considered as supply of services; transfer of rights in relation to immovable property is considered as supply of services; job-work transactions and bailments are considered as supply of services; etc. The GST laws further provide that in certain cases the activity is neither a supply of goods or services. In other words, these activities are outside the total ambit of GST laws. These activities are enumerated in the GST law itself¹⁰, few examples of which are services under employment contract, services of courts or tribunals, services of constitutional functionaries, sale of land or building, supply of goods outside the taxable territory of India, etc. It is noteworthy that government services are within the scope of GST, unless otherwise exempted.

The GST laws also specifically provide for multiple supplies. In such instances the key is to determine whether the supply is "composite" or "mixed". A bundle of supplies is considered as composite supply when there is an underlying principal supply and the remaining supplies are ancillary. On the other hand, a bundle is a mixed supply where such bundle does not constitute a composite supply. In case of composite supply, all the supplies in the bundle are charged at the rate of tax applicable to principal supply. In case of mixed supply, the highest rate of tax applicable to any of the supplies in the bundled applies to all the supplies in the bundle. In all other cases, each supply is taxed

at the rate notified against such supply.

(C) GST as a "value added tax"

GST is founded on the model of VAT. This implies that the levy of GST is only to the extent of value addition by business. The value addition is determined by giving credit of input taxes paid by business. This credit is offset against the GST which is payable to the Government. For this purpose detailed rules are prescribed which determine the eligibility of the taxpayer to avail credit as also the situations wherein the credit is available, either fully or partly. In order to avail the credit, the business must be registered under the GST laws and must issue tax invoices as per the prescribed procedure. It is this VAT scheme which ensures against cascading effect of taxes.

(D) Legislative framework

The levy of GST is effectuated under a combination of five laws. The relevance of CGST Act, IGST Act and SGST (State Goods and Services Tax) Acts has already been explained above. Besides these legislations, the law on GST comprises two other laws.

The Goods and Services Tax (Compensation to States) Act, 2017 is another GST law. It has been enacted in view of the constitutional assurance that the Union shall provide "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". This was a part of the grand bargain whereby the States agreed to give up their exclusive taxing rights and pool in their sovereignty for enactment of GST.¹¹ This law provides the mechanism for computation of the compensation to be paid by the Union to the States. It also provides for levy of the GST compensation cess towards enabling the Union to carry out the compensation obligation to the States.

Also enacted by the Union is the Union Territory Goods and Services Tax Act, 2017 (UTGST Act). This law applies to those territories of India which do not form part of the territory of any State and instead are under the direct administrative control of the Union and thus known as "Union Territories". Thus in case of a Union Territory, the CGST Act and UTGST Act apply for intra-State supplies instead of the CGST Act and SGST law which apply in those territories which form part of a State. In case of inter-State supply in a union territory, IGST Act applies just as it applies to any other inter-State supply.

Under each of these five GST laws, rules have been enacted for carrying out their provisions. These rules are known by the names similar to the parent laws. For illustration, rules made under the CGST Act are known as Central Goods and Services Tax Rules, 2017 (CGST Rules); rules made under the IGST Act are known as Integrated Goods and Services Tax Rules, 2017 (IGST Rules), etc. These rules contain detailed provisions in respect of various aspects of the GST laws, such as registration, valuation, input tax credit, tax invoice, accounts and records, returns, payment of tax, assessment and audit, appeals and revision, etc.

Besides these rules, the GST laws are further supplemented by notifications. These notifications are issued by the respective Governments i.e. Union or State, depending upon the GST law under which the notification is being issued. The notifications cover areas such as rate of tax in respect of supply of goods or services, supplies exempt from GST, identification of the taxpayer, rate of interest for delayed payment, empowerment of officers, etc. The GST laws further empower the tax administration to issue instructions or directions to the tax officers "for the purpose of uniformity in the implementation" of the GST laws. Through issuance of instructions the tax administration clarifies various aspects of the GST laws.

(E) Indirect taxes outside the GST framework

As stated above, while GST largely represents the Indian indirect tax structure, it is not exhaustive of the structure. There are a number of other indirect taxes still applicable in India which are outside the GST regime. Some of these are listed below;

(a) Customs and allied duties: Customs duties have been applicable in India right

from its independence. They are applied both on import or export of goods. The legal framework for levy of these duties along with the concomitant details are contained in the Customs Act, 1962 and the Customs Tariff Act, 1975. Besides the customs duties, the customs duty legislations concerned also administer a number of other taxes which are imposed at the time of import of goods. These taxes include (i) countervailing duty (equivalent to the amount of tax payable in India in the event the goods which have been imported were instead manufactured in India); (ii) special additional duty (in lieu of sales tax which would have been payable in India if the imported goods do not suffer the sales tax); (iii) antidumping duty (imposed when it is determined that the imported goods are detrimental to the domestic industry as they are being sold at less than their normal value leading to dumping of such goods in India); and (iv) safeguard duty (imposed when it is determined that the imported goods cause or threatening to cause serious injury to domestic industry), etc.

- (b) Excise duties: Excise duties are indirect taxes levied on goods at the time of their manufacture. The 2016 Amendment has restricted the application of the union excise duty to petroleum and tobacco products and the State excise duty to alcoholic liquor for human consumption only.
- (c) <u>Electricity duty</u>: Despite the enactment of GST, levy of tax on consumption or sale of electricity continues to remain outside with the States being exclusively empowered to levy such tax.
- (d) Entertainment tax: Before the 2016 Amendment, the Constitution permitted levy of entertainment tax by the States. The 2016 Amendment has modified the scheme. The States do not have the power to levy entertainment tax but it can be levied by local authorities of the States.
- (e) Others: Many other taxes, such as stamp duties, toll taxes, various cesses and surcharges and many other supplies, such as immovable property, petroleum products, etc. also continue to remain outside GST.

6. Conclusion

GST has changed not just the legislative structure relating to indirect taxes in India but also redefined the manner of doing business. Now the entire country has common tax law and rules for supply of goods and services, which has improved compliance and also removed the distortionary cascading effect of taxes. The current GST law is a work in progress and it will be a while before all the indirect tax laws are subsumed in GST. Nonetheless, it is a big change from earlier era of multiple tax laws and reflects a shift towards common national market for goods and services, thereby integrating the entire country irrespective of the State borders.

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¹ Available at https://dea.gov.in/task-force-report-implementation-fiscal-responsibility-and-budget-management-act-2003. Relevant at Ch. 5.

² Available at http://www.gstcouncil.gov.in/sites/default/files/First%20Discussion%20Paper%20on%20GST.pdf.

³ Available at https://fincomindia.nic.in/writereaddata/html_en_files/oldcommission_html/fincom13/discussion/report291209.pdf. link not accessible

⁴ Available at https://www.cbic.gov.in/resources//htdocs-cbec/gst/sc-rpt-consti-amend-bill-115-2013-new.pdf.

⁵ For details, see, Tarun Jain, Goods and Services Tax: Constitutional Law and Policy (Eastern Book Co., 2018).

⁶ Constitution of India, Art. 279-A.

⁷ CGST Act, 2017, S. 7.

STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX

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⁸ CGST Act, 2017, Sch. II.

⁹ CGST Act, 2017, S. 7(3).

¹⁰ CGST Act, 2017, Sch. III.

 $^{^{11}}$ See Tarun Jain, Goods and Services Tax: Constitutional Law and Policy, 217-231, Eastern Book Co. (2018) for details.

GOODS AND SERVICES TAX IN INDIA: A ROADMAP

by

Dinesh Kumar Agrawal[±]

India is in the process of revamping its direct and indirect taxation system through introduction of the new direct tax code and goods and services tax (GST). The Union Finance Minister in his Budget Speech on 28-2-2009 had promised to implement GST from 1-4-2010. However, considering the complexities of structuring GST in a federal structure and multiplicity of stakeholders, implementation of GST has been delayed. The Finance Minister has now committed to implement GST from 1-4-2011. The contour of the proposed GST has been recently released by the Empowered Committee of State Finance Ministers (EC) in "the First Discussion Paper on GST". The Task Force constituted by the 13th Finance Commission has also proposed a structure of GST which is slightly at variance from the GST design proposed by EC. The proposed GST will have a major impact on India's economy and the way businesses are presently carried by enterprises.

This article explains the proposed GST framework in the light of the existing indirect taxation regime and also traces the obstacles and roadblocks, which need to be addressed and resolved for smooth transition to the new regime.

Existing framework of taxation of goods and services in India

India has a federal system comprising of the Union, 28 States and 7 Union Territories (UTs). The indirect tax system in India is complicated and multilayered with levies both at the federal and State levels. In the existing framework of taxation, the Central Government levies Central excise duty (CENVAT) on manufacture of goods under the Central Excise Act, 1944 and service tax on the provision of specified services under the Finance Act, 1994. Value added tax (VAT) is levied by the State Governments on sale of goods within the respective States under the respective State VAT laws and Central sales tax (CST) on inter-State sale of goods under the Central Sales Tax Act. Multilayered indirect taxes in India can be broadly classified as follows:

Indirect taxes in India

Central taxes	State taxes				
Custom duty on import	VAT on intra-State sale of goods				
Excise duty (CENVAT) on manufacture	CST on inter-State sale of goods				
Additional excise duty on manufacture	Purchase tax				
Additional duty of custom (CVD) on	Entry tax				
import					
	Excise duty on manufacture of alcoholic				
products, petroleum products	beverage				
Excise duty on manufacture of toilets preparation containing alcohol	Luxury tax				
Service tax on provision of services	Entertainment tax				
Special additional duty of customs (SAD)	Taxes on lottery, betting and gambling				
on import	., -				
Surcharges	Taxes on tobacco products, petroleum				
	products				
Cesses	Electricity duty				

Tax on vehicles and carriages of goods and passengers Tax on carriage of goods and passengers State cesses and surcharges Stamp duty on immovable property

Problems with existing framework of indirect tax

In the colloquial sense, an indirect tax is a tax collected by an intermediary from the person who bears the ultimate economic burden of the tax. Indirect tax is a consumption tax levied on goods and services that are acquired by individuals for their personal use or satisfaction. It generally does not include goods and services that are physically used or incorporated by business in the production or distribution of goods or in the rendition of services (business inputs). Indirect tax includes customs duty levied on import and taxes levied for consumption of goods and services within the State. It is difficult for a business to operate without considering the implications of sales tax or VAT on local, inter-State and international trade. A dynamic tax regime fastens growth as peoples aspirations change due to globalisation, technological innovation and economic integration.

The first phase of reform of indirect taxation in India occurred when the Modified Value Added Tax (Modvat) was introduced for selected commodities at the Central level in 1986, and then gradually extended to all commodities through Cenvat credit system. The introduction and integration of service tax into Cenvat has deepened this effort.

The second phase reformed the sales tax regime of the States. Prior to 2005, the State Government levied sales tax on sales within the State. Single point tax was levied either on the first or last sale of goods within the State. There was no mechanism available to set-off the sales tax paid on business inputs, thus there was a cascading impact of sales tax every time goods were used in the process of production. For instance, before a commodity is produced, inputs are first taxed, and then after the commodity is produced with input tax load, output is taxed again. This cascading effect increased the tax component on the price of goods where there were more stages between the production, distribution and the consumption. Thus, it had obvious distortionary impact as between highly integrated enterprises and other enterprises.

In the year 2005, single point levy of sales tax on sale of goods by the State Governments was replaced by VAT system. State VAT provided for levy of tax on each sale in the supply chain with set-off for input tax as well as purchase tax. Multiplicity of taxes, such as turnover tax, surcharge on sales tax, additional surcharge which were levied on sales of goods were abolished. The Central and State Governments also committed to phase out CST levied on the inter-State sale of goods. Thus, as a result, overall tax burden was rationalised to a certain extent. VAT system also replaced the inspection raj by a system of built-in self-assessment by the dealers and auditing. VAT system was a step towards more efficiency, equal competition and fairness in the taxation. All States implemented VAT in lieu of sales tax, the last being Uttar Pradesh which implemented VAT in the year 2008. VAT is the most important tax revenue of the States, contributing almost half of their total own tax receipts. The switch-over from sales tax regime to VAT regime has yielded significant dividends in economic

efficiency of the tax system, ease of compliance, and growth in revenues. At the consolidated level, State sales tax/VAT as a ratio to State GDP improved from 2.1% during 1980-1985 to 3.1% during 2005-2009. Further, VAT to State Tax revenue ratio also increased from 42.7% during 1980-1985 to 50.4% during 2005-2009, registering a marked increase of 7.7 percentage points over the period.¹

However, the present system could not integrate Central and State taxes. Further, set-off of CST paid on inter-State sale of goods and VAT paid on inputs used by manufacturer/service provider is not available. The problems of cascading effect of tax on tax, differential tax treatment and threshold limit for manufacturing, service sectors and trade continued to haunt enterprises. Further, the line between goods and services is getting blurred by the day, giving rise to disputes that are incapable of being resolved in the existing framework. The existing flaws in tax policy have distorted the structure of production, consumption and export of goods and services. Multiplicity of taxes and authorities has induced a malfunctioning tax administration. Various export incentive schemes have not been able to neutralise the total effect of tax incidence suffered on such goods or services. Thus, Indian goods sometimes become uncompetitive in the international market. Efforts by the Central Government to neutralise such incidence through some schemes like DEPB have resulted in levy of anti-dumping duty by the importing country. Hence, both administrative and compliance cost considerations as well as negative externality has necessitated the integration of the Central and State levies and implementation of GST.

Necessity for implementation of GST in India

The Indian economy is the twelfth largest economy in the world by nominal value and the fourth largest by purchasing power parity. In the 21st century, India is an emerging economic power with vast human and natural resources, and a huge knowledge base. India's economy has grown by more than 9% for three years running, and has seen a decade of 7%+ growth. The share of exports (goods and services) in GDP has increased from 8% in 1990-1991 to 14.7% in 2000-2001 and further up to 25.6% in 2008-2009. Economists predict that by 2020, India will be among the leading economies of the world.

National Council of Applied Economic Research (NCAER) in the recent impact analysis of GST on Indian economy has concluded that implementation of a comprehensive GST in India will lead to efficient allocation of factors of production thus leading to gain in GDP somewhere within a range of 0.9% to 1.7% or a gain between INR 428 billion and INR 839 billion in absolute values of GDP over 2008-2009. The present value of the GST-reform induced gains in GDP, computed at

3% discount rate, is estimated to be between US \$325 billion to US \$637 billion.2

The case for a uniform tax on goods and services becomes more compelling in view of India proposing to sign a spate of free trade agreements (FTAs) with other countries. With so many FTAs in operation, it becomes imperative for India to rationalise its local tax regime to ensure a level-playing field for domestic manufacturing. This makes imperative for India to move to a uniform goods and services tax regime.

What is GST and how does it work

In the GST regime, the distinction between various economic activities like manufacture, service and trade is eliminated and GST is collected on the value added at each level of the supply chain as goods and services move through the supply

chain. A fundamental feature of GST is the ability of taxpayers to claim a credit for "input tax paid" on purchases against the output tax liability.

To understand how input tax credit mechanism works, let us take example of a manufacturer who incurs GST on the purchases that he makes. The GST incurred on his purchases will be his GST input tax (ITC). When the manufacturer subsequently sells the manufactured goods to his customers, the manufacturer will charge GST on the value of the manufactured goods sold. The GST levied by the manufacturer is his GST output tax. The manufacturer will have to account to the Tax Authority the difference between the GST output tax that he charges to his customers and the GST input tax that he incurred on his purchases.

Table

From the illustration, it can be noted that the present system has cascading and distortionary tax on production resulting in misallocation of resources and lower productivity and economic growth. It also inhibits voluntary compliance. The GST regime, inter alia, ensures that:

- a Distinction between manufacturing and trading as well as between goods and services will be eliminated;
- b Central and State taxes will be integrated with seamless input credit across taxing jurisdictions;
- c The incidence of tax will fall only on domestic consumption;
- d There will be no export of taxes across taxing jurisdictions;
- e The Indian market will be integrated into a single market.

Introduction of GST will be a game changer for the enterprises. Concepts like manufacture, captive consumption, inter-unit supply, branch transfer, consignment sale, sale at factory gate, etc. will lose their meanings under the GST regime. GST will ensure optimal allocation and utilisation of resources based on pure commercial reasons. It is also expected that consequent to elimination of cascading effect of tax, goods and services will become cheaper as well as broaden the tax base.

There are various models of GST/VAT being followed across different countries. Japan follows an accounts-based VAT system wherein the taxpayer computes his tax liability from data for each tax period taken from books of account. European Union follows credit-invoice VAT system which relies on invoices to verify tax reported on taxable sales by sellers and input credit claimed by purchasers on allowable taxable purchases. The present State VAT as well as CENVAT is based on credit-invoice system.

Indian GST design

First discussion paper released by EC outlines the broad framework and guidelines of proposed GST. The Task Force report also recommends a GST design. The salient features of the GST model proposed by EC are:

- *i* Most of the Central levies like CENVAT, CVD, SAD, service tax and State levies like VAT, entertainment tax, luxury tax, entry tax, etc. would be subsumed in GST. As of now, there is no unanimity on subsuming of purchase tax and some other taxes. GST rate structure is also under intense discussion.
- ii A dual GST structure i.e. one for Central GST (CGST) and State GST (SGST) statute for every State with defined functions and responsibilities of the Centre and the States, to be binding on both the Centre and the States. Basic features of law such as chargeability, definition of a taxable event and taxable person, measure of levy including valuation provisions and basis of classification would be uniform across these statutes as far as practicable. To the extent feasible, a uniform procedure for collection of both CGST and SGST would be prescribed in the respective legislations.
- iii All transactions of goods and services will attract both CGST and SGST except on

those exempted.

- *iv* Adopting a two-rate structure (for both CGST and SGST) viz. a lower rate for necessary items and goods of basic importance and a standard rate for goods in general and a special rate for precious metals and a list of exempted items.
- \emph{v} For taxation of services, however, there may be a single rate for both CGST and SGST.
- vi As GST is an exercise in reforming the consumption tax in India and not an exercise for additional resource mobilisation through discretionary changes, the CGST and SGST rates should be of

"revenue neutral rate" (RNR) so as to yield same revenue collected as before.

- vii Input tax credit (ITC) will be based on credit-invoice system.
- viii Cross-utilisation of ITC for tax paid on purchases of goods and services, for payment of tax between goods and services will be allowed under the GST regime, however, cross-utilisation of ITC of CGST will not be permitted for payment of SGST and vice versa.
- ix On exports, zero rating is proposed, while imports will attract CGST and SGST, on a destination principle and no benefit to sales from an SEZ to domestic tariff area (DTA) will be allowed.
- x Inter-State supply of goods and services will be taxed on the destination basis. EC has recommended the adoption of the inter-State GST (IGST) model, wherein the Centre would levy IGST which would be CGST plus SGST on all inter-State transactions of taxable goods and services. The inter-State seller will pay IGST on value addition after adjusting available credit of IGST, CGST, and SGST on his purchases. The exporting State will transfer to the Centre the credit of SGST and the importing dealer will claim credit of IGST.

Generally, very small business enterprises are exempt from tax. At present, small-scale manufacturers with a turnover of INR 15 millions, small service providers with a turnover of INR 1 million and small traders with a turnover of 100-500 hundred thousand are not subjected to CENVAT, service tax and VAT respectively. In the GST regime also small business enterprises will be exempt from GST. EC has suggested a threshold limit of gross annual turnover of goods and services of INR 1 million for SGST and a higher gross annual turnover of goods INR 15 million for CGST whereas threshold limit for services for CGST is not yet prescribed. On the other hand the Task Force and Union Finance Ministry has favoured common threshold limit of INR 1 million for CGST and SGST without any distinction between goods and services. As against the EC proposal of dual rate structure, the Task Force and Union Finance Ministry has advocated for single rate of GST.

Small traders exceeding threshold turnover under the VAT regime has an option to pay compounding fee at a reduced rate instead of general VAT rate and claim ITC. This compounding/composition scheme saves the small business enterprises from the hassle of maintaining elaborate records. EC has also recommended an optional composition/compounding scheme for small traders with a cut-off gross annual turnover at INR 5 million with a floor rate of 0.5% applicable both for goods and services under CGST and SGST. The Task Force has recommended cut-off turnover of INR 4 million for the composition scheme.

The Task Force has also recommended, inter alia, for the transformation of EC into a permanent constitutional body known as the "Council of Finance Ministers" comprising

of the Union Minister and all the State Finance Ministers. This is to ensure that neither the Centre nor the State unilaterally make any change in the agreed design of GST. However, in case of any exigencies, member State or the Centre may be empowered to take immediate steps subject to ex post de facto approval by the Council within one month.

Task and challenges of GST

India is the second most populous nation in the world with a geographical area of 3.3 million square kilometres with 28 States and 7 Union Territories. 30% of the population is illiterate and many places do not have electricity and banking facilities. Transparency International has ranked India 84 out of 180 countries in the corruption index. Therefore, designing and implementing an elegant and flawless GST in India is a Herculean task. A robust banking and IT infrastructure is the prerequisite for hassle free GST, especially for inter-State supplies. Minimal or no discretionary power should be vested with the tax administration authorities to eliminate chances of corruption. Filing and scrutiny of tax returns should be electronic to reduce interference between the tax administration and public. Transparency in the decision making should be the thumb rule.

Destination of service

GST is based on destination principle i.e. the tax is imposed in the state of consumption—generally where the goods and services are delivered. In the present system, VAT and service tax is based on destination principle. However, defining the destination has eluded the policy makers in service tax law. There is endless litigation for the reason that delivery of service and consumption thereof is different from delivery and consumption of goods, which could be easily verified with the movement of goods. The service tax laws have been amended time and again to provide for a suitable provision to tax service on destination basis, like location of performance of service, delivery or use. Despite several efforts to define the "export of service", there were many controversies on their interpretation—such as whether use should be determined on location of clients or the location of business operation for which service is intended or the place where the service is delivered irrespective of subsequent use by the client. In the recent Budget 2010-2011, the Finance Minister has altogether deleted the contentious export condition requiring a service to be provided from India and used outside India. Now export will be determined based on location of performance of specified services and receipt of foreign exchange. However, this approach will not work for inter-State service as payments will be made/received in INR alone. It is not feasible to determine consumption of services in all circumstances and therefore deeming provisions are required for each service. A vague or general provision will

lead to massive litigation especially in the inter-State supplies of services.

Threshold Limit

Determination of threshold limit for levy of CGST and SGST on goods and services is marred in controversy. EC has proposed different threshold limit for CGST and SGST on goods and a common threshold limit of both taxes for services. In other words, EC has retained the distinction between goods and services. A flawless GST design requires no distinction between goods and services; otherwise GST will fail to yield true benefits to the economy.

Compounding scheme cut-off

Ability of taxpayers to claim a credit for "input tax paid" on purchases against the output tax liability is the fundamental feature of GST. ITC is based on credit-invoice system which requires maintenance of proper accounts, periodic returns and audit. Compliance cost is prohibitive for the small producers, traders and service providers. Cut-off limit for compounding scheme needs fine balance between the compliance cost vis-à-vis broadening of tax base. Income tax laws require maintenance and audit of books of accounts of assesses having specified turnover. In the recent Budget 2010-2011, the Finance Minister has proposed a higher turnover limit of INR 6 million for goods and INR 1.5 million for services for tax audit as against earlier turnover of INR 4 million and 1 million. As income tax laws require bookkeeping for such traders, tax audit threshold limits under income tax may also be adopted for the compounding scheme under GST. However, states may not be willing to grant such higher cut-off as it will mean lower tax revenue. Small taxpayers will crave for tax audit cut-offs to mitigate increase in the compliance cost.

Cross-utilisation of ITC

EC has not been able to break open the iron cast of dual structure and cross-utilisation of ITC, despite the fact that proposed GST will require extensive amendment to the Constitution of India. A single GST rate for goods and services with seamless credit, without any distinction between CGST and SGST would have been a much better idea, but then it could have been a blow to the federal structure of India. On comparison with the present regime, one will find that there is hardly any change except that value base for tax has changed. Credit and set-off for Central levies (now subsumed in CGST) and State levies (now subsumed in SGST) are available even in the present regime without facility of cross-utilisation. The cascading effect of tax due to different value base can be easily addressed in the present system also.

Co-ordination between Centre and States

Again, keeping in mind the principles of federalism, multiple statutes have been recommended by EC as well as the Task Force. The Central Excise Department of the Central Government is likely to administer CGST, which presently also administers all levies proposed to be subsumed in CGST. Similarly, Commercial Tax Departments of the respective State Governments will administer SGST which present deal with all taxes proposed to be subsumed in SGST. Although uniform provisions have been suggested in the Central and State laws, the policy makers have to also ensure perfect coordination between the Central and State government employees otherwise the taxpayers will feel cheated.

Exemptions and concessions

A flawless model requires minimum possible exemptions to avoid leakages from the supply chain. At present, the Central and State Governments have created various general, area based and thematic exemptions for a large number of goods and services. Area based exemptions are considered vital for the growth of backward areas. Hence, evolution of a proper mechanism to balance the growth of backward area and aspiration of people vis-à-vis the principles of GST is a task cut-out for the policy makers.

RNR rate

Comprehensive data is not available to arrive at RNR rate. Proposed RNR rate differs widely from 12% as suggested by the Task Force to 16-18% being advocated by some States. Some States with low consumption which have recently increased tax collection with higher mobilisation are apprehensive that there was little scope for them to increase their revenues under the proposed GST regime. Manufacturing States are likely to suffer due to the abolition of CST, as GST will be destination based i.e. tax will be collected and retained by the States with high consumption. Finding a RNR tax rate acceptable to all stakeholders is a tough challenge.

Single rate

Dual rate structure increases compliance cost and administration cost. However, a single GST tax rate is considered as regressive as same tax rate requires to be levied on items of common use and items of luxury. Taxing bicycles and car or wheat flour and cake at the same rate is politically unjustifiable. Debate of dual rate as suggested by EC and single rate as suggested by the Task Force is likely to keep the economists, politicians, policy makers and columnists busy in the coming days.

Small enterprises

Small enterprises manufacturing specified goods with an annual turnover of less than Rs 15 million are presently exempt from Central excise duty. GST will bring them into the tax net, rendering them uncompetitive and enhancing their compliance cost. Small enterprises have spread to every nook and corner of the country thus providing gainful employment to a vast chunk of population. Tax incentives are major attractions and bringing them under the GST net may stifle their growth.

Checking of frauds

GST is supposed to be a self-enforcing regime on the assumption that vendors will not evade tax on supply chain as

purchasers will want to produce evidence that the taxes have been paid in order to claim ITC. In reality, experience shows that GST fraud is big business. Tightening the noose through more frequent audits and delayed payments of refunds will increase taxpayers' compliance costs whereas not providing sufficient safeguards could lead to massive frauds. Massive frauds witnessed in advance licensing (DEEC) and DEPB schemes are not yet forgotten. A tradeoff between controlling tax evasion and minimising compliance costs is the requirement of the day. On this point Elinor Caplan, Canadian Minister of National Revenue has very appropriately stated that:

"We will remain vigilant in pursuing those who attempt to defraud the Government. But we cannot seal our GST initiatives in barbed wire or red tape—because it would do untold damage to Canadian business. Many of you might have heard the Chief Economist for the Canadian Manufacturers and Exporters Association say a lot of companies use GST tax credits as an important part of their cash flow. Anything we do to hold that up can hurt the bottom line."

A similar pragmatic approach is also required in the proposed GST regime.

Incentivising consumers

Ultimate consumers who pay GST on goods and services other than business inputs are not able to claim ITC against GST they owe on their subsequent sales. Thus, there is tendency to condone tax evasion by such consumers all over the world as it means supply of goods and services at lower price. Government may make use of tamperproof electronic cash registers mandatory for the traders to enhance compliance. Government may also improve tax compliance at retail level by launching innovative schemes like VAT lottery. Some countries like Taiwan and Indonesia have VAT lotteries wherein the taxpayers submit their VAT receipts (showing their names or taxpayer identification numbers) to be drawn at random. Large prizes are awarded in periodic draws. Ultimate consumers will have lesser incentives to condone tax evasions, as by ensuring tax compliance, they will be entitled to win bonanza.

State autonomy

Politically motivated economic decisions are a major issue in a welfare democracy like India. As per 2005 World Bank estimate, 42% of Indian population falls below the

international poverty line of US \$1.25 per day. At times, politicians tweak the tax rates to keep the voting flock happy. Even otherwise, some politicians are perturbed over the fact that GST would compromise the fiscal autonomy of the State Governments and deprive them of the only lever of macro-economic policy available to them. GST requires a mechanism whereby both the Centre and the States will cease to have any independent power to make changes in the design and structure once agreed upon. Thus, the powers enjoyed by the politicians at State level will be curtailed. A permanent institution is required to keep the integrity of the GST design, a difficult task considering the multi-party political system in India.

Indian economy has grown by 6.7% in the year 2008-2009 despite the world facing the worst recession. India is poised to take a big jump in the economy of the world comity. GST will provide the right platform for such a big jump, and therefore, no hurdle will be big enough to halt such progress. Considering the complexity and task of GST in India, designing and implementing a flawless GST is a real challenge, but the gains of GST are estimated to surpass the pains of such challenges. No wonder, the world is watching the Indian design and a successful GST in India may show the way to other countries.

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¹ State Finances: A study of State Budgets 2008-2009 by Reserve Bank of India.

 $^{^{2}}$ Moving to Goods and Services Tax in India: Impact on India's Growth and International Trade by NCAER., December 2009.

 $^{^3}$ "Speaking Notes for the Honourable Elinor Caplan," under the heading "Annual Amount of GST Fraud." Year 2002.

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BALANCING TAXPAYER RIGHTS WHILE PROTECTING INTERESTS OF REVENUE: A CASE COMMENT ON SUPREME COURT DECISION CLARIFYING PROVISIONAL ATTACHMENT MECHANISM UNDER GST LAWS

by Tarun Jain^t

1. Introduction

Determination of proceedings for recovery of tax takes its own time, passing through the adjudication stage, appellate stages and ultimately judicial review of tax administration's actions. It is vividly possible that, in the interim the taxpayer may engage in activities which frustrate the tax administration's recovery proceedings. For illustration, the taxpayer may liquidate the business partly or in whole, dispose significant assets, etc. in order to avoid recovery. In order to address such challenges, the tax administration is entrusted with statutory powers to pre-empt such attempts of the taxpayers to forestall recovery. For illustration, Section 281 of the Income Tax Act, 1961 cloths the tax administration with the power to declare "certain transfers to be void".¹ In the goods and services tax (GST) laws, the tax administration is entrusted with the power to effect "provisional attachment to protect revenue in certain cases" wherein "any property, including bank account" can be attached provisionally by the tax administration during the pendency of certain proceedings.

In a short span of four years since the enforcement of GST laws, this power of provisional attachment has been exercised in plenitude by the tax administration which has resulted into judicial challenges and detailed judgments of the High Court. Recently the Supreme Court was seized with a controversy regarding provisional attachment of the properties of a taxpayer by the Himachal Pradesh GST authorities. By way of a detailed judgment in Radha Krishan Industries v. State of H.P.,² the Supreme Court has culled out the relevant facets of this power of GST authorities, its contours, limitations, etc. as also enunciated the role of the courts in monitoring the exercise of this power by the GST authorities. The decision is expected to streamline the exercise of such powers under the GST laws while also balancing the rights of the taxpayers. This case comment explores the decision in greater detail so as to demystify the legal position and envision its impact on GST laws.

2. Factual Setting before the Supreme Court

The appellant before the Supreme Court was a manufacturer who was issued a notice under Section 78 of the Himachal Pradesh Goods and Services Tax Act, 2017 (H.P. GST). Post a series of hearings, the Joint Commissioner of State Taxes passed orders provisionally attaching the appellant's receivables from its customers. The provisional attachment was ordered under Section 83 of the H.P. GST read with Rule 159 framed thereunder. This provisional attachment was challenged by the appellant by way of writ petition before the High Court. Instead of adverting to the merits of the challenge, however, the High Court dismissed the writ petition on the ground of maintainability, citing availability of alternate remedies. This refusal by the High Court to examine the correctness of the provisional attachment order was challenged before the Supreme Court.

3. Enunciating the Contours and Limitations on the Power of Provisional

Attachment

The relevant provision of the Central Goods and Services Tax Act, 2017 (which has been similarly incorporated under the State GST laws, such as the H.P. GST) states as under:

- 83. Provisional attachment to protect revenue in certain cases.— (1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1-A) of Section 122, in such manner as may be prescribed.
 - (2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

The Supreme Court extensively dissected the statutory scheme under the GST laws whereupon the power of provisional attachment was pedestaled. Noting that in the aforesaid scheme the power was no unbridled and instead was circumscribed by various conditions inherent in the statutory scheme, the Supreme Court laid out the following six parts in which sub-section (1) of Section 83 could be divided, observing thus:

- 42. Sub-section (1) of Section 83 can be bifurcated into several parts. The first part provides an insight on when in point of time or at which stage the power can be exercised. The second part specifies the authority to whom the power to order a provisional attachment is entrusted. The third part defines the conditions which must be fulfilled to validate the power or ordering a provisional attachment. The fourth part indicates the manner in which an attachment is to be levelled. The final and the fifth part defines the nature of the property which can be attached. Each of these special divisions which have been explained above is for convenience of exposition. While they are not watertight compartments, ultimately and together they aid in validating an understanding of the statute. Each of the above five parts is now interpreted and explained below:
 - (i) The power to order a provisional attachment is entrusted during the pendency of proceedings under any one of six specified provisions: Sections 62, 63, 64, 67, 73 or Section 74. In other words, it is when a proceeding under any of these provisions is pending that a provisional attachment can be ordered.
 - (ii) The power to order a provisional attachment has been vested by the legislature in the Commissioner.
 - (iii) Before exercising the power, the Commissioner must be "of the opinion that for the purpose of protecting the interest of the government revenue, it is necessary so to do".
 - (iv) The order for attachment must be in writing.
 - (v) The provisional attachment which is contemplated is of any property including a bank account belonging to the taxable person.
 - (vi) The manner in which a provisional attachment is levied must be specified in the rules made pursuant to the provisions of the statute.

Explaining the practical purport of this scheme, the Supreme Court opined that formation of "opinion" was sine qua non for exercise of this power and thus is its precondition. Enthralling the salient features of this conditionality, the Supreme Court observed the following:

49. Now in this backdrop, it becomes necessary to emphasise that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest

of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalisation of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory preconditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

- 50. By utilising the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorised not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency. A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallised. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unquided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assesses can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorise Commissioners to make pre-emptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.
- 51. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-section

(1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement.

The aforesaid aspect reveals that the Supreme Court has effectively rewritten the scheme regarding the power of the tax administration of provisional attachment whereby (a) heavy onus has been placed upon the tax administration to demonstrate the necessity for the exercise of such power objectively and judicially; and (b) also ensure its limited application, in view of the doctrine of proportionality.

In order to incorporate further safeguards towards protecting the taxpayers against indiscriminate exercise of this power, the Supreme Court culled out the principles prevailing under the income tax laws, namely, the "tangible material" test as the basis for inquiry and exercise of powers. On this point, the Supreme Court observed as under:

52. We adopt the test of the existence of "tangible material". In this context, reference may be made to the decision of this Court in CIT v. Kelvinator of India Ltd.3 Mr Justice S.H. Kapadia (as the learned Chief Justice then was) while considering the expression "reason to believe" in Section 147 of the Income Tax Act, 1961 that income chargeable to tax has escaped assessment inter alia by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief". This principle was followed subsequently in a two-Judge Bench decision in ITO v. Techspan India (P) Ltd.4 While adverting to these decisions we have noticed that Section 83 of the H.P. GST Act uses the expression "opinion" as distinguished from "reasons to believe". However for the reasons that we have indicated earlier we are clearly of the view that the formation of the opinion must be based on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue.

To conclude on the legal position, the Supreme Court decision summarises as under:

*7*9. ...

- (iv) The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.
- (v) The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue.
- (vi) The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.
- (\emph{vii}) The formation of an opinion by the Commissioner under Section 83(1) must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue.
- (ix) Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards:

- (a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and
- (b) An opportunity of being heard.
- (x) The Commissioner is duty-bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached.

On the facts of the decision, the Supreme Court rejected the tax administration's reasoning and declared the provisional attachment to be unlawful.

4. Reflections on Role of High Courts in Provisional Attachment Cases

According to the Supreme Court, the Himachal Pradesh High Court⁵ erred in refusing to examine on merits the correctness of provisional attachment by dismissing the writ petition as non-maintainable. In the process of addressing the correctness of the High Court decision, the Supreme Court opined that the power of provisional attachment made significant inroads into the property rights of the taxpayers and thus close supervision of the exercise of such powers was necessary. Being of the opinion that under the statutory scheme of GST there was no means to correct errors in the exercise of such powers by the statutory authorities, the Supreme Court declared that it was incumbent upon the High Courts to exercise their extraordinary writ jurisdiction to examine the propriety of the tax administration's exercise of power of provisional attachment. For such reason, the Supreme Court categorically concluded as maintainable a writ petition challenging an order of provisional attachment. In doing so, the Supreme Court also affirmed the views of various High Courts which had exercise addressed this proposition. Some of the key propositions emanating from the High Court decisions, which were approved by the Supreme Court in Radha Krishan *Industries* v. *State of H.P.*^Z are summarised below:

- Decision of the Delhi High Court, in *Proex Fashion*[§] holding that there are five conditions for invocation of Section 83 of the CGST, which stand approved in para 41 of the Supreme Court decision.
- Decision of the Gujarat High Court, in Valerius Industries⁹ which laid down principles for construction of Section 83 of the SGST/CGST Act. The High Court held that provisional attachment on the basis of a subjective satisfaction, absent any cogent or credible material, constitutes malice in law; vague, indefinite, distant, remote or far-fetching material would not warrant provisional attachment. The High Court further went on to lay down the conditions which would permit provisional attachment : (a) where there exists "reasonable apprehension" that the assessee may default the collection of the demand; (b) where there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his/her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective; and (c) provisional attachment power is to be used only as a last resort measure. The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.
- In Jay Ambey Filament¹⁰ the Gujarat High Court further expounded the above reasoning, holding that on his opinion being challenged, the competent officer must be able to show the material on the basis of which the belief is formed.
- Decision in *UFV India Global Education*¹¹ of the Punjab and Haryana High Court which held that pendency of proceedings under the provisions mentioned in Section 83 (viz. Sections 62 or 63 or 64 or 67 or 73 or 74) is the sine qua non for an order of provisional attachment to be directed under Section 83.

- Decision of the Bombay High Court in *Kaish Impex*¹² which considered a similar question regarding the application of Section 83. In this case the tax authorities traced money trail in tax fraud by an export firm and provisionally attached the bank accounts of the petitioner. The issue before the High Court was whether the petitioner's assets could be attached considering the fact pattern that the proceedings were against another taxable entity. The High Court noted that the proceedings referred to under Section 83 of the Act must be pending against the taxable entity whose property is being attached. It inter alia observed:
- 18. ...Section 83 does not provide for an automatic extension to any other taxable person from an inquiry specifically launched against a taxable person under these provisions. ...The format of the order i.e. Form GST DRC-22 also specifies the particulars of a registered taxable person and which proceedings have been launched against the aforesaid taxable person indicating a nexus between the proceedings to be initiated against a taxable person and provisional attachment of bank account of such taxable person.

In short, contextualising the observations of the High Courts, the Supreme Court streamlined the legal position regarding the power of provisional attachment available to GST officers seeking to balance the tax recovery objective underlying the power while preserving the legitimate rights of the taxpayers.

5. Conclusion

Any decision of the Supreme Court, given its constitutional authority under Article 141 as being binding on all courts and authorities in India, settled the controversy and lays down the law of the land. However, this decision is relevant on multiple counts not just in the context of the immediate facts but much beyond. Some of the salient aspects are enlisted below:

- First, as discussed above, the Supreme Court has streamlined the legal position regarding the power of provisional attachment available to GST officers. This is crucial because GST is a relatively new tax and, more critically, cited as a reform. Thus, it is crucial that its provisions are interpreted uniformly across the country and that too in a humane manner such that their indiscriminate application does not derail the underlying objective of the new tax regime.
- Second, the decision of the Supreme Court is not just based upon interpretation
 of the statutory provisions. Instead, it seeks to achieve a delicate balance
 protecting government revenue and allowing genuine businesses to operate,
 evidently in furtherance of underlying objective of making the GST law workable.
- Third, the jurisprudential intercourse sought to be embedded in the scheme of provisional attachment related statutory provisions clearly dispels the long-standing tradition of the Supreme Court wherein the principle of natural justice and fair play are sought to be read in the fiscal laws, thereby ensuring that they remain within the constitutional precincts and do not trample upon the fundamental rights of the taxpayers, indulging the right for reasonable and balanced application of fiscal laws. To this effect, inter alia, the Supreme Court rightly dismissed the contention to grant higher sanctity to discretion of the GST Commissioner, thereby ensuring that the rights of the taxpayers are protected by a fair interpretation of the taxing statute.
- Fourth, on a larger level, by confirming High Court's supervision of tax officers' actions under the extraordinary writ jurisdiction even though the statutory provisions do not provide any legal remedy to the aggrieved taxpayer, the Supreme Court has not just ensured that the taxpayer is not left remediless and instead introduced a mechanism to ensure tax officers' accountability. No executive power can be exercised without effective supervision, much less a wide and potent power to attach assets which cannot only put fetters upon business

operations of any entity but can also put strenuous effect on the very survival of business. In such circumstance, it is only appropriate that the exercise of such power is supervised by a constitutional court such that it can ensure balance between the law's objective and the rights of the affected party.

• Fifth, by reading into the law twin tests, the doctrine of proportionality and "tangible material", the Supreme Court has adverted to the conditions necessary to make the law fair and reasonable which is a constitutional tenet. Absence of such tenets do not ipso facto make the law unconstitutional but by reading them into the law, the Supreme Court has ensured that arbitrariness and capricious conduct is not perpetrated in the garb of exercising statutory functions. Thereby the Supreme Court has protected genuine persons from unwarranted harassment and obviated the possibility of unguided discretion leading to peril of arbitrary power.

In short, this decision of the Supreme Court is a welcome addition to tax jurisprudence and incremental vindication of taxpayers' rights.

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¹ The provision states that "[w]here, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under R. 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise".

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² 2021 SCC OnLine SC 334.

^{3 (2010) 2} SCC 723.

^{4 (2018) 6} SCC 685.

⁵ Radha Krishan Industries v. State of H.P., 2021 SCC OnLine HP 4566: (2021) 48 GSTL 3.

⁶ Bindal Smelting (P) Ltd. v. Directorate General of GST Intelligence, 2019 SCC OnLine P&H 6015: (2020) 34 GSTL 592; Society for Integrated Development in Urban and Rural Areas v. CIT, 2001 SCC OnLine AP 1457: (2001) 252 ITR 642; Vinodkumar Murlidhar Chechani v. State of Gujarat, 2020 SCC OnLine Guj 3010.

⁷ 2021 SCC OnLine SC 334.

⁸ Proex Fashion (P) Ltd. v. Govt. of India, 2021 SCC OnLine Del 2082.

⁹ Valerius Industries v. Union of India, 2019 SCC OnLine Guj 6866 : (2019) 30 GSTL 15.

¹⁰ Jay Ambey Filament (P) Ltd. v. Union of India, 2020 SCC OnLine Guj 3009: (2021) 44 GSTL 41.

¹¹ UFV India Global Education v. Union of India, 2020 SCC OnLine P&H 2796: (2020) 43 GSTL 472.

¹² Kaish Impex (P) Ltd. v. Union of India, 2020 SCC OnLine Bom 125: (2020) 6 AIR Bom R 122.

THE INPUT TAX CREDIT PARADOX : AN ANALYSIS OF RULE 36(4) OF THE CENTRAL GOODS AND SERVICES TAX (CGST) RULES, 2017 WITH SPECIFIC EMPHASIS ON ITS LEGAL VALIDITY

by Abir Satsangee and Shabd Roop Satsangee ABSTRACT

Allowing credits for taxes paid on inputs of previous stages is the *sine quo non* of any value added tax regime. From 1st of July, 2017, in a landmark display of cooperative federalism, India has ushered in a new Indirect Tax regime of Goods and Services Tax (hereinafter "GST") for seamless flow of Input Tax Credit (hereinafter "ITC") and to create a 'One Nation, One Tax' encompassing all supplies of goods and services. However, with the cases of ITC related frauds on a constant rise, the GST Council, the overseeing constitutional body for making recommendations to the Union and State Government on issues related to GST, decided to impose certain restrictions on availment of ITC. In pursuance of the same, sub-rule (4) to Rule 36 of the Central Goods and Services Tax Rules, 2017 (hereinafter "CGST Rules") has been inserted vide Notification no. 49/2019-Central Tax dated 09.10.2019. This sub-rule imposes a restriction on the quantum of credit that a taxpayer can avail on a monthly basis. This paper aims to explore the legal validity of the restriction imposed on availment of ITC by a tax-payer only up-to the extent of 20% (the same has been further brought down to 10%) of the eligible credit available in respect of invoices declared by his supplier in FORM GSTR-1 on constitutional as well as other grounds on which the legal validity of Rule 36(4) may be tested in the Courts of Law. The paper is divided



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into five sections. The first section gives an introduction of the concept of ITC. The second section analyses the provisions contained under the GST laws regarding ITC. The third section aims to test Rule 36(4) on the touchstone of the Constitution of India and the fourth section explores other grounds on which its validity may be tested in the Courts of Law. The fifth section summarises the discussion and gives suggestions and the way forward.

I. INTRODUCTION

India has ushered in a landmark reform in its Indirect Tax regime with the introduction of GST with effect from 1st July, 2017. One of the major reasons behind this shift was to replace multiple indirect taxes at different points of the value chain with one single tax on 'supply' of goods and services and provide seamless flow of taxes paid on inputs in order to prevent the cascading effect of taxes.

In order to prevent 'Tax-on-Tax' (also termed as the 'Cascading Effect'), it is necessary to allow the credit of taxes paid on inputs of previous stages. This ensures that the tax is levied only on the 'value added', which is the 'sine quo non' of any value added tax regime. If ITC is not available, the same becomes a cost of purchase and hence leads to an increase in prices of goods and services—

Illustration 1 - Input Tax Credit and the Cascading Effect

	Particulars	Without Input Tax Credit		
(a)	Purchase price of Inputs	100.00	100.00	
(b)	Input Tax @ 18% [(a) *18%]	18.00	18.00	
(c)	Cost of Inputs [Includes Input	100.00	118.00	

	Tax when Credit is not available]		
(d)	Value Addition by Supplier	100.00	100.00
(e)	Total Cost [(c)+(d)]	200.00	218.00
(f)	Assumed Margin per unit	10.00	10.00
(g)	Selling Price [(e)+(f)]	210.00	228.00
(h)	Output Tax @ 18% [(g)*18%]	37.80	41.04
(i)	Selling Price (Including Tax)	247.80	269.04
(j)	Net Tax payable by dealer	37.80 - 18.00 = 19.80	41.04
(k)	Total Tax received by Government [(b)+(j)]	18.00 + 19.80 = 37.80	18.00 + 41.04 = 59.04
(1)	Total Value of goods/services without Taxes [(i)-(k)]	210.00	210.00
(m)	Tax as % of Total Value	18.00%	28.11%

The difference between the taxes paid in the above two scenarios is of Rs. 21.24, which is equal to Tax @ 18% on the Rs. 118.00, the amount paid for inputs. From the above illustration, it is apparent that Rs. 100.00 which had been tax earlier is being taxed again and not only that, even Rs. 18.00 which was paid as taxes is being taxed again. This leads to cascading of taxes and increases the effective tax rate on goods and services which has gone up to 28.11% from 18% in the instant case.

To address this concern in particular, it was stated in the Statement of Objects and Reasons of the Central Goods and Services Tax Bill, 2017, (hereinafter "the Bill") that the proposed legislation will simplify and

harmonise the indirect tax regime in the country and ensure seamless flow of ITC.

It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers.¹

Further, the Statement of Objects and Reasons also states that the Bill aims to broad base the input tax credit by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business.²

Keeping the above intention of the Legislature in mind, the relevant provisions of the GST laws are analysed in the next section of this paper.

II. RELEVANT PROVISIONS UNDER THE GST LAWS

A. Broad Framework

The GST laws consist of the Central Goods and Services Tax Act, 2017 (hereinafter "CGST Act"), the Integrated Goods and Services Tax Act, 2017 (hereinafter "IGST Act"), the GST Acts passed by the respective States/Union Territories and the Goods and Services Tax (Compensation to States) Act, 2017 along with the Rules made thereunder.

The provisions regarding ITC are contained in the CGST Act and Rules made thereunder and are pari materia to the provisions contained in the GST Acts passed by the respective States/Union Territories. Further, provisions of the CGST Act regarding ITC have been mutatis mutandis made applicable with reference to the IGST Act.³

Chapter V of the CGST Act, consisting of Sections 16 to 21, contains the provisions regarding ITC. Section 16 deals with eligibility, conditions and time period for taking ITC. Section 17 deals with apportionment of ITC in cases where the goods or services or both are used for dual purposes (business and other than business or for effecting taxable or non-taxable supplies). It also provides a list of supplies on which ITC cannot be availed. Section 18 provides for availability of credit in special circumstances like new registration, exempted supplies becoming taxable and vice versa, etc. Section 19 deals with provisions regarding ITC in case of job work. Section 20 and 21 are related to provisions regarding Input Service Distributor.

Further, Chapter IX of the CGST Act, which contains provisions regarding returns, includes Section 41, 42 and 43A, 4 which deal with claim, provisional acceptance and matching of ITC in the Returns.

Further, Chapter X, which deals with payment of tax, contains provisions regarding maintenance of an Electronic Credit Ledger and utilisation of the ITC reflected in it in Section 49.

For the purposes of this paper, Sections 16, 41, 49, 42 and 43A of the CGST Act are relevant and have been analysed further.

B. Eligibility to Claim ITC

Section 16 of the CGST Act entitles every registered person to take "credit of input tax charged on any supply" of goods or services or both to him which are "used or intended to be used in the course or furtherance of his business" and the amount of ITC claimed shall be credited to the electronic credit ledger of such person. However, this claim is to be made in the manner specified in Section 49 and is subject to such conditions and restrictions as may be prescribed.⁵

C. Conditions for Claiming ITC Provided in the Act

However, Sub-section (2) to Section 16 states that notwithstanding anything contained in Section 16, no registered person shall be entitled to any ITC in respect of any supply of goods or services or both to him, unless the following conditions are fulfilled -

- (a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
- (b) he has received the goods or services or both....
- (c) subject to the provisions of section 41or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and
- (d) he has furnished the return under section 39 : 6

Further, the recipient needs to reverse the ITC availed along with in case of non-payment of the value and tax to the supplier within 180 days from the date of issue of the invoice. ²

Further, the CGST Act also provides that the cut-off date for availment of ITC for a financial year is the due date of furnishing of the return under section 39 for the month of September following the

end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

D. Conditions Prescribed in Rule 36 Prior to Insertion of Rule 36(4)

Rule 36 of the Central Goods and Services Tax Rules, 2017 (hereinafter "CGST Rules") prescribes the documentary requirements and conditions for claiming ITC.

Sub-rule (1) provides that ITC can be availed by a registered person on the basis of a Tax Invoice, a Self-Invoice issued u/s 31(3)(f), a debit note issued by supplier u/s 34, a Bill of Entry/any similar document prescribed under the Customs Act, 1962 or an ISD Invoice.²

Sub-rule (2) further provides that the ITC shall be availed only if the said document contains all the details specified in Chapter VI of the CGST Rules (or at least the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, Goods and Services Tax Identification Number (hereinafter

"GSTIN") of the supplier and recipient and the place of supply in case of inter-State supply) and the relevant information as contained in such document is furnished in FORM GSTR-2 by the recipient.¹⁰

Further, no ITC can be availed in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, wilful misstatement or suppression of facts.

E. Manner of Claiming ITC and Its Matching

The CGST Act provides for provisional claiming of ITC and its finalisation after matching the details of inward supplies (purchases) furnished by the recipient with the details of outward supplies (sales) furnished by the suppliers.

Section 41 provides that every registered person shall, subject to such conditions and restrictions as may be prescribed, be "entitled to take the credit of eligible input tax, as self-assessed, in his return" and such amount shall be "credited on a provisional basis" to his electronic credit ledger and this credit can be utilised only for payment of self-assessed output tax.¹²

Further, the ITC as 'self-assessed' in the return of a registered person shall be credited to his electronic credit ledger, in accordance with "section 41 or section 43A", to be maintained in such manner as may be prescribed 13 and the 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. 14

It may be noted that Rule 69 of the CGST Rules prescribes the mechanism regarding matching of claim of input tax credit.

It prescribes the claim of input tax credit on inward supplies including imports, provisionally allowed under section 41, shall be matched under section 42 after the due date for furnishing the return in FORM GSTR-3 on the parameters of GSTIN of the supplier; GSTIN of the recipient; invoice or debit note number and date; and the tax amount.¹⁵

It also provides that where the time limit for furnishing the Return specified under section 37 (Return of outward supplies in FORM GSTR-1) and the Return specified under section 38 (Return of inward supplies in FORM GSTR-2) has been extended, the date of matching relating to claim of input tax credit shall also be extended accordingly.

It may be noted that the time period of filing of FORM GSTR-2 and FORM GSTR -3 for the month of July 2017 to March 2018, was extended from time to time and ultimately it was decided by the GST council that a revised time-line would be worked out by a Committee of officers. In cognizance of the same, the system-based reconciliation envisaged under the GST laws was to be kept in abeyance till such new time-lines were notified. In absence of the same, the current process of claiming ITC is on the basis of self-assessment in the return filed under Section 39 in FORM GSTR-3B.

F. The Bone of Contention - Rule 36(4)

With rise in the menace caused by fake invoices and the resultant wrongful availment of ITC coming into light, the GST Council in its 37th Meeting held on 20th September 2019, decided to impose certain restrictions on availment of ITC by the recipients. ¹⁸

In this regard, the Press Release of the GST Council stated: "In order to nudge taxpayers to timely file their statement of outward supplies, imposition of restrictions on availment of input tax credit by the recipients in cases where details of outward supplies are not furnished by the suppliers in the statement under section 37 of the CGST Act, 2017." 19

In furtherance of the same, Notification No. 49/2019-Central Tax, dated 09.10.2019 was issued which inserted Sub-rule (4) to Rule 36 of the CGST Rules as under:

Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.²⁰

Through the above Rule, a restriction on the quantum of ITC that a taxpayer can avail on self-assessment basis has been imposed by stating

that a taxpayer can avail ITC pertaining to outward supplies not declared by his supplier in FORM GSTR-1 (and reflected in FORM GSTR-2A) only up-to the extent of 20% of the eligible credit available in respect of invoices declared by his supplier in FORM GSTR-1.²¹

The same can be explained with the help of the following illustration -

Illustration 2 - Restriction on Availment of ITC under Rule 36(4) up to 31/12/2019

	Particulars	Amount
(a)	ITC pertaining to supplies received by the Taxpayer	1,000.00
(b)	Eligible ITC reflected in GSTR-2A	750.00
(c)	ITC which can be claimed in GSTR-3B [(b)* 120%]	900.00
(d)	ITC which is deferred due to Rule 36(4) [(a)-(c)]	100.00

The same has been subsequently reduced to 10% of the eligible credit available in respect of invoices or debit notes reflected in FORM GSTR-2A with effect from $01/01/2020.^{22}$ In light of the same, the above illustration is reworked as under -

Illustration 3 - Restriction on Availment of ITC under Rule 36(4) w.e.f. 01/01/2020

	Particulars	Amount
(a)	ITC pertaining to supplies received by the Taxpayer	1,000.00
(b)	Eligible ITC reflected in GSTR-2A	750.00
(c)	ITC which can be claimed in GSTR-3B [(b)* 110%]	825.00
(d)	ITC which is deferred due to Rule 36(4) [(a)-(c)]	175.00

Therefore, with the insertion of Rule 36(4), the eligibility of the recipient to claim ITC has been made dependent on the timely filing of GSTR-1 by the supplier.

Further, the Government has clarified, inter alia, the following points with reference to Rule 36(4) vide Circular No. 123/42/2019- GST, dated November 11, 2019-

1. Compliance to be done on Self-Assessment Basis

The Government has clarified that the conditions and eligibility for the ITC that may be availed by the recipient shall continue to be governed as per the provisions of Chapter V of the CGST Act and the rules made thereunder. The restriction provided under Rule 36(4) is not imposed through the common portal and it is the responsibility of the taxpayer that credit is availed in terms of the said rule and therefore, the availment of restricted credit in terms of sub-rule (4) of rule 36 of CGST Rules shall be done on self-assessment basis by the tax payers.²³

2. The Restriction is imposed on a Consolidated Basis and not Supplier wise

The restriction imposed is not supplier wise. The credit available under sub-rule (4) of rule 36 is linked to "total eligible credit" from all suppliers against all supplies whose details have been uploaded by the

suppliers. Further, invoices where ITC is ineligible would not be considered for calculating the limit under Rule 36(4).

3. Cut-off Date for Calculation of ITC for a Particular Tax Period

Another issue which arose in implementation of Rule 36(4) was that FORM GSTR-2A is a dynamic document, therefore what would be the amount of ITC that is admissible to the taxpayers for a particular tax period.

In this regard, it has been clarified that the cut-off date for calculations would be the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said tax period. Therefore, the taxpayer may have to ascertain the ITC admissible for a particular tax period from his auto populated FORM GSTR-2A "as available on the due date of filing of FORM GSTR-1 under sub-section (1) of section 37".25

4. Availability of Balance ITC

It has been clarified that the balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers. In other words, taxpayer may avail full ITC in respect of a tax period, as and when the invoices are uploaded by the suppliers to the extent of 83.33% of Eligible ITC (90.91% w.e.f. 01/01/2020).

III. ANALYSIS OF THE CONSTITUTIONAL VALIDITY OF RULE 36(4)

A. Fundamental Right to Carry on Business

1. Right to Carry on Business is subject to Restrictions

Article 19 of the Constitution of India grants all citizens the fundamental right to practise any profession, or to carry on any occupation, trade or business. 27

However, such freedom does not preclude the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right to do business.²⁸

The constitutionality of a statute imposing any restrictions on the right granted under Article 19 (1)(g) can be challenged by showing that the restrictions imposed by the statute are unreasonable, either because the restrictions go in excess of the object of the statute, or activities which are not against the public interest are included within its ambit, or because the procedure laid down in the statute for curbing such activities is unreasonable or unjust or arbitrary.²⁹

It may be noted that as the fundamental rights are granted to citizens only, a non-citizen cannot challenge the validity of laws under Article $19.\frac{30}{2}$ For the purpose of Article 19(1)(g), a company incorporated under the Companies Act is a non-citizen. However, the fundamental

rights of the shareholders of a company are not lost when they associate to form a company.32

Keeping the above in mind, the question that whether Rule 36(4) is in violation of Article 19(1) (g) has been restricted to the analysis of the following two points—

- i. Whether Rule 36(4) imposes a restriction on carrying on business?
- ii. Whether such restriction is reasonable and in interest of the general public?

2. Whether Rule 36(4) imposes a restriction on carrying on business?

The term 'restriction' has been defined as an official limit or control on what people or companies are allowed to do, or on what can happen. 33 A restriction is a rule or order that limits what you can do or that limits the amount or size of something; a fact or situation that limits you or prevents you from doing what you want to do. 34

Sub-section (1) of Section 16 of the CGST Act provides for conditions and restrictions subject to which the input tax credit shall be credited to the electronic credit ledger. Basis the same, the Law Committee of the GST Council made a recommendation that necessary

restriction may be prescribed through amendment of rule 36 of the CGST Rules, 2017.35

Therefore, Rule 36(4) is in the nature of imposing a restriction on the ITC a dealer can take on his purchases.

3. Test of Reasonableness of the Restriction

'Reasonable' means that which is in accordance with reason, and which is associated with logic and not arbitrariness. It implies intelligent care and deliberation that which reason dictates.³⁶

The following aspects need to be considered for determining whether a restriction is reasonable or not:

(a) A restriction is reasonable if it is not arbitrary or of an excessive nature beyond what is required in the interest of the public.37

Prior to introduction of Rule 36(4), provisions regarding an elaborate matching mechanism were already in place in the CGST Act. Even the ITC on supplies not declared by the seller in GSTR-1 could be claimed by the recipient by including the details of such supplies in his FORM GSTR-2,38 which were then to be made available to the supplier in FORM GSTR-1A and FORM GSTR-1 furnished earlier by the supplier was to stand amended to the extent of modifications accepted by him.39 Therefore, the CGST Act permits availment of 100% ITC even if respect

of supplies not declared by including the details of such supplies in FORM GSTR-2, which are then subject to acceptance by the supplier.

However, the envisaged matching mechanism including FORM GSTR-2, GSTR-1A and FORM GSTR -3 could not be operationalized because of technical glitches and due to the same there was no matching of credit in the system. Therefore, the possibility of fraud, adverse impact on the revenue and encouragement to suppliers to file FORM GSTR-1 was cited as a key reason to introduce Rule 36 (4).40

Rule 36(4) is an indirect attempt to put the onus of the matching on the taxpayers instead of operationalising the matching mechanism already provided for in the law which allowed availment of 100% ITC if the requisite details were disclosed. Due to non-operationalisation of the matching mechanism, the tax-payers were exercising their right to claim ITC by declaring such details in aggregate in GSTR-3B on a self-assessment basis instead of invoice-wise details in GSTR-2. Rule 36 (4) seeks to restrict this right.

Further, no justification has been provided for the 20% cap which was introduced by Rule 36(4) and the same has now been further reduced to 10% without any justification.

Even if prevention of fraud may be considered as in furtherance of public interest, the adverse impact it may have on small businesses has not been considered while framing Rule 36(4).41

(b) The restriction must have a reasonable relation with the object which the legislation seeks to achieve, and must not go in excess of that object. $\frac{42}{2}$

A Standard Operating Procedure (SOP) for tackling GST fraud cases involving the use of fake invoices for wrong availment of ITC is already in place⁴³ and a new return system is ready to be operationalised from 1st April, 2020.

Similarly, the government itself had given relaxations on filing of FORM GSTR-1 by making it quarterly for taxpayers having turnover up to Rs. 1.5 Crore and non-imposition of automatic late fee in case of late filing of GSTR-1 were the main factors which were causing poor filing of FORM GSTR-1.

Further, there is already a provision in the CGST Rules for blocking e-way bill generation in case of non-filing of GST Returns. 44

Therefore, adequate alternative measures to achieve the objects sought to be achieved by Rule 36 (4) are already in place. Instead of enforcing the already existing provisions in place, Rule 36(4) seeks to penalise the recipients for the default by suppliers which seems to be unreasonable.

(c) The reasonableness of a restriction has to be determined in an objective manner and the standpoint of the interest of the general public and not

from the point of view of the person upon whom the restrictions are imposed.⁴⁵

Blocking of ITC would lead to increase in cost of doing business and would ultimately lead to higher prices for the consumers due to cascading of taxes. Further, it would also impact the small vendors in the supply chain as it would discourage procurements from small taxpayers who have opted for quarterly filing of GSTR-1, as the same will appear in GSTR-2A of the recipient only at the end of the quarter and it would lead to working capital blockage at the recipient's end for up to 3 months. This problem would be compounded in case the supplier misses to upload the invoice or uploads incorrect details as any amendment can be made only in the next GSTR-1.46

Therefore, Rule 36(4) not only affects the recipients on whom the restriction has been imposed, but also their suppliers and the consumers at large.

- (d) A law cannot be said to be unreasonable merely because, in a given case, it operates harshly. 47
- (e) Whether a restriction is reasonable or not shall depend on many factors, viz., the nature of the right infringed, the purpose of the restriction, the extent and the nature of the mischief required to be

suppressed and the prevailing social and other conditions at the time.48

It may be noted that the detailed Agenda note to the 37th GST Council meeting in which this restriction was imposed highlights declining revenue collection as a key factor behind implementing Rule 36(4).

Even though most of these issues will get addressed in the new return system, considering the concerns regarding declining revenue collection from GST, it is felt necessary to put in place a mechanism to curb such wrongful availment of credit. Accordingly, it is proposed that reasonable restriction may be imposed on self-assessed input tax credit availed in FORM GSTR-3B in respect of those invoices, the details of which have not been uploaded by the supplier as required under sub-section (1) of section 37 of the CGST Act i.e. which is not reflected in FORM GSTR-2A. This will also encourage filing of FORM GSTR-1 by suppliers thus bridging the gap in the tax payable

as per supplier declaration in FORM GSTR-1 and the credit availed by the recipient in FORM GSTR-3B. $\frac{49}{100}$

From the above it seems that, Rule 36(4) aims to artificially inflate the tax-collection figures by putting restrictions on availing credit which was otherwise legally available to the recipients merely by citing that few instances of frauds/wrongful availment of credit have come into light.

Further, Rule 36(4) does not prevent the mischief it is intended to prevent, *i.e.*, fraud/wrongful availment of credit, as the restriction has to be followed by the tax-payers on self-assessment basis instead of being automatically imposed from the portal.

- (f) An enactment be reasonable must satisfy the test of reasonableness also with regard to its procedural aspects. 50
- In this regard, Rule 36(4) has several short-comings—
- i) The burden of implementation of Rule 36(4), and indirectly, the entire matching mechanism, is on the recipient. Forcing the recipient to reconcile the invoices at extra time and cost, where even the Common Portal is unable to do so is unreasonable.
- ii) The data reflected in GSTR-2A available on the Common Portal is not time-stamped. Further, on due date of filing of FORM GSTR-1, the Common Portal is usually unable to handle the volume of taxpayers filing the returns. Therefore, the clarification by the Circular that ITC should be calculated as per the GSTR-2A data available on the due date of filing of FORM GSTR -1 under sub-section (1) of section 37 is unreasonable.
- iii) Further, in case of quarterly filers of GSTR-1, the State is collecting the taxes on the monthly basis, but under Rule 36(4), the ITC of the same would be available to the recipient only after the end of the quarter.
- (g) While determining the reasonableness of a restriction imposed on any fundamental right, the Courts have, to decide the point for themselves, and any opinion expressed by the Legislature thereon is hardly relevant.⁵¹
- (h) Reasonableness of a restriction imposed upon a fundamental right has to be judged in the context of the scheme of an Act and not territorially. 52

One of the major legislative intents behind the introduction of GST was to reduce the multiplicity of indirect taxes and ensure a seamless flow of credit is available to the recipients to remove cascading of taxes and reduce cost of production and inflation. 52

Rule 36(4) goes against the very spirit of ensuring seamless availability of ITC to the recipient.

From the above analysis, it may be seen that Rule 36(4) falls short on multiple criteria that are used to judge the reasonableness of a restriction.

B. Right to Equality

Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.⁵⁴

It may be noted that the percentage of mismatch between the credit availed in GSTR-3B and the Credit reflected in GSTR-2A of the taxpayer is not uniform across different categories of taxpayers. The following data set shows that the maximum unmatched credit is in the bracket of taxpayers having turnover between 10 crores and 25 crores.

Table 1: Percentage of Mismatched ITC between GSTR-3B and GSTR-2A56

Year\Turnover	0- 20 Lacs	20 Lacs -50 Lacs	-1	-1.5	1.5 Crore -2 Crore	-5	-10	-25	-50	- 100	Crore
17-18	2	23	2	1	1	3	3	49	3	3	11
18-19	3	2	3	2	2	6	6	22	8	8	38

Further, Rule 36(4) does not distinguish between the *bona fide* cases where a mismatch is due to any act/omission of the supplier and *mala fide* cases where bogus/fraudulent credits are sought to be claimed through collusion between supplier and recipient.⁵⁷

Painting all recipients with the same brush without even substantiation of *mens rea* and putting in a blanket restriction on all taxpayers, where data analytics can help in pinpointing fraudulent taxpayers, is treating the innocent and the guilty as equally guilty and is in violation of Article 14 of the Constitution.

Further, similar provisions on disallowance of ITC on the default of the selling dealer in depositing tax under the Delhi VAT Act have been held to be violative of Article 14 in the case of *Arise India Limited*. The Special Leave Petition filed by the Revenue against the same has also been dismissed by the Hon'ble Supreme Court.

IV. OTHER ISSUES REGARDING LEGAL VALIDITY OF RULE 36(4)

A. Can a Restriction on ITC on a Cumulative Basis be imposed under Section 16(1)?

It may be noted that in terms of Section 16(1) such "restrictions" have to be qua the ITC charged on "any" supply. Considering that the other conditions and restrictions for claiming ITC provided under Section 16 and Rule 36 are related to individually identifiable supplies (possession of invoice, invoice to contain specific details, tax paid on such invoice, suppliers received against such invoice), it is a valid contention that whether Section 16(1) grants the authority to impose restrictions on the cumulative value of ITC charged on all the supplies or it merely permits imposition of restriction only qua the tax charged on a particular supply. $\frac{59}{2}$

B. Section 43A is yet to be notified

Section 43A of the CGST Act provides for a similar restriction in respect of availment of ITC beyond 20% of the ITC reflected in the returns of the purchaser. ⁵⁰ However, the same has not been notified yet.

If the same restriction could have been imposed under Section 16(1), there was no need to insert such a provision under Section 43A. Hence, unless Sec. 43A is notified, Rule 36(4) cannot be made to restrict the ITC in such manner. 61

C. Lack of Proper Machinery

The legal validity of a law can be bought into question on the grounds that it lacks proper machinery for its implementation. 62

Putting the onus of implementation of Rule 36(4) entirely on the taxpayer, not ensuring availability of time-stamped GSTR-2A data, not providing a mechanism to track entries which are subsequently updated in GSTR-2A in previous months and not devising a mechanism to ensure monthly reflection of purchases made from quarterly filers are some of the areas which create a bottleneck in the implementation of Rule 36(4).

D. The Doctrine of Lex Non Cogit ad Impossibila

'Lex Non Cogit ad impossibilia' is an age-old maxim meaning that the law does not compel one to do that which one cannot possibly perform. Where the law creates a duty or charge and the party is disabled to perform it, without any default in him and has no remedy over it, there the law will in general excuse him.⁶³

It is impossible for the recipient to ensure that his supplier files his GST returns on time and that too with the correct details. Further, the reconciliation work would involve monthly as well as year-to-date reconciliations which would only add to the cost of the compliance for the recipient. Therefore, Rule 36(4) penalises the *bona fide* recipient without any default on his part and without any remedy over such defaults made by his supplier.

V. RELAXATION IN RULE 36(4) ON ACCOUNT OF COVID-19

In the 39th GST Council Meeting held on 14^{th} March, 2019, it was decided that the existing system of furnishing FORM GSTR-1 & FORM GSTR-3B shall continue till September, 2020.

Further, due to wide spread of the COVID-19 pandemic, a proviso has been inserted in the Rule 36(4) vide notification No. 30/2020 - Central Tax, dated 03.04.2020, to provide that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and that the return in FORM GSTR-3B for the tax period of September, 2020 shall be furnished with cumulative adjustment of input tax credit for the said months in accordance with the condition under Rule 36(4).

VI. CONCLUSION

Although, Rule 36(4) aims to curb fraudulent availment of ITC, it also imposes an unreasonable restriction on the *bona fide* and compliant taxpayers which is subject to challenge in the courts of law on the grounds of being in violation of Articles 19 and 14 of the Constitution of India.

Rule 36(4) would create more problems for the legitimate taxpayers due to issuance of mismatch notices in bulk and is a classic example of missing the woods for the trees in order to catch a few errant taxpayers.

When adequate checks and balances have already been provided under the CGST Act, implementing of such restrictions could have been deferred until the New Returns under GST become operational as they

have the machinery mechanism to implement this restriction in a hassle-free manner for taxpayers.

With the relaxation provided under Rule 36(4) due to COVID-19 pandemic coinciding with the deferred due date for implementation of the New Returns under GST, one can say that Rule 36(4) has been deferred, to some extent, with a one-time adjustment allowed in September, 2020 before transitioning to the New Returns under GST.

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¹ Central Goods and Services Tax Bill, 2017, Bill No. 57 of 2017, Statement of Objects and Reasons, ¶4 (2017).

² *Id.*, ¶5.

 $^{^{3}}$ Integrated Goods and Services Tax Act, 2017, No. 13, Acts of Parliament, 2017, § 20.

⁴ Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017, § 43A, *inserted vide* Central Goods and Services Tax (Amendment) Act, 2018, No. 31 of 2018, § 18 [hereinafter **CGST Act, 2017**].

⁵ CGST Act, 2017, § 16(1).

⁶ Id, § 16(2).

⁷ *Id.*, second proviso to § 16(2).

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- 8 Id., § 16(4). ⁹ The Central Goods and Services Tax Rules, 2017, Rule 36(1) [hereinafter **CGST Rules, 2017**]. 10 Id., Rule 36(2). 11 Id., Rule 36(3). 12 CGST Act, 2017, § 41. 13 Id., § 49(2), as amended vide the Central Goods and Services Tax (Amendment) Act, 2018, § 20 (2018). 14 Id., § 49(4). 15 CGST Rules, 2017, Rule 69. ¹⁶ Minutes, 23rd GST Council Meeting, Nov. 10, 2017, ¶76. ¹⁷ Ministry of Finance, Circular No. 26/26/2017-GST (issued on Dec. 29, 2017). ¹⁸ Shubham Vijay & Shabd Satsangi, A Nudge or a Shove: An Analysis of Rule 36(4) of the CGST Rules, 2017, [2019] 111 Taxmann.Com 21 (Article), ¶1. 19 Press Release (Law and Procedure Related Changes), 37th Meeting of the GST Council (Sep. 20, 2019), ¶4, available at http://cbic.gov.in/resources//htdocs-cbec/press-release/Final_Press%20Release_GSTPW_20092019.pdf ²⁰ CGST Rules, 2017, Rule 36(4), inserted vide Notification No. 49/2019-CT, dt. 09.10.2019. ²¹ See supra note 18.1(3. ²² CGST Rules, 2017, Rule 36(4), amended vide Notification No. 75/2019 - CT, dt. 26.12.2019, with effect from 01.01.2020. ²³ Ministry of Finance, Circular No. 123/42/2019- GST (issued on November 11, 2019), ¶3. 24 Id., at 2. ²⁵ *Id.*, at 2. ²⁶ *Id.*, at 4. ²⁷ INDIA CONST. art. 19(1)(g). 28 Id., art. 19(6). ²⁹ Harlalka v. Union of India, 1970 AIR 520 (Cal). 30 Monstant-Joan v. Union of India, 2010 AIR(NOC) 87 (AP). ³¹ State Trading Corporation of India v. Commercial Tax Officer, 1963 AIR 1811 (S.C.). 32 Bennett Coleman & Co. v. Union of India, 1973 AIR 106 (S.C.). 33 Restriction. Cambridge Business English Dictionary (Cambridge University Press, Cambridge, 2011), available at https://dictionary.cambridge.org/dictionary/english/restriction. 34 Restriction. Collins Cobuild English Language Dictionary (Collins, London, 1987). 35 Agenda for 37th GST Council Meeting, GOODS AND SERVICES TAX COUNCIL, File No: 434/37th GSTCM/GSTC/2019, Aug. 26, 2019, at 56. ³⁶ Gajraj Yadav, A Study of Fundamental Right to Occupation in India, Maharshi Dayanand University, 2011, at 31. ³⁷ P.P. Enterprises v. Union of India, AIR 1982 SC 1016, ¶8. 38 CGST Act, 2017, § 38(1).
- 40 See supra note 35, at 56.

³⁹ CGST Rules, 2017, Rule 59(4).

- ⁴¹ See supra note 18, ¶7.6.
- 42 Kochuni v. State of Madras, 1960 AIR 1080 (S.C.).
- ⁴³ See generally Ministry of Finance, Office Memorandum F. No. GST/INV/FAKE INVOICES/18-19, dated 12.05.2019, ¶3.
- 44 CGST Rules, 2017, Rule 138E, inserted vide Notification No. 74/2018-CT dt. 31.12.2018, made effective from 21.08.2019 vide Notification No. 25/2019-CT dt. 21.06.2019.

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- ⁴⁵ See supra note 36, at 31.
- ⁴⁶ See supra note 18, ¶7.6.
- ⁴⁷ Pathumma v. State of Kerala; AIR 1978 SC 771.
- ⁴⁸ Singh v. Delhi Administration, AIR 1973 SC 1091.
- ⁴⁹ See supra note 35, at 56.
- ⁵⁰ Arora v. Commissioner of Police, AIR 1961 SC 705.
- 51 Ram v. Singh, AIR 1962 SC 1476.
- ⁵² Quemin v. Union of India, AIR 1970 Goa 35.
- 53 See supra note 1 and 2.
- 54 INDIA CONST. art. 14.
- 55 Minutes, 23rd GST Council Meeting, Nov. 10, 2017, at 81.
- 56 *Id*.
- ⁵⁷ Sudipta Bhattacharjee, Amendments Trying to Block Mis-Matched ITC & Nullify Favorable Court Orders Nuances & Legal Tenability, GSTSUTRA (Oct. 14, 2019), http://gstsutra.com/experts/column?sid=587&page=1.
- ⁵⁸ Arise India Limited v. Commissioner of Trade & Taxes, 2017 SCC OnLine Del 11286 (Delhi H.C., 2017).
- ⁵⁹ Abhya Desai, 20% Itc Restriction An Analysis. Yagnesh Desai & Co., Chartered Accountants.
- 60 CGST Act, 2017, § 43A(4).
- 61 See supra note 59.
- 62 Jagannath Singh v. State of U.P., 1962 AIR 1563 (S.C.).
- 63 Inter College Kusmaul, Gorakhpur v. the State of U.P. (All. H.C., Jan. 2006).

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ROLE OF THE JUDICIARY IN INDIAN TAX POLICY - AN EVALUATION OF THE EFFICIENCY OF JUDICIAL OUTCOMES

by Roopashi Khatri

The Indian tax system suffers from an excessive incidence and pendency of tax disputes before civil courts. A certain degree of disputes is unavoidable since the tax code and policy of any jurisdiction (being the outcome of various competing factors) inevitably contains a certain degree of ambiguity. However, a significant amount of unnecessary tax litigation is caused by the development of inconsistent tax jurisprudence. The author details the permissible scope of litigation expected in a tax system that truly complies with the rule of law. Following this, the author surveys two major areas of disputes - namely, the distinction between a "tax" and "fees", and the interpretation of exemption notifications. This demonstrates the significant likelihood of judicial activism by appellate courts in tax disputes, which contributes to a tax policy that is doctrinally incoherent. It is submitted that inconsistent tax jurisprudence contributes to a larger number of disputes since both the taxpayers and the revenue department are uncertain of the outcomes in a tax system where the judiciary enjoys extraordinary jurisdiction in tax disputes. The solution proposed is to identify and enforce a broad set of principles concerning an efficient and fair tax system at the level of the judiciary, in line with international best practices.

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I. INTRODUCTION

The Indian jurist Soli Sorabjee noted that the judges of the Supreme Court of India

have, in many landmark decisions, read their personal preferences into provisions of statutes and the Constitution of India ('Constitution').¹ He further noted the 'atrocious' arrears of disposal of cases by courts in India.² Nonetheless, he notes that "despite dissatisfaction, disillusionment almost bordering on disgust with the laws' scandalous delays and the working of the legal system and the judicial process, the common person still turns to the judiciary."²

In tax matters, it is not only the common person, but also the Department of Revenue, (under the Ministry of Finance, Government of India) that relies on the discretionary jurisdiction of civil courts for remedies against unfavourable tax orders. According to the Economic Survey of India 2017-18,4 the vast majority of tax matters pending before Indian civil courts are appeals preferred by the Department of Revenue itself. Such appeals are preferred against orders of lower authorities (including administrative tribunals), though the Department of Revenue does not win such appeals in nearly eighty-five percent of such appeals. A high incidence of appeals (especially unsuccessful ones) being preferred by revenue authorities is an undesirable trend, since such litigation adds to excessive compliance and leads to additional costs that must be paid off against tax revenues.

In the design of an efficient tax system, it is important for the judiciary to render rulings that balance taxpayer rights with the goal of securing adequate public revenue. I submit that rulings of the Indian judiciary do not apply appropriate legal principles in tax matters. There are at least two possible and mutually incompatible outcomes in tax litigation. On the one hand, courts may apply the argument of the 'interest of public revenue' in a manner that is inconsistent with the legitimate expectations of ordinary taxpayers. On the other hand, courts may inappropriately apply the principles of purposive interpretation in securing taxpayers' rights in the interpretation of a tax code (including an exemption notification), thus, negatively impacting the interest of public revenue. Uncertain judicial outcomes in tax disputes make it difficult to measure expected national revenues and consequently govern the application and distribution of such revenues. Hence, I emphasise on the importance of a comprehensive review of the limited role that civil courts must play in tax disputes and the manner in which

common law principles or tax code may be employed to improve the efficiency of civil courts in this regard.

The division of this paper is as follows. Part II concerns the constitutional framework of taxation. The Constitution comprises various general provisions, tax-specific provisions as well as fundamental rights that may all form the basis of a claim for discretionary judicial remedy in a tax matter. It is submitted that these provisions provide a limited scope for preferring tax appeals. Nonetheless, as demonstrated in Part III, I seek to demonstrate the practical considerations of taxpayers and revenue authorities in seeking wide discretionary remedies by civil courts as opposed to relying on the established administrative mechanisms in resolving tax disputes. Firstly, the various influences in the design of a tax policy means that for any jurisdiction, a tax code may not be drafted in a manner that clearly identifies mutually compatible revenue goals. Secondly, it is submitted that the design of Indian tax administrative tribunals (particularly advance ruling authorities) increases the possibility of taxpayers and the Department of Revenue preferring appeals before civil courts in tax matters.

Parts IV and V of this paper examine two areas where judicial interference may be considerably reduced if not avoided. Part IV discusses the jurisprudence developed by

the Supreme Court in the levy of a 'tax' and 'fees' by a State Legislature. It is argued that the incidence of such disputes may be reduced if had both terms been defined in the Constitution of India. Part V delves into the process of drafting and the interpretation of exemption notifications. Following an overview of the process by which competent authorities determine exemptions, I seek to demonstrate how purposive interpretation may be inappropriately applied in disputes concerning exemption notifications and how this may result in uncertainty as regards the balance between the interest of public revenue or the concerns of taxpayers in tax disputes. The concluding section addresses the way in which the efficiency of civil courts in tax disputes may be improved - by making appropriate amendments to the tax code and the Constitution, or by developing a common law framework that enforces the principles of an efficient and fair tax system.

II. THE CONSTITUTIONAL FRAMEWORK OF TAXATION

The Parliament and State Legislatures of India cannot levy and collect a tax without the 'authority of law'. In this context, the 'authority of law' is to be understood in the context of the provisions of the Constitution. The foregoing key provisions of the Constitution in this regard are discussed below:

■ Fundamental rights - The fundamental rights guaranteed under the Constitution encompass the sphere of taxation as well. In particular, the

Constitution guarantees the freedom of a person not to be compelled to pay such tax, the proceeds of which are specifically appropriated to pay expenses in order to promote or maintain any particular religious or religious denomination.²

- *Tax-specific provisions* These include, for instance:
 - a. The exemption of property of the Union from taxation by a State Legislature,⁸ as well as the property and income of the State from Union taxation;⁹
 - b. Exclusive jurisdiction of the Parliament in terms of levying taxes on the supply of goods or services or both; $\frac{10}{2}$
 - c. Prohibition of State Legislatures from levying and collecting taxes on electricity that is sold to/consumed by the Government (except as provided by the law of the Parliament)!
 - d. Limitations on the power of a State Legislature to tax professions, trades, callings and employments. 12
- Other provisions related to tax matters Certain constitutional provisions concerning trade, commerce and intercourse within the territory of India are applicable to tax statutes. Imposition of restrictions on the freedom of trade, commerce or intercourse by either the Parliament or the State Legislature must be reasonable and necessary in public interest. Further, the Parliament and State Legislatures may not pass laws that discriminate between States as regards inter-state trade. Substantial controversy has arisen (prior to the introduction of the nation-wide goods and services law) regarding the validity of state tax legislations that accorded

preferential tax treatment to intra-state traders or created a higher effective tax

liability for inter-state traders.¹⁸ Taxes as such are not to be understood as *restrictions* on free trade that must be justified as 'reasonable' - rather, they are laws that must satisfy the test of being non-discriminatory.¹⁹ Since a recent amendment to the Constitution has limited the powers of State Legislatures to pass laws in respect of certain taxes applicable to inter-state transactions,²⁰ the question of whether a tax law passed by a State Legislature discriminates between taxable goods and services generated within that State and taxable goods and services from other States does not arise.

■ Entries of the Seventh Schedule - Parliament and State Legislatures may pass laws concerning tax matters in compliance with the Seventh Schedule of the Constitution,²¹ which lists the matters on which the Parliament and State Legislatures exercise either exclusive or concurrent jurisdiction to make laws. Where both a State Legislature and the Parliament have concurrent jurisdiction to make a law and there is inconsistency between the laws enacted by both on a particular matter, the law enacted by the Parliament shall prevail (whether enacted before or after the law of the State Legislature) so long as the law enacted by the Parliament continues to have effect.²²

It is submitted that the aforementioned provisions provide a limited scope of appeals in tax disputes. Accordingly, litigation on tax matters may be broadly classified under two headings. The first comprises of constitutional challenges, which in turn consists of the following:

- Competence-based challenges (i.e. challenge to the power of a federal State or the Union government to legislate on a particular fiscal matter); and
- Rights-based challenges (i.e. challenges to the tax statute on the ground that it violates fundamental rights).²³

The second category comprises substantive tax challenges, involving appeals based on questions of law, which are entertained within the scope of Articles 32 and 226 of the Constitution (as well as any statutory provisions

governing the right to appeal before higher courts in tax disputes). $\frac{24}{10}$ However, as demonstrated in the subsequent part, the choice of preferring an appeal before higher courts in tax disputes is incentivised by practical considerations faced by both the taxpayer and the tax administration.

III. THE LURE OF THE COURT'S REMEDIES

Codified tax policy will always be imperfect. A code will be plagued by many artificial rules that are retained for the purpose of administrative expediency²⁵ and vestiges of rules that no longer serve their purpose as the concerned government gains experience in better tax administration.²⁶ Tax policy may be the outcome of several factors, including but not limited to: administrative feasibility; the level to which economic activities can be taxed (keeping in mind the structure of the economy, the prevalence of the shadow economy or unreported activities, etc.); political influence and lobbying; and desired behavioural control (such as control on certain kinds of consumption through customs, excise and VAT). Edward Zelinsky, a prominent tax commentator describes such factors in the following manner:

"(I)deology, accident, history, inertia, partisanship, public opinion, cultural norms, bureaucratic aggrandisement, the idiosyncrasies of legislators and the legislative process, and the personalities and proclivities of individual decision-

makers, as well as their concern for the public interest, all affect the outcomes of political and administrative processes."27

Due to the competing factors that influence a tax policy, the statutes and delegated legislation of a jurisdiction may not always be efficient in raising the required public revenue. Hence, in practice, a lengthy and complex tax code is likely to take the shape of a catalogue rather than legislation governed by a set of clear, predictable and overarching tax principles.²⁸ This factor contributes to a certain amount of tax litigation that is unavoidable.

Excessive litigation in tax matters stems from the preferences of litigants for the expansive jurisdiction of civil courts. The process of administrative appeals against a demand of tax entails significant costs for taxpayers. Although tax statutes prescribe time limits for completion of proceedings before administrative appellate tribunals, the requirement of complying with the time limit is

qualified with often the phrase 'where it is possible to do so'.²⁹ There are no provisions entailing consequences for authorities that do not adhere to the stipulated time limits in deciding cases. Moreover, appeals before administrative tribunals require the deposit of a percentage of the amount demanded by authorities,³⁰ with only a few legislations empowering tribunal members to grant waiver of this requirement if such payment causes undue hardship to the applicant-taxpayers.³¹

Tax statutes also make provision for the application of 'advance ruling', which is understood either as a 'determination'³² or a decision with respect to specified questions relating to tax liability and other statutory obligations.³³ Such questions may be on law, on fact or both.³⁴ There is a common authority designated for advance rulings in matters concerning income tax, customs duty and excise law.³⁵ This advance ruling authority must comprise of members with stipulated number of years of experience in the judicial and the Indian legal service³⁶—however, proceedings and pronouncement of advance rulings in such matters will not be invalid solely on the grounds of vacancies or defects in the constitution of the advance ruling authority.³⁷

In matters concerning goods and services tax law, the Authority for Advance Ruling as well as the Appellate Authority for Advance Rulings comprise of members who are serving as tax officers and does not comprise of any members from judicial or legal service. Various state authorities have rendered contradictory decisions on the same legal issue, creating uncertainty for taxable businesses that operate in more than one State or Union Territory. Curiously, in the case of advance rulings in goods and services tax matters, if an appeal lies to the

Appellate Authority for Advance Rulings and members of that authority differ on the points of the appeal or the reference, it will be deemed that no advance ruling can be given in that matter,⁴⁰ although appeals may lie from such a decision to the general appellate Authority constituted under the relevant legislation.⁴¹ Without the presence of a judicial member in advance ruling authorities, taxpayers are not afforded legal certainty and fairness in a process that is intended to reduce compliance burdens and avoid unnecessary legal disputes by obtaining a conclusive ruling as regards their tax liability.

Given the excessive costs and time taken by the administrative appellate process. the taxpayers may instead prefer to seek direct relief from High Courts or the Supreme Court where possible.42 Tax statutes stipulate the conditions under which applicants may approach these courts on substantive challenges to their liability—for instance, the taxpayer is required to mandatorily deposit a certain percentage of the disputed amount before the appeal may be entertained.43 It is possible that the taxpayer is unable to prefer an appeal on questions of law-either because the higher courts do not find the matter fit for appeal on questions of law, or because the taxpayer has failed to comply with statutory pre-conditions for an appeal, review or revision of the (including the prescribed limitation period). Under matter circumstances, a taxpayer may prefer to challenge the vires of the law by claiming that contested provision of tax law violates a fundamental right of the taxpayer. The latter is advantageous for a taxpayer since revenue authorities are compelled to refund the entire amount collected under a law that is subsequently held ultra vires whereas the right to refund, and otherwise challenge a tax assessment or collection, under a valid law is confined within the limits of the tax statute that provides such remedv.44

The above reasoning explains why taxpayers would prefer seeking remedies under the expansive jurisdiction of civil courts, but does not readily justify why the revenue authorities prefers the vast majority of appeals (even though they unambiguously lose sixty-five percent of such cases).⁴⁵ A possible explanation is that once a taxpayer is successful in their matter before a lower authority, revenue authorities contest the decision before higher authorities in order to secure necessary public revenue. It is likely that the revenue authorities consider that the possible revenue gain from contesting taxpayer-favourable decisions outweighs the cost of litigation. It is also possible that the judiciary overreaches its jurisdiction in tax disputes or does not apply tax jurisprudence consistently—these

aspects may contribute to legal uncertainty and compel revenue authorities to continue contesting tax matters before civil courts.

It is not incorrect to state that the Indian tax administration treats judicial decisions in tax matters in a reactive and predictive way rather than a proactive way. For instance, in the case of excise law, a specific provision was introduced in Indian law by which the central government would be authorised not to reverse the central excise input credit to the taxpayer if the court of law finds (subsequent to tax assessment) that the goods for which the taxpayer was charged duty are no longer excisable. This is applicable provided that the taxpayer has not preferred a refund application—which implies that the Central Government is authorised in law to retain input credit that is not claimed by taxpayers.

A similar amendment was made subsequent to the decision rendered in *Vodafone International Holdings BV* v. *Union of India*, ⁴⁸ where the provision of law governing income deemed to accrue or arise in India ⁴⁹ was held not to be extended so as to apply to indirect transfers of capital assets or property situated in India. The Parliament introduced a proviso to an explanation of the said provision, with retrospective effect from the date of the judgment, by which the judgment no longer had any effect with respect to direct and indirect transfers of capital assets held as investments in Foreign Institutional Investors. ⁵⁰

Official data indicates that nearly \$1.04 trillion USD of public revenue remains

uncollected due to pendency of tax disputes before courts.⁵¹ The response of the government has been to reduce the pendency of tax disputes before courts. The following sections explore two areas that illustrate the various factors contributing to excessive pendency of tax disputes—namely, constitutional litigation (challenging the *vires* of a tax law), and litigation involving the interpretation of ambiguous tax provisions.

IV. THE OMISSION OF DEFINITIONS OF 'TAXES' AND 'FEES'

An important area of litigation in India is the distinction between 'tax' and 'fees'. Fees⁵² and taxes⁵³ are designated as separate entries in the Seventh Schedule of the Constitution. Disputes often arise on the issue whether legislation

enacted by the State Legislature that purports to levy fees is, in substance, imposing a tax that transgresses the limits imposed under the Seventh Schedule on such legislature's ability to levy particular taxes. 'Fees' is not defined in the Constitution. 'Taxation' is defined as follows:'the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly'.⁵⁴ Hence, the definitions provided under the Constitution do not give sufficient guidance as to the true distinction between taxes and fees.

Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ('Shirur Mutt') was the first decision rendered by the Supreme Court that provided some guidance on the distinction between 'tax' and 'fees' under the Constitution. 55 The case concerned a challenge to various provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 ('MHRCE Act') and involved disputes on a number of questions of law. In so far as the tax dispute raised in this case, §76 of the MHRCE Act made it compulsory for all religious institutions to pay to the State an annual contribution not exceeding five percent of their income. This contribution was purportedly levied in lieu of the services rendered to such religious institutions by the State government and their officers functioning under the MHRCE Act. 56 On behalf of such religious institutions, the chief contention raised against the said levy was that it outside the competence of the State Legislature. 57 Since the said levy was a tax, the Union Legislature alone was competent to charge it by virtue of Entry 97 of List I or Article 248(1) of the Constitution. The Supreme Court found that §76 of the MHRCE Act was void as it was beyond the legislative competence of the Madras State Legislature.

While considering the validity of §76 of the MHRCE Act, the Supreme Court in Shirur Mutt considered the basis of distinguishing between a tax and a fee under the constitutional framework. The Apex Court held that this distinction could not lie in the element of compulsion in their payment. It acknowledged that neither ordinary parlance nor technical literature ascribed any special meanings to the terms 'taxes', 'fees' or special assessments of any other designation.

As such, subsequent cases have clarified that the measure of the levy does not distinguish between a tax and a fee either—hence, a fee does not become a tax merely because it is calculated on a value-added basis or directly proportionate to the income level of the person/institution paying the fees (which are common feature of taxes). Hence, in another matter concerning the challenge against a cess on coal-bearing land (that the State Legislature concerned was competent to levy), the Supreme Court held that such a cess could be levied with reference to

the annual value of such land without losing its character as a cess and becoming a $\tan^2 \frac{58}{2}$

Instead, the Supreme Court in Shirur Mutt sought to distinguish a 'tax' and 'fees' on the basis that "a tax is levied as a part of a common burden, while a fees confer a special capacity, although the special advantage...is secondary to the primary motive of regulation in the public interest". 59 In other words, fees are *quid pro quo* payments for services rendered by the Government in a select capacity.

In Shirur Mutt, the Madras legislation sought to levy the concerned fees in respect of services rendered by the State Government to religious institutions. It was argued that religious institutions did not want these services, and that being compelled to pay fees for services it did not wish to consume was the same as paying a compulsory tax. The Supreme Court observed in this regard that "(i)f in the larger interest of the public, a State considers it desirable that some special service should be done for certain people, the people must accept these services, whether willing or not". 50 This ruling did not clarify the manner in which a court of law could determine whether a compulsory and special service for a section of society was distinct from general duties of the State for which taxes are utilised.

Subsequent decisions of the Supreme Court have clarified that the special benefits provided by the State Legislature must have a 'direct, close and reasonable correlation' between the persons who must be the fees and the expenditures from the proceeds of the fees. This replaced the strict application of the *quid pro quo* test laid down by the Supreme Court in Shirur Mutt. There was a necessity to establish a 'broad, reasonable and general correlationship' (not with precise, mathematical exactitude) between the levy and the class of people on which the fee is levied. A validly levied 'fees' still retains its character if incidental benefits are available to the public at large as a result application of the proceeds for special benefits.

It has been clarified by the Supreme Court that fees must be segregated and not merged with the public revenue of the States. 64 The methodology used by courts of law for distinguishing between a tax and a fee has been to

evaluate expenditures by the State Government out of the proceeds of the 'fee'. In one case,⁶⁵ the constitutional validity of a license fee for plying rickshaws for hire within the municipal limits of the city of Varanasi was challenged. As per the findings of the Supreme Court, expenditures made by the Municipal Board constituted only forty-four percent of the revenue from the 'fees'. Hence, it could not be established that the license fees were *quid pro quo* payments in exchange of special services.

State authorities must show with reasonable certainty that they have spent 'at least a good and substantial portion of the amount collected on account of fees' (i.e. within the broad range of two-third or three-fourths) on the purported special services for which the fees was collected. Moreover, a State Legislature must follow a prescribed procedure in its application for appropriations from the Consolidated Fund of that State for the purpose of using any amounts as fees for a specific purpose as opposed to a general expenditure. 12

A broad test developed by the courts (as described above) in order to distinguish

fees from a tax in order to address the lacunae in the Constitution, which does not clearly define the terms, 'fees', 'tax' or any similar terms. As demonstrated above, the position of law as regards the difference between a tax and fees has evolved over many years. In the present day, State legislatures must comply with the correct constitutional provisions and statutorily mandated procedure before they may levy a fees (provided that they are competent to do so in terms of the Seventh Schedule). However, this conceptual clarity may not be readily apparent to taxpayers, particularly if the provision of law levying fees is worded similarly to provisions that levy taxes. Taxpayers may believe that a constitutional challenge correctly lies against such levy as being outside the competence of the concerned State legislatures, leading to litigation that may possibly be avoidable with greater certainty in the legal system instead.

V. EXEMPTION NOTIFICATIONS

A. THE PROCESS OF DRAFTING EXEMPTION NOTIFICATIONS

Indirect tax statutes empower the Central Government to make a general exemption in respect of any notified goods or services of any specified description, if it is satisfied that such exemption is necessary in public interest. This exemption may be with respect to the whole or part of the duty payable and may be subject to fulfilment of certain conditions. General exemptions must be granted by notification in the Official Gazette. However, under exceptional circumstances, the Central Government may instead grant a specific exemption for goods or services in respect of which tax is payable by a special order, which must state such reasons for such exemption.

As regards direct tax, the Central Government is empowered to make special exemptions in certain circumstances; ²⁰ in most cases, the heads of income that should be exempted from the tax base are specified in the statute. ²¹ This is a departure from an earlier provision of the direct tax law that empowered the Central Government to make general exemptions. ²²

In accordance with the rules mandating the manner of conducting the business of the Government of India, ²³ the Department of Revenue (Ministry of Finance) is responsible for administering tax matters. ²⁴ The exceptions include:

- *Matters relating to Tax-Free Bonds* allotted to the Department of Foreign Affairs under the Ministry of Finance;⁷⁵
- *The Income-Tax Appellate Tribunal* allotted to the Department of Legal Affairs under the Ministry of Law and Justice;⁷⁶
- *Taxation of motor vehicles* allotted to the Ministry of Road Transport and Highways; 77
- Recovery of claims in a State in respect of taxes and other public demands that arise out of such State— allotted to the Department of Land Resources under the Ministry of Rural Development.⁷⁸

However, previous concurrence, or approval by way of a general or special order, is

required by the Ministry of Finance if any other Department seeks to issue any orders which have any 'financial bearing' (including, notably, 'any grant of land or assignment of revenue or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession').

The Department of Revenue must mandatorily consult the Ministry of Law and Justice if, pursuant to a statutory power conferred on the Government, it seeks to make a rule or order of a 'general character'. Moreover, the Department of Revenue cannot take decisions on a matter if the subject concerns another Department as well—i.e. if the decision of the Department of Revenue as regards that matter is likely to affect the transaction of business allotted to another Department. A decision with respect to such a matter can only be taken when all concerned departments have concurred or, in the absence of such concurrence,

the Cabinet⁸³ takes or authorises a decision.⁸⁴ Unless the Minister-in-Charge, the President or the Prime Minister have not sought for the matter to be brought before the Cabinet,⁸⁵ the unanimous decision of the Department of Revenue and the Ministry of Law and Justice in respect of a particular matter (in exercise of the statutory power conferred on the Government) will be valid law.

B. THE INTERPRETATION OF EXEMPTIONS

1. Purposive Interpretation of Exemption Notifications

It is often stated that 'there is no equity about a tax'.86 This phrase is often cited by courts of law in order to support a plain meaning interpretation of a provision of tax law that is unambiguous.87 The application of the principles of statutory interpretation do not differ in the case of tax provisions and exemption notifications.88 In interpreting exemption notifications, a purposive approach involves a reading of the entire notification in order to determine the context in which the tax benefit is granted. A purposive interpretation is only applied when the language of the notification is ambiguous or renders more than one meaning.89

In a case involving sales tax benefits to dealers of saleable steel under various exemption notifications issued by the government of Bihar during the period of 1995 to 2002, a dispute arose as to whether such exemption was to be given to existing manufacturers that had set up new/expanded/diversified/modernised units or only new manufacturers (having set up operations of dealing in saleable steel for the first time). The Apex Court applied purposive interpretation (involving a combined reading of the industrial policy developed by the concerned government over the years) in determining that the State legislature did not intend the extension of sales tax benefits to existing units.⁹⁰

Similarly, another dispute concerned the application of an excise duty exemption for certain capital goods (which were otherwise excisable) as long as they were used by hundred percent export oriented undertakings under certain conditions. Broadly, the dispute arose as regards the interpretation of the term "in

connection with manufacture". In other words, it was unclear whether the taxpayer could claim an exemption for capital goods that were being used indirectly for

manufacture (such as air conditioners, typewriters, tables and chairs), where the main product being manufactured by the applicant was filament yarn. The Supreme Court adopted a purposive test approach and determined that the exemption notification, read as a whole, intended for the tax benefit to be given only as regards capital goods directly used in the manufacture of the final product (thus denying the tax benefit to the said applicant in this case).⁹¹

2. Substantive Preconditions and Procedural/Technical Provisions of an Exemption Notification

However, a unique principle as regards the interpretation of tax exemption notifications is the distinction between conditions of a substantive character (which a taxpayer must satisfy in order to be eligible for an exemption) and provisions of a procedural or technical nature (the non-compliance of which does not necessarily disentitle the taxpayer from the benefit of the tax exemption). 92 A case that demonstrates the shortcomings of the said principle is Commr. of Customs v. Tullow India Operations Ltd. 93 ('Tullow'). Here, an importer of seismic data tapes and seismic survey vessels could not procure an essentiality certificate from the Department of Hydrocarbons (Government of India) in time prior to the import (which took place in 1999). While provisional clearance was granted for moving the imported goods into the domestic tariff area, the duty concession was denied. This was because the relevant notification stipulated a condition that importers of such items must avail an "essentiality certificate" in order to gain the benefit of the concession. It was found that although the importer had duly applied for a certificate, the Department of Hydrocarbons had not awarded the certificate to the importer on time (not on account of any fault of the importer).

It is relevant to note that the local Customs Clearing House had issued a notification stating that concessions and exemptions would not be denied due to delay in time alone (although no reference was given to delay in procuring a necessary certificate prior to date of importation). The Supreme Court observed that the Customs House was not the appropriate authority to issue instructions and that only the Central Board of Indirect Taxes and Customs is entitled to issue such instructions by authority of statute. However, the Supreme Court believed that denial of an exemption due to delays in grant of certificate was an unfair outcome. The Tribunal went by the strict terms of the exemption notification and rejected the benefit of the exemption, even though it observed that this outcome

would be unfair. ⁹⁶ The Supreme Court observed that the importer ought not to have been denied the tax exemption merely because a government authority failed to issue a mandated certificate in a timely manner—however, the matter was remitted to the Commissioner of Customs. To this end, the Supreme Court in Tullow relied on precedent to support the conclusion that the benefit of a tax exemption ought not to be denied because a department failed to issue a mandated certificate in a timely manner. ⁹⁷

3. The strange notion of "equitable conduct" in Tullow

In the opinion of the Supreme Court, the importer, being a government company, had procured the items for purposes that had already been approved by other government agencies. In other words, the Supreme Court did not consider that any significant public interest would be damaged if a concession were to be granted to the assessee when the "formal" approval of a single authority (namely the Department of

Hydrocarbons) was not obtained in time. However, this approach ignored the separation of duties among different departments of the government that is envisaged in the concerned tax legislation. It is submitted that the function of the court of law in such a circumstance ought to have been restricted to reviewing the importer's strict compliance with such legislative scheme. The requirement of a separate certificate for the purposes of a tax exemption need not be dismissed as a mere formality, since such certification could be necessary. For instance, certification by a separate authority may be required for the purpose of correct valuation of imports or any other aspects relevant to the taxation of imports that the Department of Revenue may not be competent to verify through its limited resources, authority or permitted verification processes.

It is submitted that the correct approach in the aforementioned case would have been for the Apex Court adhere to the principle of administrative deference by rejecting the appeal of the importer. The administration could have used its ordinary powers (described above) in issuing a retroactive exemption notification or a department circular *de novo*, providing an exemption to the specific importer having regard to the unique circumstances (which resulted in a denial of exemption for no fault of the importer) and the general public interest in providing the exemption retroactively.²⁸ It was also possible for the importer to seek a direct remedy against the undue delay by the department responsible for issuing the certificate (for instance, through the writ jurisdictions of higher courts challenging the delay caused by the Department of Hydrocarbons). It is submitted that by denying the benefit to the importer, the Supreme Court would have issued a ruling that was consistent with the rule of law (where taxpayers would have to

approach appropriate forums and follow prescribed procedure in order to receive legal remedies).

Instead, by bypassing the appropriate procedure to address the delay in issuing the essentiality certificate (and hence directly awarding the tax benefit to the taxpayer), the ruling of the Supreme Court in Tullow diminishes the conceptual clarity of remedies in tax disputes. An applicant can be considered to have satisfied a strict exemption condition if the applicant displays "equitable conduct" or has done "everything the applicant could have reasonably done to comply with the law".

It may be argued that Tullow merely expands on the principle of distinguishing substantive and technical/procedural pre-conditions in an exemption notification. In other words, the Supreme Court in Tullow considered the essentiality certificate to be a mere procedural provision:

"The principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning where for the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed liberally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning."99

However, this observation was not based on a careful consideration of the true nature of the pre-condition to produce an essentiality certificate issued by the Department of Hydrocarbons. The Supreme Court in Tullow did not offer a complete reasoning as to why the importer was deemed to have satisfied the eligibility clauses

in the exemption notification. Although the Supreme Court had perused notifications and the procedural/case history, the counsel for the importer had not produced any specific material or raised an argument to support the conclusion of the Supreme Court. The case was remitted to jurisdictional commissioner, thus repeating the process of assessment proceedings and litigation. The Supreme Court qualified this order by stating that:

"It is made clear that in the event the order of the Commissioner goes against the contentions of the assessee Tullow, it will be open to it to question the correctness thereof before an appropriate forum."

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The jurisdictional commissioner rejected the importer's application for exemption benefits and the matter once again reached the stage of appeal before the Supreme Court of India in a division bench that comprised of a judge common to both proceedings ('Tullow II'). 101

In Tullow II, the Commissioner of Customs rejected the grant for exemption notification, finding that the essentiality certificate was rejected by the Department of Hydrocarbons because the importer had not obtained a valid oil exploration license ('License') at the relevant time. The importer was first required to obtain the License before the Department of Hydrocarbons could issue an essentiality certificate. The License was issued in 2000, having retrospective effect since 1997. The Department of Hydrocarbons rejected the importer's application for an essentiality certificate in the year 1999 (because the License had not been issued then), but granted an essentiality certificate in 2004—however, such essentiality certificate issued in 2004 did not have retrospective operation similar to the License. Once again, the Supreme Court in Tullow II considered that the importer had a License in law due to its retrospective effect as of the time of the contested import (being the year 1999). In Tullow II, the Supreme Court categorically emphasises that the "equitable conduct" of the taxpayer is sufficient in order to gain a tax exemption:

"The conduct of the Appellant must, therefore, be judged from the factual matrix obtaining therein...Once it is held that the Ministry of Petroleum had renewed the licence and the Directorate General of Hydrocarbons had issued the essentiality certificate (in 2004), the conditions precedent for obtaining exemption in terms of the exemption notification stood fully satisfied". 102

To summarise, the Supreme Court in Tullow and Tullow II did not explicitly distinguish the essentiality certificate as either substantive precondition or a procedural/technical provision in interpreting exemption notifications (leading to doctrinal obscurity). Rather, the Apex Court introduced the element of "equitable conduct" in satisfying the conditions necessary for obtaining a tax exemption.

4. No equity in tax under Indian law

As such, the usage of 'equity' by Supreme Courts may be misleading in this context. Under English law, equity is said to retain some distinction from common law (at least an 'intellectual' one) due to its history. ¹⁰³ In India, there is

no similar separation of legal rights and equitable rights, 104 and equitable remedies

take the form of statutory rights.¹⁰⁵ Courts may mollify the harsh effect of tax laws under 'equitable considerations',¹⁰⁶ but the better view is that these remedies nonetheless stem from statute. For instance, the decision of the Supreme Court in *Mafatlal Industries Ltd.* v. *Union of India*¹⁰⁷ ('Mafatlal') considers that equitable consideration of unjust enrichment for mistaken payments of tax¹⁰⁸ stems from §72 of the Indian Contract Act, 1872. The said provision falls under the chapter of the Indian Contract Act, 1872, on relations resembling those created by contract. Mafatlal differs from the approach taken under English common law of identifying an equitable basis of relief in case of mistaken payments of tax,¹⁰⁹ particularly when the applicant has demonstrated equitable conduct in a timely manner.¹¹⁰

The Supreme Court has on another occasion held that a government may withdraw concessions in public interest without being liable to claims of promissory estoppel from taxpayers that have relied on these concessions to their detriment. Although a challenge against the withdrawal of a tax concession may be sustained on the grounds of the violation of the taxpayer's fundamental rights or statutory rights, overwhelming public interest will override concerns regarding the violation of a legitimate expectation of a taxpayer to receive a particular tax benefit. Taxes that are validly levied at one point of time have been said to create a vested right in favour of the State — delay in collection of those taxes (whether attributable to administration or taxpayer's fault) or subsequent amendments to the law under which the tax was originally levied may not result in a loss of the vested right in the government's favour (or may conversely mean that taxpayers are not guaranteed a vested right under earlier laws).

In contrast to such decisions that are favourable to the government, the suggestion by the Supreme Court in Mafatlal that a tax may be considered as payments resembling those under contract or contract-like relationships, for which

a remedy of unjust enrichment can be found in case of mistaken payments to the government. It is reiterated that the principle of unjust enrichment under Indian law does not expand the scope of taxpayer right for refund in any way. However, equating a tax to a payment under contract or contract-like relationshipsis incompatible with the understanding that tax payments are amounts to which the government has a right if it is collected under a valid levy. It is unclear whether the understanding of the nature of tax in terms of Mafatlal or the extension of equity to tax under Indian law will provide an opportunity for taxpayers to seek creative remedies or complicate the principles concerning the nature of tax in future cases.

5. A case of judicial activism and not equity

The correct understanding is that the Supreme Court did not exercise any "equitable jurisdiction" in Tullow and Tullow II but engaged in judicial activism based on its preferences. This is evidenced by the fact that in a case with a similar fact pattern, non-compliance with registration rules disentitled a taxpayer from exemptions. In *Indian Oil Corpn. Ltd.* v. *CCE* ('Indian Oil Corporation'), the appellant was entitled to an excise duty exemption if, *inter alia*, it obtained an excise registration certificate in terms of Rule 8 of the Central Excise Rules, 1944 (as it stood then). For the disputed period, the appellant had failed to renew this excise registration certificate.

The Supreme Court denied the excise duty exemption, in terms of Rule 192 of Central Excise Rules, 1944 (as it stood then) which mandated that the duty

concession would cease on the expiry of the registration certificate. The Supreme Court in Indian Oil Corporation distinguished the matter from Tullow and correctly interpreted the provisions of the Central Excise Rules, 1944 (as they stood then) in strict terms. It is argued that the Supreme Court in Tullow and Tullow II ought to have been equally faithful to the strict conditions of the exemption notification. It ought to have considered that the Department of Hydrocarbons in the latter cases may not have been in a position to issue a retroactive essentiality certificate under law and that "equitable conduct" is not a satisfactory basis to grant a tax exemption to an appellant.

Tullow is now established precedent that has been cited in subsequent cases to justify a purposive interpretation in a wide variety of factual circumstances. 117 The decision effectively permits courts of law to evaluate the conduct of a taxpayer and other surrounding circumstances to determine whether

it had satisfied the requirements of equitable remedies, 118 even though an appellate court is limited to questions of law andis not authorised to evaluate the eligibility of taxpayers to gain concessions by considering facts. Rather, it is submitted that Tullow (along with Tullow II) is correctly to be understood as an example of the dangers of uninhibited purposive interpretation (which is nearly indistinguishable from impermissible judicial activism).

There are valid circumstances in which courts may be entitled in principle to make choices based on its own policy considerations. For instance, in interpreting a double tax avoidance agreement, a jurisdiction may express preference of either a static interpretation of internal law (i.e. as the internal law existed on the date the treaty was executed) or an ambulatory interpretation (i.e. as the internal law exists at the time of interpretation, which may be several years after the date of execution of treaty). For a court of law in such a jurisdiction, this choice may depend purely upon the approach that appears to render the best purposive interpretation of a tax statute.

Inevitably, the choice of interpreting a tax treaty using the ambulatory method holds a country accountable to its bilateral/multilateral obligations (in the case of the treaties under European Union law) regardless of changes in the law. On the other hand, a static interpretation of tax treaties may sometimes (but not always) imply the protection of domestic concerns over bilateral/multilateral obligations under contemporary law. In other words, the way in which a domestic court interprets tax treaties unavoidably influences the tax policy of the concerned nation. However, policy choices by the courts of law are not always appropriate in so far as tax law is concerned, since it may contribute to inconsistency within the internal legal system (with taxpayers and the revenue departments having no certainty as to whether the legislation/administrative rule or judicial ruling having priority or a better chance of prevailing over the other).

VI. CONCLUSION

It is argued that the legislature is the appropriate authority to make the policy choices it considers necessary to increase public goods. Accordingly, courts bound by the principle of administrative deference would limit remedies in tax matters must, hence, be based on objective principles of legislative interpretation. However, given the overreaching jurisdiction that the Supreme Court has developed as a result of the principles in cases such as Tullow, the revenue authority and taxpayers are perhaps correct in viewing the court of law as an institution with unusual and extraordinary

power to resolve tax dispute in their favour. Judicial

activism (that is enabled by ambiguous tax legislations) reduces conceptual clarity of a taxpayer's rights or a government's revenue entitlements under the Indian legal system. Litigants (including government authorities and taxpayers) must have certainty about the limited nature of the court's powers and should not be misled into lengthy litigation in the hope of extraordinary remedies.

If civil courts are to continue enjoying an extraordinary jurisdiction in tax matters (where administrative deference is more appropriate), the next best alternative is for the courts to actively enforce efficiency in the tax administration by identifying and enforcing a broad set of well-founded principles. According to the Organization of Economic Development (OECD), the international standards for an effective tax system include neutrality in tax outcomes, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility in the tax system. It is possible to enforce these standards in a way that does not require the court to overstep its limits in judicial review. For instance, if a particular department has unreasonably delayed the issue of a certificate that a taxpayer requires for obtaining a tax exemption (similar to the factual matrix in Tullow), it is appropriate for the courts of law to first evaluate the taxpayer's claims under such broad principles. This may help a court identify a better solution to the taxpayer's dispute caused by administrative delay—for instance, a writ remedy.

This principle-based approach will ensure that civil courts will be capable of self-regulation and may avoid awarding inappropriate rights and remedies in tax disputes. Further, government departments will be under stricter judicial scrutiny for ensuring an efficient tax system and tax disputes. Disputes that may be resolved at the stage of the departmental inquiry need not result in long years of pending litigation—a violation of a taxpayer's legitimate expectation to efficient tax collection may be remedied by sanctions againstadministrative authorities that unnecessarily delay the tax administration process. In essence, the principle-based approach reinforces conceptual clarity about the complex nature of a tax system and the importance of the judiciary to exercise administrative deference.

I acknowledge that a principle-based approach alone may not be sufficient to address the incompatibility of judicial remedies with coherence in the tax system. A long-term solution to reducing the incidence and pendency of tax disputes involves a deliberate cohesion between tax administrations and the judiciary. A tax policy that is taxpayer and business friendly, transparent and coherent will significantly reduce litigation. Till such time that cohesion is achieved in tax policy and tax jurisprudence, the remedies of the courts and administrative practices may remain incompatible to a great degree and result in national revenue undesirably being clogged in the appellate mechanism.

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¹ Soli J. Sorabjee, Role of the Judiciary: Boon or Bane?, 38(3/4) India International Centre Quarterly 126 (2012).

² *Id.*, 14.

³ *Id.*, 14.

- ⁴ MINISTRY OF FINANCE, GOVERNMENT OF INDIA, *Economic Survey of India* 2017-2018 (Vol. I) available at http://mofapp.nic.in: 8080/economicsurvey/ (Last visited on April 31, 2019)('Economic Survey of India').
- ⁵ Id., 136.
- ⁶ The Constitution of India, Art. 265.
- ⁷ The Constitution of India, Art. 27.
- 8 The Constitution of India, Art. 285.
- ⁹ The Constitution of India, Art. 289.
- ¹⁰ The Constitution of India, Art. 279A (§12 inserted vide the Constitution (One Hundred and First) Amendment Act, 2016); Constitution of India, Art. 286 (§13 inserted vide the Constitution (One Hundred and First) Amendment Act, 2016).
- ¹¹ The Constitution of India, Art. 287.
- ¹² The Constitution of India, Art. 276.
- 13 The Constitution of India, Part XIII.
- ¹⁴ The Constitution of India, Art. 302.
- ¹⁵ The Constitution of India, Art. 304(b).
- ¹⁶ The Constitution of India, Art. 303(1). (However, in terms of Art. 303(2) of the Constitution of India, the Parliament is not prevented "from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India".)
- ¹⁷ The Constitution of India, Art. 304(a).
- ¹⁸ Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232, Shree Mahavir Oil Mills v. State of J&K, (1996) 11 SCC 39; Video Electronics (P) Ltd. v. State of Punjab, (1990) 3 SCC 87: AIR 1990 SC 820.
- 19 Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1: AIR 2016 SC 5617.
- ²⁰ The Constitution (One Hundred and First Amendment) Act, 2016, §17(b).
- ²¹ The Constitution of India, Art. 246.
- ²² The Constitution of India, Art. 251.
- Harish Salve, Retrospective Taxation—the Indian Experience, available at https://www.biicl.org/files/6722_panel_two_harish_salve.pdf (Last visited on October 13, 2019).
- ²⁴ See Central Goods and Services Tax Act, 2017, §117; Central Goods and Services Tax Act, 2017, § 118; Customs Act, 1962, §§130-§130(a); The Income Tax Act, 1961, Chapter XX, Parts CC and D.
- ²⁵ Victor Thuronyi, *Drafting Tax Legislation* in Tax Law Design and Drafting (1st ed., 1996).
- ²⁶ Richard K. Gordon & Victor Thuronyi, Tax Legislative Process in Tax Law Design and Drafting (1st ed., 1996).
- ²⁷ Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch : A Procedural Defence of Tax Expenditures and Tax Institutions*, 102(5) YALE L.J. 1165 (1993), 1167.
- ²⁸ John Avery Jones, *Tax Law: Rules or Principles?*, 17(3) FISCAL STUDIES 63 (1996).
- ²⁹ Central Excise Act, 1944, §35A(4A), §35C(2A); Central Goods and Services Tax Act, 2017, §107(13); Central Goods and Services Tax Act, 2017, §113(4); Customs Act, 1962, §28A(4A), §129B(2A); The Income Tax Act, 1961, §254(2A).
- ³⁰ Central Excise Act, 1944, §35F; Central Goods and Services Tax Act, 2017, §107(6), §112(8); Customs Act, 1962, §129E; Income Tax Act, 1961, §253(6).
- ³¹ Customs Act, 1962, Proviso to §129E. However, this waiver concerns demand "in respect of goods which are not under the control of the customs authorities or any penalty levied under (the Customs) Act" pending disposal of such appeal.

- 32 The Income Tax Act, 1961, §245N(a).
- ³³ Central Goods and Services Tax Act, 2017, §97(2); Central Excise Act, 1944, §23C(2), §28F; Customs Act, 1962, §28(2)(H); Model State Goods and Services Tax Act, 2016, §97(2).
- ³⁴ Income Tax Department, Authority of Advance Ruling, https://www.incometaxindia.gov.in/pages/international-taxation/advance-ruling.aspx (Last visited on April 31, 2019); The Central Goods and Services Tax Act, 2017, §97(2).
- ³⁵ The Income Tax Act, 1961, §245Q(1); Customs Act, 1962, §28(F) read with Customs (Advance Rulings) Rules, 2002 (as amended by Rule 2 Customs (Advance Rulings) Amendment Rules, 2017), Rule 2(b).
- ³⁶ The Income Tax Act, 1961, §245(O).
- ³⁷ The Income Tax Act, 1961, §245(P).
- 38 The Central Goods and Services Tax Act, 2017, §96, §99; Model State Goods and Services Tax Act, 2016, §95, §96.
- ³⁹ For a comprehensive study of the contradictory rulings rendered by advance ruling authorities under the Goods and Services Tax law in India, see National Law School of India University, Bangalore, *Report on Goods and Services Tax Probable Areas of Disputes* (2019).
- ⁴⁰ The Central Goods and Services Tax Act, 2017, §101(3).
- ⁴¹ The Central Goods and Services Tax Act, 2017, §107(1). (Advance rulings from the authority constituted under the Income Tax Act, 1961 are not appealable in regular administrative tribunals in terms of §246 Income Tax Act, 1961).
- ⁴² The Constitution of India, Arts. 32, 226.
- 43 See the Customs Act, 1962, §129E; The Central Goods and Services Tax Act, 2017, §107(6), §112(8).
- ⁴⁴ Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.
- ⁴⁵ MINISTRY OF FINANCE, *supra* note 4, 138.
- ⁴⁶ The Central Excise Act, 1944, §5B.
- ⁴⁷ Id.
- ⁴⁸ Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613: (2012) 341 ITR 1.
- ⁴⁹ The Income Tax Act, 1961, §9.
- ⁵⁰ The Income Tax Act, 1961, §9(1)(i), Explanation 5, First Proviso.
- ⁵¹ MINISTRY OF FINANCE, *supra* note 4, 138.
- ⁵² The Constitution of India, Schedule VII, List I, Entries 77, 96; List II, Entries 3, 66; List III, Entries 44, 47 (relating to court fees, fees relating to other matters and stamp duty).
- ⁵³ The Constitution of India, Schedule VII, List I, Entries 82, 83, 84, 86, 89, 90, 97; List II, Entries 46, 49, 50, 54, 57, 58, 60, 61, 62; List III, Entries 35, 43.
- ⁵⁴ The Constitution of India, Art. 366(28).
- 55 Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.
- ⁵⁶ *Id*.
- ⁵⁷ *Id*.
- ⁵⁸ State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201: AIR 2005 SC 1646.
- ⁵⁹ Commr., *Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, 47.
- 60 Id., 51.
- 61 Kewal Krishan Puri v. State of Punjab, (1980) 1 SCC 416.

- ⁶² See Bangalore Development Authority v. Aircraft Employees' Coop. Society Ltd., (2012) 3 SCC 442; Kishi Upaj Mandi Samiti v. Orient Paper & Industries Ltd., (1995) 1 SCC 655; Sreenivasa General Traders v. State of A.P., (1983) 4 SCC 353.
- ⁶³ See Bangalore Development Authority v. Aircraft Employees' Coop. Society Ltd., (2012) 3 SCC 442; ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476.
- ⁶⁴ Govt. of Madras v. Zenith Lamp and Electrical Ltd., (1973) 1 SCC 162: AIR 1973 SC 724.
- ⁶⁵ Nagar Mahapalika, Varanasi v. Durga Das Bhattacharya, AIR 1968 SC 1119. (However, the Supreme Court subsequently examined the powers of taxation under the concerned statute (since the State had powers to levy a tax and a fee under separate entries of the Seventh Schedule). The concerned legislation required the Municipal Board to comply with specific procedures in order to levy taxes or fees. Since these procedures were not complied with in the levy of the license fees under consideration, the imposition was found to be not in the nature of a tax. This involved a purposive interpretation of a legislation that clearly distinguished the procedure for levying a tax and a fee.)
- 66 Kewal Krishan Puri v. State of Punjab, (1980) 1 SCC 416.
- 67 The Constitution of India, Art. 202.
- ⁶⁸ The Central Excise Act, 1944, §5A(1); The Central Goods and Services Tax Act, 2017, §11(1); Customs Act, 1962, §25(1); The Integrated Goods and Services Tax Act, 2017, §6(1); Model State Goods and Services Tax Act, 2016, Cl. 10(1).(It may be noted, however, that in terms of the Central Excise Act, 1944, §5A(1), Proviso (as regards excise duty), a general exemption does not apply with respect to excisable goods that are a) produced or manufactured in a free-trade zone, special economic zone or a hundred per-cent export-oriented undertaking; b) then brought into India).
- ⁶⁹ The Central Excise Act, 1944, §5A(2); The Central Goods and Services Tax Act, 2017, §11(2); Customs Act, 1962, §25(2); The Integrated Goods and Services Tax Act, 2017, §6(2); Model State Goods and Services Tax Act, 2016, Clause 10(1).
- ⁷⁰ The Income Tax Act, 1961, §293A (This is in respect of exemptions in favour of class of persons engaged in specified business in connection with prospecting for or extraction or production of mineral oils with, for or under authorisation of the Central Government); Income Tax Act, 1961, §294 (This is in respect of the power of exemption (for assessment years prior to 1967) in order to reduce the hardship of the application of the said Act in the Union Territories of India); Wealth Tax Act, 1957, §46A (repealed)(This is in respect of exemption in order to reduce the hardship of the application of the said Act in the Union Territories of India).
- 71 The Income Tax Act, 1961, Chapters IV, V, VI-A.
- ⁷² The Indian Income Tax Act, 1922, §60 (repealed). (This is in respect of powers of Central Government (prior to the year 1939) to make general exemption and provide relief of tax liability (in the specific circumstance where tax assessee has received salary in arrears/advance in a particular financial year and the applicable tax rate is higher as a result of this receipt.)
- ⁷³ Government of India (Allocation of Business) Rules, 1961, Rule 2. (The said Rules are enacted in pursuance of the Constitution of India, Art. 77(3), enabling Parliament to enact rules for the purpose of convenient transaction of the business of the Government of India).
- ⁷⁴ Government of India (Allocation of Business) Rules, 1961, Schedule I, Item 30.
- ⁷⁵ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No. 26, Item 28.
- ⁷⁶ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No. 12, Item 48.
- ⁷⁷ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No. 6, Item 64.
- ⁷⁸ Government of India (Allocation of Business) Rules, 1961, Schedule I, Sl. No. 3, Item 66.
- ⁷⁹ Government of India (Transaction of Business) Rules, 1961; See also Government of India (Transaction of Business) Rules, 1961, Rule 4(2)(a)(Concerning matters involving "any abandonment of revenue or involve any expenditure for which no provision has been made in the appropriation act.")
- 80 Government of India (Transaction of Business) Rules, 1961.
- 81 Government of India (Transaction of Business) Rules, 1961, Rule 4(3)(b).
- 82 Government of India (Transaction of Business) Rules, 1961, Explanation Rule 4(1).

- ⁸³ The Constitution of India, Art. 352(3). (It defines the Union Cabinet as "the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Art. 75 (of the Constitution)."
- 84 Government of India (Transaction of Business) Rules, 1961, Rule 4(1).
- ⁸⁵ Government of India (Transaction of Business) Rules, 1961, Rule 7, read with Government of India (Transaction of Business) Rules, 1961, Schedule II, Item (j), (k) and (n).
- ⁸⁶ See Cape Brandy Syndicate v. Commissioners of Inland Revenue, (1930) 12 TC 358.
- 87 CIT v. Ajax Products Ltd., AIR 1965 SC 1358.
- 88 Hansraj Gordhandas v. H.H. Dave, AIR 1970 SC 755, ¶5.
- 89 See Hico Products Ltd. v. CCE, (1994) 4 SCC 578: AIR 1995 SC 400; Union of India v. Wood Papers Ltd., (1990) 4 SCC 256: AIR 1991 SC 2049; Tata Oil Mills Co. Ltd. v. CCE, (1989) 4 SCC 541: AIR 1990 SC 27.
- 90 TISCO v. State of Jharkhand, (2005) 4 SCC 272: AIR 2005 SC 2871.
- 91 CCE v. Ginni Filaments Ltd., (2005) 3 SCC 378: AIR 2005 SC 1330.
- 92 Mangalore Chemicals and Fertilisers Ltd. v. CCT, 1992 Supp (1) SCC 21: AIR 1992 SC 152, ¶13.
- 93 Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536.
- 94 Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536, ¶20.
- 95 Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536, ¶31-33.
- ⁹⁶ Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536, ¶34.
- 97 CCE v. M.P.V. & Engg. Industries, (2003) 5 SCC 333: (2003) 153 ELT 485, ¶11.
- 98 Customs Act, 1962, §25(1).
- ⁹⁹ Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536, 18.
- 100 Commr. of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789: AIR 2006 SC 536, 21.
- 101 ONGC Ltd. v. Commr. of Customs, (2006) 7 SCC 403.
- ¹⁰² ONGC Ltd. v. Commr. of Customs, (2006) 7 SCC 403, ¶8.
- 103 ALASTAIR HUDSON, EQUITY AND TRUSTS 16, 19 (4th ed., 1995).
- ¹⁰⁴ R.B. Jodha Mal Kuthiala v. CIT, (1971) 3 SCC 369: AIR 1972 SC 126.
- ¹⁰⁵ See generally the Specific Relief Act, 1963.
- ¹⁰⁶ R.B. Jodha Mal Kuthiala v. CIT, (1971) 3 SCC 369: AIR 1972 SC 126.
- ¹⁰⁷ Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.
- ¹⁰⁸ Mistaken payments of tax were distinguished from unconstitutional levies (for which relief was available since the levy fell outside legislative powers) and illegal levies (for which statutory remedy was available).
- 109 Woolwich Equitable Building Society v. Inland Revenue Commissioners, [1992] 3 WLR 366.
- ¹¹⁰ Test Claimants in the *FII Group Litigation* v. *Revenue and Customs Commissioners*, [2012] UKSC 19; Graham Virgo & Amy Goymour, *Avoiding Restitution of Tax*, 71(3) CAMBRIDGE LAW JOURNAL 488 (2012), 491.
- 111 Sharma Transport v. Govt. of A.P., (2002) 2 SCC 188: AIR 2002 SC 322.
- 112 Bannari Amman Sugars Ltd. v. CTO, (2005) 1 SCC 625.
- ¹¹³ The General Clauses Act, 1897, §6; CIT v. Shah Sadiq and Sons, (1987) 3 SCC 516: AIR 1987 SC 1217.
- 114 Prosper Jewel Arcade LLP v. CCT, (2019) 1 KCCR 252; Willowood Chemicals (P) Ltd. v. Union of India, (2018) 19 GSTL 228; Sheen Golden Jewels (India)(P) Ltd. v. State Tax Officer, 2019 SCC OnLine Ker 973: (2019) 23 GSTL 4.
- ¹¹⁵ TVS Motor Co. Ltd. v. State of T.N., (2009) 13 SCC 403: AIR 2018 SC 5624.

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- ¹¹⁶ Indian Oil Corpn. Ltd. v. CCE, (2012) 5 SCC 574.
- ¹¹⁷ Mangalore Chemicals and Fertilisers Ltd. v. CCT, 1992 Supp (1) SCC 21: AIR 1992 SC 152; State of Orissa v. Tata Sponge Iron Ltd., (2007) 8 SCC 189; A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala, (2007) 2 SCC 725; IVRCL Infrastructure and Projects Ltd. v. Commr. of Customs, (2015) 13 SCC 198; Zuari Industries Ltd. v. CCE, 2007 SCC OnLine CESTAT 3606: (2007) 8 RC 568.
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PROVISIONAL ATTACHMENT UNDER THE GOODS AND SERVICES TAX ACT - LAWS ON PAPER VERSUS LAW IN PRACTICE

by Salona Mittal

Introduction

We begin with the comments of the eminent jurist Professor Sir William Wade in his treatise, *Administrative Law* (9th Edn.):

The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.

With these prefatory remarks, we delve straight into the legislative provision in question. The Goods and Services Tax (GST) regime was introduced in the country with effect from 1-7-2017 through the 101st Amendment of the Constitution of India¹. As per the Statement of Objects and Reasons of the Central Goods and Services Tax Act, 2017² (CGST Act"), the Act was meant to "simplify and harmonise the indirect tax regime in the country" by subsuming the extant indirect taxes such as central excise, service tax and value added tax, etc. into a unified destination and consumption based indirect tax known as the Goods and Services Tax, which would be payable on "supply" of goods and services.

The present research paper seeks to deliberate on a specific provision of the fiscal legislation that allows the taxation authorities to provisionally attach the properties of the assessee, including bank accounts i.e. Section 83 of the CGST Act³. For ready reference, Section 83 is reproduced below:

- 83. Provisional attachment to protect revenue in certain cases. —
- (1) Where during the pendency of any proceedings under Section 62^{4} or Section 63^{5} or Section 64^{6} or Section 67^{7} or Section 73^{8} or Section 74^{9} , the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.
- (2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Without even going into the text of the section, the heading of Section 83, gives a brief indication of the scope of the section. It is now well settled that heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning¹⁰. According to the heading, Section 83 provides for "provisional attachment", "to protect revenue", "in certain cases". Thus, this section was enacted, as is commonplace in other fiscal statutes (discussed hereinbelow), to provisionally attach properties of the assessee pending certain proceedings in order to protect the interest of the revenue. Such discretion is based on the formation of opinion of the Commissioner.

Such is the nature of the provisional attachment that no notice is given to the assessee before such an attachment, lest such attachment should lose its purpose i.e. the fear of the assessee alienating its properties before recovery can be made. It also cannot be gainsaid that a provisional attachment order, in a way, directly places fetters on the right of an assessee to conduct its business. Thus, it must be clearly understood that this power, as with all discretionary powers, must be exercised sparingly and not in a routine manner because of its far-reaching consequences. Section 83 itself, read with the corresponding rules¹¹, provides for stringent conditions for invoking this section and the procedure to be followed - this being in consonance with the law regarding provisional attachments i.e., that drastic and far-reaching powers must be used only on weighty grounds and reasons.

However, with the benefit of hindsight, we can safely say that law on statute books and law in its practical application, are two very separate phenomenon. The taxing authorities have been issuing orders under Section 83 at the drop of a hat, much to the dismay of the assessees. This has led to evolvement of significant jurisprudence since the assessee is left with no option but to knock on the doors of the constitutional courts, eventually culminating into the judgment of the Supreme Court in *Radha Krishan Industries* v. *State of H.P.*.½, which is most likely to become (even without the benefit of foresight) a locus classicus. This paper also discusses how the evolvement of Judge-made law on Section 83, particularly by the High Courts, has led to issuing of clarificatory guidelines as well as the amendment of the section itself (yet to be notified).

Taking a leaf from earlier statutes

Before dissecting Section 83 of the CGST Act, it is worth noting that powers relating to provisional attachment are normal currency in fiscal statutes. There obviously exists a need to protect the revenue from unscrupulous dealers/assessees. Therefore, various earlier provisions such as Section 281-B of the Income Tax Act, 1961¹³; Section 73-C of Chapter 5 of the Finance Act, 1994¹⁴; Section 11-DDA of the Central Excise Act, 1944¹⁵; Section 127-D of the Customs Act, 1962¹⁶; Section 46-A of the Delhi Value Added Tax Act, 2004; Section 35 of the Maharashtra Value Added Tax, 2002; Section 45 of the Gujarat Value Added Tax Act, 2003, to name a few, contained pari materia provisions for provisional attachment. The basis of it however stems from Order 38 Rule 5 of the Code of Civil Procedure, 1908¹⁷, (CPC) which provides for attachment before judgment.

One may profitably refer to how these provisions have been interpreted by the courts. This is more so in light of the settled principle of law that that where a word has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it¹⁸. This principle, first evolved by courts in England¹⁹, has also found acceptance by the courts in India²⁰.

Order 38 Rule 5 of the Code of Civil Procedure, 1908 - In Raman Tech. & Process Engg. Co. v. Solanki Traders, the Supreme Court of India held that the purpose of attachment before judgment is to prevent the ends of justice from being defeated²¹. Such power "not be exercised mechanically or merely for the asking"²² and that a defendant is not debarred from dealing with her/his property merely because a case is filed against him²³.

Section 281-B of the Income Tax Act, 1961

1. Gandhi Trading CIT²⁴- The Bombay High Court inter alia held that the power of provisional attachment is a drastic power and must only be exercised if there is sufficient material on record to justify the apprehension that the assessee is about to dispose of the whole or any part of her/his property with a view to

thwart the ultimate collection of the demand. It was also warned that such power must not be used to harass the assessee.

- 2. VLS Finance Ltd. v. CIT²⁵ The Delhi High Court inter alia held that the principles of Order 38 Rule 5 CPC is implicit in Section 281-B of the Income Tax Act, 1961.
- 3. Society for Integrated Development in Urban and Rural Areas v. CIT²⁶- The High Court of Andhra Pradesh held that there must be some material on record to show that the Assessing Officer had formed an opinion on the basis thereof that it was necessary to attach the property in order to protect the interests of the revenue.
- 4. Gopal Das Khandelwal v. Union of India²⁷ According to the Allahabad High Court, the power of attachment must be exercised for attachment of the property of only the assessee and no one else.

Section 45 of the Gujarat Value Added Tax Act, 2003

- 1. Vishwanath Realtor v. State of Gujarat²⁸ The opinion formed by the Commissioner must be on some tangible material on objective facts available with the Commissioner such as the past conduct of the dealer or that the dealer is likely to sell her/his property.
- 2. Automark Industries (I) Ltd. State of Gujarat²⁹ Powers under Section 45 of the Gujarat Value Added Tax Act, 2003 are drastic in nature and must be exercised with due care. Such power cannot be exercised merely because assessment proceedings are pending, since it is merely prima facie, ex parteopinion of the assessing authority that a provisional attachment is necessary.

These are settled rules of provisional attachment which find expression not only in statutes but also time-honoured hallowed principles which are followed by the courts of our country. Thus, the legislature, at the time of enacting the CGST Act, was conscious of these principles of provisional attachment (it would be deemed to have been aware of it in any instance 30).

Analysis of Section 83 of the CGST Act

It would be apposite to segregate Section 83 into distinct parts for a better understanding thereof:

- 1. The power under Section 83 can be exercised only during the pendency of proceedings under certain sections.
- 2. These sections are exhaustive Sections 62, 63, 64, 67, 73 or 74 of the CGST Act.
- 3. The power under Section 83 must be exercised by the Commissioner.
- 4. The Commissioner must form an "opinion" that such attachment is "necessary", for the purpose of "protecting the interest of the Government revenue".
- 5. The order of provisional attachment must be in writing.
- 6. The provisional attachment must be of a property belonging to a taxable person.

Section 83 is further fleshed out by Rule 159 of the CGST Rules, which provides for the following:

- 1. The order shall be passed in Form DRC-22, mentioning the details of property.
- 2. The assessee, may, within seven days of order of attachment, file an objection to the attachment to the effect that the said property was or is not liable to attachment.
- 3. If an objection is filed, the Commissioner shall afford an opportunity of hearing to the assessee.
- 4. Thereafter, the Commissioner may release the said property by an order in Form DRC-23.

Probably the most important safeguard against provisional attachment is the

formation of an "opinion" by the Commissioner. The term "opinion" was succinctly explained by Lord Bramwell in *John Derby Allcroft* v. *Lord* (*Bishop*) 31 - "If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him." In *Barium Chemicals Ltd.* v. *Company Law Board* 32 , the Supreme Court while construing Section 237 of the Companies Act, 1956 33 , held that:

- 30. ... Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative....
- 31. ... There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Again, in *Bhikhubhai Vithlabhai Patel* v. *State of Gujarat*³⁴, the Supreme Court was concerned with the term "is of opinion" as appearing in Section 17 of the Gujarat Town

Planning and Urban Development Act, 1976, wherein the Supreme Court held that existence of relevant material is condition precedent for formation of opinion³⁵ and that such opinion cannot be on imaginary grounds or wishful thinking, however laudable they may be³⁶.

The Supreme Court also importantly went on to hold that construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion"37. Therefore, one may argue that even the jurisprudence developed around Section 147 of the Income Tax Act, 196138, which uses the expression "reason to believe" may also apply to Section 83 of the CGST Act. These inter alia include holding of belief in good faith39; such belief not being based on mere suspicion, gossip, or rumour40; such belief not being irrational41; and the reasons to believe having a rational connection with the formation of belief42.

Again, what is also important is the use of the word "necessary" as opposed to "expedient". Necessity would mean something that is indispensable, unavoidable, and impossible to be otherwise or inevitable⁴³. In *J. Jayalalitha* v. *Union of India*⁴⁴, the Supreme Court, while interpreting the term "as may be necessary" used in Section 3 (1) of the Prevention of Corruption Act, 1988⁴⁵, held that:

14. ... The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in the nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of "necessity". It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of a speedy trial. The term "necessary" means what is indispensable, needful or essential.46

Thus, it only when, on the basis of some tangible material, that the taxation

authorities deem that to protect the interest of the revenue, provisional attachment of the properties of the assessee is the *only* viable solution, can such order of provisional attachment be made.

Interpretation by the High Courts

From a bare reading of the provisions, it is discernible that the legislature had, in its wisdom, provided for safeguards as conditions precedent for the use of such a drastic power. The fact that the taxing authorities have been overzealous in their use of Section 83 of the CGST Act is evident from the considerable body of precedents that have emerged from the High Courts in India, despite the legislation being only at its nascent years. Assessees have been constrained to move to the High Courts for protection of their rights. The High Courts have responded fittingly and have had to constantly remind the taxing authorities about the drastic nature of powers of provisional attachment.

Gujarat High Court - The Gujarat High Court can be safely considered to be the flagbearer of development of GST jurisprudence in the country. Several judgments of the Gujarat High Court have described the powers of provisional attachment and the principles thereof. So brazen have been the conduct of the tax authorities in the State, that it even led to the High Court remarking "No wonder, the State of Gujarat has topped the list of States with the highest collection of tax under the GST Act in the country for the year 2020-2021".

- i) Valerius Industries v. Union of India⁴⁷- The formation of opinion of the Commissioner must be based on some credible material disclosing the necessity to provisionally attach the property of the assessee. Further, the reasons to believe for exercise of powers under Section 67 (power of inspection, search and seizure) is in contradistinction to the formation of opinion under Section 83. Just because a search has taken place does not ipso facto necessitate provisional attachment of properties. If the interest of the revenue is sufficiently secured by reversal of the input tax credit (ITC), provisional attachment may not be justified.
- ii) Jay Ambey Filament (P) Ltd. v. Union of India⁴⁸ If the subjective satisfaction under Section 83 is arrived at in absence of any cogent or credible material, then such action amounts to "malice in law". Mechanical exercise of powers under Section 83 ought to be set aside as being arbitrary.
- iii) Patran Steel Rolling Mill Commr. of State Tax⁴⁹ Firstly, no proceedings were pending against the petitioner under the sections mentioned in Section 83 above. Further, it was not the case of the department that the petitioner was a fly by night operator or a habitual offender or that it did not have the means to pay the sum that would be ultimately assessed. In such circumstances, order of provisional attachment was quashed.
- iv) Vinodkumar Murlidhar Chechani v. State of Gujarat⁵⁰ The Gujarat High Court has deprecated the practice of issuing orders of provisional attachment in a routine matter even when the law is well settled. It was suggested that Union of India may come up with appropriate guidelines in this regard.

Punjab and Haryana High Court

- i) Bindal Smelting (P) Ltd. v. Director General⁵¹ Courts are entitled to determine whether the formation of opinion under Section 83 is arbitrary, capricious or whimsical. Mandate of Section 83 is to attach amount lying in fixed deposit account or savings bank account and not an account having a debit balance such as a cash credit account. Attachment of cash credit account having debit balance does not protect interest of revenue, instead it merely ruins the business of a dealer.
- ii) Ufvindia Global Education v. Union of India⁵² The effect of proceedings under

Section 83 comes to end as soon as the proceedings pending in any of the aforesaid Sections i.e. 63 or 64 or 67 or 73 or 74 are over because pendency of the proceedings is the sine qua non. Since proceedings under Section 67 were over, there did not arise any case for continuance of the provisional attachment⁵³. It may also be noted that an order under Section 83 also loses its force after one year from the date of the order, as per Section 83(2) of the CGST Act.

Bombay High Court

- i) Kaish Impex (P) Ltd. Union of India⁵⁴ Since proceedings were initiated under Section 70 of the CGST Act⁵⁵ ("power to summon persons to give evidence and produce documents"), the properties of the assessee could not have been attached, since Section 70 is not one of the sections prescribed in Section 83 of the CGST Act. Even the prescribed form i.e. DRC-22, specifies the particulars of a registered taxable person and which proceedings have been launched against the aforesaid taxable person indicating a nexus between the proceedings pending against a taxable person and provisional attachment of bank account of such taxable person⁵⁶.
- ii) Siddharth Mandavia Union of India⁵⁷ In exercise of powers under Section 83, the taxation authorities cannot attach bank accounts held by persons other than the taxable person in this case, bank accounts held jointly by the petitioner with his wife and with his minor son. Moreover there was no allegation that any money belonging to the assessee or to his firm had been credited into the joint accounts with his wife or with his minor son.
- iii) AJE India (P) Ltd. v. Union of India⁵⁸ Section 83 order was passed against the assessee since proceedings under Section 67 had been initiated. It was held that merely because there is a proceeding under Section 67 would not mean that recourse to such a drastic power as under Section 83 would be an automatic consequence, more so when petitioner has cooperated with the investigation. Interim protection was thus granted.

Delhi High Court

1. Proex Fashion (P) Ltd. v. Govt. of India⁵⁹- Following the judgments in Kaish Impex⁶⁰, Bindal Smelting⁶¹ and Valerius Industries⁶², it was reiterated that powers under Section 83 are far reaching and cannot be invoked when no proceedings under the sections mentioned in Section 83 were pending.

CBIC Guidelines - Clarification with caveats

Ostensibly, the purport of Section 83 of the CGST Act has not been fully appreciated by the taxation authorities. The judgment of the Gujarat High Court in *Chechani* was perhaps the straw that broke the camel's back, with the Gujarat High Court observing that judicial time was being wasted due to mechanical exercise of powers under Section 83. It was therefore suggested that Union of India should consider issuing appropriate guidelines in this regard.

Accordingly, the Central Board of Indirect Taxes and Customs (Board), on 23-2-2021 published certain guidelines for provisional attachment of property under Section 8364. Though the said guidelines do not mention the section under which it is issued, it clear that same has been issued under Section 168(1) of the CGST Act65 which empowers the Board to issue instructions/directions to the Central Tax Officers.66

It was clarified that for forming an opinion, the Commissioner must exercise due diligence and examine facts of the case such as nature of offence, established nature of business and possibility of the assessee disposing of her/his assets⁶⁷. Importantly, the guideline states that "The basis, on which, Commissioner has formed such an opinion, should be duly recorded in file." Since the power under Section 83 is "extraordinary", it had to be resorted with utmost caution. It was clarified that

property (preferably immovable property⁶⁹) of only the taxable person should be attached⁷⁰ and in such a manner that it does not hamper the business activities of the taxable person⁷¹. A welcome direction (which is not borne from the rules) issued under the guidelines is that when bank accounts are attached, it may be released in lieu of certain immovable property furnished by the assessee.

The Board has also laid down certain non-exhaustive illustrations in which the power of provisional attachment can be exercised, such as where the taxable person has:

- a) supplied any goods/services without an invoice;
- b) issued an invoice without supply of goods or services;
- c) fraudulently availed input tax credit;
- d) fraudulently obtained refund;
- e) collected tax but failed to pay the same to the exchequer within three months; and
- f) fraudulently passed on input tax credit.

The Board seems to have a missed a trick. The power of provisional attachment is not so much dependent on the merits of the case (as enumerated in the six categories above) as it is on the possibility of the taxable person thwarting the ultimate demand by alienating its assets. A good working test was laid down in *Patran Steel*? i.e., where the taxable person is habitual offender or "fly-by-night" operator or where there exists a reasonable apprehension that such person will alienate assets to defeat the ultimate demand or that the assessee may not be in a position to pay the demand since the assessee is going into insolvency/liquidation. It is this apprehension that must form the basis of opinion of the Commissioner and not strictly the merits of the case itself, since there are multiple ways in which interest of the revenue can be protected.

Supreme Court's analysis of provisional attachment - Death knell to arbitrary exercise of powers We may now turn to the judgment of the Supreme Court in *Radha Krishan Industries*⁷³, which, in a sense, seems to be a culmination of jurisprudence developed by the High Courts - with the Supreme Court referring to many of the cases stated hereinabove. It is interesting to note the observations of Justice D.Y. Chandrachud during the course of hearing of this particular case⁷⁴. Justice Chandrachud is reported to have observed that "(t)he Parliament had intended the GST to be a citizen-friendly tax structure. The purpose of the Act is lost by the manner in which tax law is enforced in our country" and that the culture of "business are all fraudulent" needs to be given a go-by.

It was further observed that just because the department has account numbers of the assessee does not give them a licence to start attaching the bank accounts dehors any threat of alienation of assets or the assessee being subject to liquidation or winding up. An order of provisional attachment was likened to a "pre-emptive strike" and such powers were termed to be "draconian". A need was felt to lay down the law regarding provisional attachment so that the message percolates to the actual authorities.

In the judgment authored by Justice Chandrachud, His Lordship has, in his inimitable style, succinctly and lucidly laid down the law in relation to provisional attachments under the GST regime. The author takes the liberty of summarising this for brevity:

i) The power to levy a provisional attachment is draconian in nature and the legislature was in fact conscious of the draconian nature of the power since it conditioned the exercise of such power by employing specific statutory language⁷⁵.

- ii) The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue⁷⁶.
- iii) By using the word "necessary" instead of "expedient", the legislature intended that that the interest of the revenue can be protected only by a provisional attachment. Necessity postulates a more stringent requirement than "expediency" [77].
- iv) Provisional attachment orders must conform to both statutory and procedural requirements. Such provisions do not enable the Commissioner to make preemptive strikes merely because property is available for being attached.
- v) There must exist a proximate or live link between the need for the attachment and the purpose which it is intended to secure. Moreover, the Commissioner, in the formation of such belief, acts on some tangible material.
- vi) Rule 159(5) provides for post-provisional attachment right of (a) submitting an objection to the attachment; and (b) an opportunity of being heard. These dual safeguards have been provided since a business entity whose bank account is attached is seriously prejudiced by the inability to utilise the proceeds of the account (or her/his property) for the purposes of business⁸⁰.
- vii) The Commissioner who hears such objection must pass a reasoned order accepting or rejecting such objections, lest the purpose of subjecting such order to judicial scrutiny be defeated⁸¹.
- viii) Although not provided in the rules, an opportunity should be given to the assessee to offer any alternative form of security in lieu of the attachment³².
- ix) After the final order under Section 74 was passed and an appeal had also been filed, the order of provisional attachment must come to an end83.
- x) In the facts of the case, it was noticed that it was the department's case that the appellant had availed ITC on the strength of invoices issued by certain other company and such other company had fraudulently passed on the ITC to the appellant. Therefore "in view of the facts involved in (the) case", it was deemed fit to order provisional attachment of the appellant's account. The Supreme Court held that the order of the Joint Commissioner contains absolutely no basis for the formation of the opinion that a provisional attachment was necessary to safeguard the interest of the revenue and that no tangible material has been disclosed.

It is extremely germane to note at this stage that in the recent guidelines issued by the Board on 23-2-2021, one of the grounds on which provisional attachment order may be passed is fraudulent availment of ITC and fraudulent passing on of ITC. In the author's humble opinion if these conditions are the only grounds for invoking such drastic powers, it would be in teeth of the Supreme Court's judgment, which has held that even in such cases, there must be some tangible material to show that the taxable person intended to defeat the interest of revenue.

The Supreme Court's judgment in *Radha Krishan*⁸⁴ provides much needed clarity on the scope of powers of Section 83. It is now up to the taxation authorities to follow the Supreme Court's dicta in letter and spirit and refrain from arbitrary and unreasonable exercise of their discretionary powers.

The amendment to Section 83 - Two steps backward

From the body of the case law emerging above, it can be seen that courts had proscribed provisional attachments in cases where requirements of Section 83 were not met such as where proceedings were not pending under the sections mentioned in Section 83 or where attachment had been made of properties of persons/entities other than the taxable person. It seems however that this did not go down well with the Revenue Department.

The first tinge of disapproval can be seen in the 39th meeting of the GST Council held on 14-3-2020⁸⁵ wherein it was deliberated that there is a need to amend Section 83 of the CGST Act such that the words "during the pendency" be changed to proceedings initiated under Chapters 12, 14 or Chapter 15. The need to make such amendment was felt since once a search under Section 67 gets completed, the provisional attachment order ceases to exist. It was stated that such interpretation "defeated the very purpose of attachment". Further, it was also deemed necessary to include not only the properties of the taxable person but also of the "beneficiary" since in most cases of fake invoices, the taxable person hardly has any assets⁸⁶.

It is in this background that Section 115 of the Finance Act, 202187 substituted Section 83(1) of the CGST Act with the following:

83. (1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1-A) of Section 122⁸⁸, in such manner as may be prescribed.

The following comparative chart of the provision as it stood before and after its amendment, will shed light on the nature of changes made (although yet to be notified):

Section 83 before amendment	Section 83 after amendment		
·	The powers under Section 83 can be exercised <i>after the initiation</i> of proceedings under certain chapters.		
	These chapters include - Chapter 12 (Assessment - Sections 59 to 64); Chapter 14 (inspection, search, seizure and arrest); and Chapter 15 (demands and recovery)		
The power under Section 83 must be exercised by the Commissioner.	Same as before		
The Commissioner must form an "opinion" that such attachment is "necessary", for the purpose of "protecting the interest of the Government revenue".	Same as before		
The order of provisional attachment must be in writing.	Same as before		
The provisional attachment must be of a property belonging to a taxable person.	The provisional attachment can be of a property belonging to a taxable person or any person specified in sub-section (1-A) of Section 122.		

Therefore, there are three major areas where amendments have been made⁸⁹. The amendments and few issues with regard thereto are delineated:

i) First and foremost is the change from "pendency" of proceedings to "initiation" of proceedings. Therefore, a provisional attachment can technically now continue, even if there are no pending proceedings under the Chapters 12, 14 and 15. The memorandum explaining provisions of Finance Bill, 2021⁹⁰ expressly states that such change was made so that provisional attachment shall remain valid for the entire period starting from the initiation of any proceeding under the said chapter till the expiry of period of one year from the date of order. This may have a

disastrous impact on the working capital position of the business $\frac{91}{2}$.

- ii) Secondly, a provisional attachment can be issued under any of the sections mentioned in Chapters 12, 14 and 15. For instance, merely on issuance of summons under Section 70, the Commissioner may provisionally attach the properties of the taxable person. Further, even when the taxable person cooperates and produces all documents and evidences and seemingly the purpose of issuing summons is over, an order of provisional attachment can still continue since the condition now is "initiation" of proceedings and not its "pendency". Another instance may be taken Section 79⁹² authorises the Department to issue garnishee notices to bank for recovery of dues. Now, as per the amended Section 83, not only can the taxable person be subjected to recovery proceedings under Section 79 but also attachment of its bank account under Section 83. This makes little to no sense since, by issuing a garnishee notice, the interest of the revenue is already protected.
- iii) The third change is bringing into its bracket, persons other than the taxable persons i.e. persons specified in Section 122(1-A) of the CGST Act. Although the intention of legislature to curb fake invoicing is laudatory, one cannot rule out the possibility of an innocent taxpayer being roped in and having her/his assets blocked only because of the malfeasance of the main taxpayer.

However, what remains after the amendment is the requirement of the Commissioner to form an opinion on tangible material that provisional attachment is "necessary" for the protection of the interest of the revenue. This may prove to be an important safeguard even though the scope of Section 83 may have been enlarged.

Conclusion

From the entire gamut of the law revolving provisional attachment, it cannot be gainsaid that the power of provisional attachment is drastic and must be exercised sparingly. The High Courts have, even before the GST regime, and especially after coming into force of the GST regime, leaned towards a strict interpretation of these provisions. Provisional attachment is in fact detrimental to the revenue in the sense that if it is utilised in the overzealous manner that it has been, it will eventually lead to closure of business of the taxable person - which will only lead to a drop in revenue.

As rightly remarked by the Supreme Court, the change also needs to be brought in the mentality that all businessmen are fraudsters. The Department needs to be sympathetic to the fact that provisional attachment can lead to stifling one's business. Such power should be invoked only when extremely necessary. No doubt this power is necessary - but as with any other discretionary power, it is subject to the rigours of judicial review on the grounds of arbitrariness and procedural infirmity.

Finally, the changes brought by the Finance Act, 2021, though yet to be notified, seems to be yet another attempt by the Department to retain unbridled powers unto themselves. These amendments, as highlighted above, expand the scope of exercise of its powers. However, they are still subject to formation of an opinion by the Commissioner, which may be the silver lining. It remains to be seen how such amendment is interpreted by the courts. If past experience is anything to go by, the taxation authorities must be cautious of any arbitrary exercise of their discretion, lest the constitutional courts may have to step in to remind them of their duty to act in furtherance of public good.

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¹ http://www.scconline.com/DocumentLink/4386Cb1k.

² http://www.scconline.com/DocumentLink/ZN57RKH6.

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<sup>3</sup> http://www.scconline.com/DocumentLink/HFf8fXg7. Please note that S. 83 of the CGST Act is pari materia to S. 83 the State GST Acts. Thus, all references in this article to S. 83 of the CGST Act may deem to be a reference to Section 83 of the State GST Acts.
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- ⁴ http://www.scconline.com/DocumentLink/e2MJL2hh.
- ⁵ http://www.scconline.com/DocumentLink/5d4FLa80.
- ⁶ http://www.scconline.com/DocumentLink/wdV8quZz.
- ⁷ http://www.scconline.com/DocumentLink/90xSH4G7.
- 8 http://www.scconline.com/DocumentLink/1M50Giwx.
- 9 http://www.scconline.com/DocumentLink/4WfogRLL.
- ¹⁰ Union of India v. ABN Amro Bank, (2013) 16 SCC 490, para 38
- ¹¹ R. 159 of the Central Goods and Services Rules, 2017
- 12 2021 SCC OnLine SC 334
- 13 http://www.scconline.com/DocumentLink/6j9ulrSh.
- 14 http://www.scconline.com/DocumentLink/wD8UgpM8.
- 15 http://www.scconline.com/DocumentLink/Pf23wTW0.
- ¹⁶ http://www.scconline.com/DocumentLink/fN5HmKk7.
- 17 http://www.scconline.com/DocumentLink/CU2Jmtq6.
- ¹⁸ Barras v. Aberdeen Steam Trawling and Fishing Co., [1933] A.C. 402 (HL) http://www.scconline.com/DocumentLink/N9wriQ30
- 19 Greaves v. Tofield, [1880] 14 Ch.D. 563 (CA); Cathcart, Ex parte, Camphell, In re, [1870] 5 Ch. App. 703; Webb v. Outrim, [1907] A.C. 81 (PC).
- ²⁰ See Banarsi Debi v. ITO, AIR 1964 SC 1742; Diwan Bros. v. Central Bank of India, (1976) 3 SCC 800.
- 21 (2008) 2 SCC 302 (para 4).
- ²² *Id.*, para 5.
- ²³ *Id.*, para 7.
- ²⁴ 1999 SCC OnLine Bom 967
- ²⁵ 2000 SCC OnLine Del 575
- ²⁶ 2001 SCC OnLine AP 1457
- ²⁷ 2010 SCC OnLine All 654
- ²⁸ 2015 SCC OnLine Guj 6564
- ²⁹ 2014 SCC OnLine Guj 14217.
- $^{\rm 30}$ See Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661, para 104
- 31 [1891] A.C. 666 (HL)
- 32 1966 Supp SCR 311
- 33 http://www.scconline.com/DocumentLink/4l3F59pj.
- 34 (2008) 4 SCC 144
- 35 *Id.*, para 23.
- ³⁶ *Id.*, para 24.

- ³⁷ *Id.*, para 32.
- 38 http://www.scconline.com/DocumentLink/2gy820dO.
- ³⁹ Calcutta Discount Co. Ltd. v. ITO, AIR 1961 SC 372
- 40 Sheo Nath Singh v. Appellate CIT, (1972) 3 SCC 234
- 41 S. Ganga Saran & Sons (P) Ltd. v. ITO, (1981) 3 SCC 143
- ⁴² ITO v. Lakhamani Mewal Dass, (1976) 3 SCC 757
- ⁴³ P. Ramanatha Aiyar, *Advanced Law Lexicon* (6th Edn. 2009, LexisNexis).
- 44 (1999) 5 SCC 138
- 45 http://www.scconline.com/DocumentLink/08xrs9fS.
- ⁴⁶ ITO v. Lakhamani Mewal Dass, (1976) 3 SCC 757, pp. 154-155.
- ⁴⁷ 2019 SCC OnLine Guj 6866
- ⁴⁸ 2020 SCC OnLine Guj 3009
- ⁴⁹ 2019 SCC OnLine Guj 6867
- 50 2020 SCC OnLine Guj 3010
- 51 2019 SCC OnLine P&H 6015
- 52 2020 SCC OnLine P&H 2796
- ⁵³ It is relevant to note that the Punjab and Haryana High Court, has, in reaching the above conclusion that Section 67 proceedings had culminated, relied on the judgment of the Gujarat High Court in *Kushal Ltd.* v. *Union of India*, SCA No. 19533 of 2019. Against the said judgment, the Union of India had approached the Supreme Court and vide order dated 16-11-2020 it was directed that the *Kushal Ltd.* (Supra) shall be kept in abeyance and cannot be followed in other cases.
- ⁵⁴ 2020 SCC OnLine Bom 125.
- 55 http://www.scconline.com/DocumentLink/SsAK2flL.
- ⁵⁶ This judgment has been repeatedly followed to grant similar reliefs in similar fact situations (See *DNB Multitrade India (P) Ltd.* v. *Union of India*, 2020 SCC OnLine Bom 2117; *Gehna Trading LLP* v. *Union of India*, 2020 SCC OnLine Bom 2115).
- ⁵⁷ 2020 SCC OnLine Bom 2110
- 58 2020 SCC OnLine Bom 4489
- ⁵⁹ 2021 SCC OnLine Del 2082.
- ⁶⁰ DNB Multitrade India (P) Ltd. v. Union of India, 2020 SCC OnLine Bom 2117; Gehna Trading LLP v. Union of India, 2020 SCC OnLine Bom 2115.
- 61 2020 SCC OnLine P&H 2796
- 62 2020 SCC OnLine Guj 3009.
- 63 2019 SCC OnLine P&H 6015
- ⁶⁴ Circular No. CBEC-20/16/05/2021-GST/359 issued GST Policy Wing, Central Board of Indirect Taxes and Customs available at https://www.cbic.gov.in/resources//htdocs-cbec/gst/Guidelines%20for%20Provisional%20Attachment.pdf.
- 65 http://www.scconline.com/DocumentLink/9BLU3b0a.
- ⁶⁶ One may refer to *Commr. of Customs* v. *Indian Oil Corpn. Ltd.*, (2004) 3 SCC 488 which states that circulars/instructions by the department are binding on the department.
- ⁶⁷ 2000 SCC OnLine Del 575, Para 3.1.3.

- 68 Ibid, Para 3.1.4.
- 69 Ibid, Para 3.4.4.
- 70 Ibid, Para 3.4.3.
- ⁷¹ *Ibid*, Para 3.4.5.
- 72 2020 SCC OnLine Guj 3010
- 73 2021 SCC OnLine SC 334
- ⁷⁴ Mehal Jain, Parliament Intended GST as Citizen-Friendly Tax Structure, But its Purpose Lost by the Manner in which it is Enforced: Supreme Court, LiveLaw, 6-4-2021 (available at https://www.livelaw.in/top-stories/supreme-court-gst-parliament-citizen-friendly-purpose-lost-by-enforcement-government-172211).
- 75 2021 SCC OnLine SC 334
- ⁷⁶ *Id.*, para 48.
- 77 Id., para 49.
- ⁷⁸ *Id.*, para 49.
- ⁷⁹ *Id.*, para 50.
- 80 Id., para 56.
- 81 *Id.*, para 56.
- 82 Id., para 56. Please note that this in line with the guidelines issued by the Board on 23-2-2021 which also speaks of an alternate security.
- 83 Id., para 70.
- 84 2021 SCC OnLine SC 334
- ⁸⁵ Minutes of Meeting of the 39th GST Council held on 14-3-2020 in New Delhi (available at http://www.gstcouncil.gov.in/sites/default/files/Signed%20Minutes%2039th%20GSTCM.pdf).
- 86 *Id.*, Para 25.4.
- 87 http://www.scconline.com/DocumentLink/5cJ44q8n
- 88 http://www.scconline.com/DocumentLink/JX2Y8U1V.
- 89 It may be noted that Section 115 of the Finance Act, 2021 is yet to be notified.
- 90 Memorandum Explaining the Provisions in Finance Bill, 2021, Government of India, available at https://www.indiabudget.gov.in/doc/memo.pdf.
- ⁹¹ Deepak Joshi, *Drastic Amendments to the Power of Provisional Attachment Under CGST Act, 2017 Department Proposes, Budget Disposes,* [2021] 83 GST 57 (Mag.).
- 92 http://www.scconline.com/DocumentLink/6102yHzR.

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List of Relevant Judgments and FAQ

LIST OF RELEVANT JUDGMENTS

Sl. No.	Citation	Case details
1	Small Scale Industrial Manufactures Association (Registered) Vs. Union of India (2021) 8 SCC 511	There is limited scope of Judicial review in economy and economic policy decision of government – Wisdom and advisability of economic policy are not amenable to judicial review.
2	P.V Ramana Reddy Vs. Union of India 2019 SCC Online TS 3332 / (2019) 3 ALT 313 (DB)	When no FIR is registered under section 69(1) of the GST Act, 2017 petitioner cannot invoke section 438 of Cr.P.C. for Anticipatory bail however, can approach High Court under Article of 226 of the Constitution of India.
3	Skill Lotto Solutions Pvt. Ltd Vs. Union of India and others 2020 SCC Online SC 990	Whether levy of tax on lottery is discriminatory and violative of Articles 14, 19(1)(g), 301 and 304 of the Constitution of India? Held – While computing taxable value of supply the prize
		money is not to be excluded for the purpose of levy of GST.
4	Union of India and another Vs. Mohit Mineral Private	Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?
Ltd. (2019) 2 SCC 599		Held – Compensation to States Cess and GST the two taxes or imposts are separate and distinct imposts and on two different aspects of a transaction are permissible "in law there is no overlapping".
5	Union of India and Another Vs. Mohit Minerals Pvt. Ltd through Director 2022 SCC Online SC 657	The levy imposed on the 'Service' aspect of the transaction of import is in violation of the principle of 'composite supply' enshrined under Section 2(30) read with section 8 of the CGST Act. Since the Indian importer is liable to pay services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line would be in violation of Section 8 of the CGST Act.
6	Union of India Vs. Bharti Airtel Ltd and others (2022) 4 SCC 328	Assessee cannot be permitted to unilaterally carry out rectification of his returns submitted electronically in Form GSTR-3B, which inevitably would affect obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.

	STATE LEVEL CONFERENCE ON GOODS AND SERVICES TAX			
7	Union of India and others Vs. VKC Footsteps India Pvt. Ltd. (2022) 2 SCC 603	It is not the function of the court in the fiscal arena to compel Parliament to go further and to do more by expanding the coverage of the legislation or to bring in uniformity of rates, which would amount to judicial encroachment on legislative powers.		
		There exist no constitutional right to claim a refund – Refund is a matter of a statutory prescription.		
		Distinction between goods and services as well as input goods and input services explained.		
8	State of West Bengal and others Vs. Calcutta Club Limited, (2019) 19 SCC 107	members is not taxable or exigibile under the Finance Act,		
9	Srijan Reality (P) Ltd VS. Commissioner of Service Tax, Service Tax Commissionerate – II Kolkata and ors. Manu/ WB/0515/2019	by raising bills on such occupants and realizing electricity consumption charges from such occupants, is a service		
10	Commissioner of Service Tax, Ahmedabad Vs. Adani Gas Ltd., Manu/ SC/0651/2020	equipment) by the gas supplier company to its industrial,		
11	Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company and others (2018) 9 SCC 1	-In case of ambiguity in charging provisions, the benefit necessarily goes in favour of assessee, but for an exemption notification or exemption clause the benefit of ambiguity must be strictly interpreted in favour of the Revenue / State.		
		- The question whether assessee falls in the notification or in the exemption clause, has to be strictly construed and when once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly the court may construe the notification by giving full play bestowing wider		

and liberal construction.

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12	Material Recycling Association of India Vs. Union of India and others 2020 SCC Online Guj 3205	Whether provision under section 13(8)(b) of the Integrated Goods Services Tax Act, 2018 (IGST Act, 2017) (i.e. the place of supply of intermediary services shall be the location of the supplier of the services) is ultra vires under Article 14, 19, 265 and 286 of the Constitution of India? Held – The Parliament has legislated to consider the location of the service provider of intermediary to be pace of supply, and the similar situation was also existing in service tax regime with effect from 1st October, 2014 and such same situation is continued in GST regime also. Being consistent the same cannot be treated as "Export of Services" under the IGST Act, 2017 and has been rightly included in section 13(8)(b) of IGST Act to consider the location of supplier of service as place of supply so as to attract CGST and SGST – provision is not ultra vires to the constitution.
13	Union of India and another Vs. V.V.F. Limited and Another, (2020) 20 SCC 57	- Applicability of Promissory Estoppel being equitable doctrine, held, can be moulded to suit the particular situation, however, primacy of public interest over promissory estoppel Withdrawal of exemption in public interest, court ought not to interfere with fiscal policy where Government acts in public interest The doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make.

FAQ

Frequently Asked Questions on Penalties Under GST

Q1. What are the prescribed offences under CGST/SGST Act?

Ans: The CGST/SGST Act codifies the offences and penalties in Chapter XVI. The Act lists 21 offences in section 122, apart from the penalty prescribed under section 10 for availing compounding by a taxable person who is not eligible for it. The said offences are as follows: -

- (1) Making a supply without invoice or with false/incorrect invoice;
- (2) Issuing an invoice without making supply;
- (3) Not paying tax collected for a period exceeding three months;
- (4) Not paying tax collected in contravention of the CGST/SGST Act for a period exceeding 3 months;
- (5) Non deduction or lower deduction of tax deducted at source or not depositing tax deducted at source under section 51;
- (6) Non collection or lower collection of or non-payment of tax collectible at source under section 52;
- (7) Availing/utilizing input tax credit without actual receipt of goods and/or services;
- (8) Fraudulently obtaining any refund;
- (9) Availing/distributing input tax credit by an Input Service Distributor in violation of Section 20;
- (10) Furnishing false information or falsification of financial records or furnishing of fake accounts/documents with intent to evade payment of tax;
- (11) Failure to register despite being liable to pay tax;
- (12) Furnishing false information regarding registration particulars either at the time of applying for registration or subsequently;
- (13) Obstructing or preventing any official in discharge of his duty;
- (14) Transporting goods without prescribed documents;
- (15) Suppressing turnover leading to tax evasion;
- (16) Failure to maintain accounts/documents in the manner specified in the Act or failure to retain accounts/documents for the period specified in the Act;
- (17) Failure to furnish information/documents required by an officer in terms of the Act/Rules or furnishing false information/documents during the course of any proceeding;

- (18) Supplying/transporting/storing any goods liable to confiscation;
- (19) Issuing invoice or document using GSTIN of another person;
- (20) Tampering/destroying any material evidence;
- (21) Disposing of/tampering with goods detained/seized/attached under the Act.

Q2. What is meant by the term penalty?

Ans. The word "penalty" has not been defined in the CGST/SGST, but judicial pronouncements and principles of jurisprudence have laid down the nature of a penalty as:

- a temporary punishment or a sum of money imposed by statute, to be paid as punishment for the commission of a certain offence;
- a punishment imposed by law or contract for doing or failing to do something that was the duty of a party to do.

Q3. What is the quantum of penalty provided for in the CGST/SGST Act?

Ans. Section 122(1) provides that any taxable person who has committed any of the offences mentioned in section 122 shall be punished with a penalty that shall be higher of the following amounts:

- ❖ The amount of tax evaded, fraudulently obtained as refund, availed as credit or not deducted or collected or short deducted or short collected, or
- **♦** A sum of ₹ 10,000.

Further Section 122(2) provides that any registered person who has not paid tax or makes a short payment of tax on supplies shall be a liable to penalty which will be the higher of:

- ❖ 10% of the tax not paid or short paid, or
- **❖** ₹10,000.

Q4. Is any penalty prescribed for any person other than the taxable person?

Ans. Yes. Section I22(3) provides for levy of penalty extending to ₹25,000 for any person who-

- ❖ aids or abets any of the 21 offences,
- deals in any way (whether receiving, supplying, storing or transporting) with goods that are liable to confiscation,
- * receives or deals with supply of services in contravention of the Act,
- fails to appear before an authority who has issued a summon,
- fails to issue any invoice for a supply or account for any invoice in his books of accounts.

Q5. What is the penalty provided for any contravention for which no separate penalty has been prescribed under CGST/SGST Act?

Ans. Section 125 of the CGST/SGST Act provides that any person who contravenes any provision of the Act or the rules made under this Act for which no separate penalty has been prescribed shall be punishable with a penalty that may extend to ₹25,000.

Q6. What action can be taken for transportation of goods without valid documents or attempted to be removed without proper record in books?

Ans. If any person transports any goods are stores any such goods while in transit without the documents prescribed under the Act (*i.e.* invoice and a declaration) or supplies or stores any goods that have not been recorded in the books or account maintained by him, then such goods shall be liable for detention along with any vehicle on which they are being transported.

Where owner comes forward: Such goods shall be released on payment of the applicable tax and penalty equal to 100% tax or upon furnishing of security equivalent to the said amount.

In case of exempted goods, penalty is 2 % of value of goods or ₹25,000 whichever is lesser.

Where owner does not come forward: Such goods shall be released on payment of the applicable tax and penalty equal to 50% of value of goods or upon furnishing of security equivalent to the said amount.

In case of exempted goods, penalty is 5 % of value of goods or ₹25,000 whichever is lesser.

Q7. What is the penalty prescribed for a person who opts for composition scheme despite being ineligible for the said scheme?

Ans. Section 10(5) provides that if a person who has paid under composition levy is found as not being eligible for compounding then such person shall be liable to penalty to an amount equivalent to the tax payable by him under the provisions of the Act i.e. as a normal taxable person and that this penalty shall be in addition to the tax payable by him.

Q8. What happens to the goods upon confiscation of goods by the proper officer?

Ans. Upon confiscation, the title in the confiscated goods shall vest in the Government and every Police officer to whom the proper officer makes a request in this behalf, shall assist in taking possession of the goods.

Q9. After confiscation, is it required to give option to the person to redeem the goods?

Ans. Yes. In terms of section 130(2), the Owner or the person in-charge of the goods liable to configuration is to be given the option for fine (not exceeding market price of confiscated goods) in lieu of confiscation. This fine shall be in addition to the tax and other charges payable in respect of such goods.

Q10. Can any conveyance carrying goods without cover of prescribed documents be subject to confiscation?

Ans. Yes. Section 130 provides that any conveyance carrying goods without the cover of any documents or declaration prescribed under the Act shall be liable to confiscation. However, if the owner of the conveyance proves that the goods were being transported without cover of the required documents/declarations without his knowledge or connivance or without the knowledge or connivance of his agent than the conveyance shall not be liable to confiscation as aforesaid.

Q11. What is Prosecution?

Ans. Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender. Section 198 of the Criminal Procedure Code defines "prosecution" as the institution and carrying on of the legal proceedings against a person.

Q12. Which are the offences which warrant prosecution under the CGST/SGST Act?

Ans. Section 132 of the CGST/SGST Act codifies the major offences under the Act which warrant institution of criminal proceedings and prosecution. 12 such major offences have been listed as follows:

- (a) Making a supply without issuing an invoice or upon issuance of a false/incorrect invoice;
- (b) Issuing an invoice without making supply;
- (c) Not paying any amount collected as tax for a period exceeding 3 months;
- (d) Availing or utilizing credit of input tax without actual receipt of goods and / or services;
- (e) Obtaining any fraudulent refund;
- (f) evades tax, fraudulently avails ITC or obtains refund by an offence not covered under clauses (a) to (e);
- (g) Furnishing false information or falsification of financial records or furnishing of fake accounts/documents with intent to evade payment of tax;
- (h) Obstructing or preventing any official in the discharge of his duty;
- (i) Dealing with goods liable to confiscation i.e. receipt, supply, storage or transportation of goods liable to confiscation;
- (j) Receiving/dealing with supply of services in contravention of the Act
- (k) tampers with or destroys any material evidence or documents;
- (1) Failing to supply any information required of him under the Act/Rules or supplying false information:

(m) Attempting to commit or abetting the commission of any of the offences at (a) to (l) above.

Q13. What is the punishment prescribed on conviction of any offense under the CGST/SGST Act?

Ans. The scheme of punishment provided in section 132(1) is as follows:

Offence involving	Punishment (imprisonment extending to)	
Tax evaded exceeding ₹ 5 crore or repeat offender 250 lakh	5 years and fine	
Tax evaded between ₹ 2 crore and ₹ 5 crore	3 years and fine	
Tax evaded between ₹ 1 crore and ₹ 2 crore	1 years and fine	
False recordsObstructing officerTamper records	6 months	

Q14. What are the cognizable and non-cognizable offences under CGST/SGST Act?

Ans. In terms of Section 132(4) and 132(5) of CGST/SGST Act-

- ♣ all offences where the evasion of tax is less than ₹ 5 crores shall be non-cognizable and bailable.
- ❖ all offences where the equation of tax exceeds ₹ 5 crores shall be cognizable and non-bailable.

15. Can a company be proceeded against or prosecuted for any offence under the CGST/SGST Act?

Ans. Yes. Section 137 of the CGST/SGST Act provides that every person who was in-charge of or responsible to a company for the conduct of its business shall, along-with the company itself, be liable to be proceeded against and punished for an offence committed by the company while such person was in-charge of the affairs of the company. If any offence committed by the company-

- * has been committed with the consent/connivance of, or
- * is attributable to negligence of-

any officer of the company then such officer shall be deemed to be guilty of the same offence and liable to be proceeded against and punished accordingly.



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