5 YEARS OF THE COB(WEB) ON GST

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THREADING THE NEEDLE

Shailendra Kumar

Forewords by

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FOREWORD

How quickly time flies! It is five years since the implementation of GST and even the most vociferous critic would admit that taxation in our country has certainly become decluttered and more tax friendly than ever before.

Like any toddler struggling to take his baby steps, GST too has had its fair share of hiccups but considering the demography of our country and the myriad taxation phenomenon that existed earlier, what we have achieved in these five years certainly deserves a pat on the backs of, both the taxpayer as well as the taxmen.

Shailendra has, in this riveting book, comprising of fourteen chapters with a succinct opening to each section of what lies therein, laid threadbare the evolution of GST since July 2017 and has not held back himself while showering effusive praise for the technology behind it as well as what ails it. Constructive criticism is his forte.

His analysis of GST over the years through his weekly column The Cob Web has been mirrored in this book with additions on the judicial developments at every juncture thus reflecting the topicality of the book, nay a guide, for every discerning reader.

I wish Shailendra all the best for this endeavour and which I am sure would be lovingly received by one and all.

(Sushil Kumar Modi)
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Date: 14 Sep 2022

Foreword

It gives me immense pleasure to write the foreword for this eminently readable commentary on various aspects of India's GST, written over the five-year period since its inception.

The book in your hand is an economics treatise, a tax manual and a scary thriller covering the crucial first five years of the biggest tax revolution in India. The author Mr. Shailendra Kumar is a pioneer in online tax journalism, having founded the immensely popular web portal www.taxindiaonline.com in the year 2000, in the early days of the internet's ubiquity, and the Y2K was a bigger problem than the GST is today. I understand that Mr. Shailendra started his weekly column The ***CobWeb*** in October 2006 and is continuing tirelessly for the last sixteen years, without a break - that is a remarkable feat by itself.

The articles show a command over the complexities of GST, and proficiency in not only the language, but also the entire gamut of tax literature including economic and political issues.

The way each topic is presented is a model for precise and scholarly expression of the things that are happening, and the things which should and should not happen in the world of politics, economics and taxation - starting with the GST.

For example, it is disheartening to note that contraction in GST collections was mostly because of shrivelling of the IGST-inter-state trade - and due to the negative growth in IGST in the case of imports.

Mr. Kumar has covered all aspects of GST in a stimulating, scholarly, and lucid way, which makes this book a must read for all students of GST, as well as taxpayers, tax administrators, litigants, lawyers and judges - and of course, policy makers. Every chapter is a stand-alone expert analytical capsule of an important issue and is as good as an episode in the now fashionable OTT - in this case, truly *Over the Top.*

A major part of this exciting story takes place during the hard days of the COVID pandemic, and this book covers that period very coherently.

I congratulate Mr. Shailendra Kumar on this momentous work and hope he will continue with his crusading spirit.

And I commend this book highly.

Dr Palanivel Thiaga Rajan
Finance Minister of Tamil Nadu

With Best Wishes,

JUSTICE A.K. PATNAIK
Former Judge, Supreme Court of India

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FOREWORD

Goods and Services Tax (GST) was introduced in India in April 2017. Five years have passed since then and during these five years there have been many disputes between the States and the Union on various aspects of the GST, which have been reported in the national newspapers. As GST is a very specialised subject, only a few who have a knowledge of the law relating to GST as well as its intricacies can understand any debate regarding GST.

Mr. Shailendra Kumar, who has worked closely with the GST Law Committee, the Fitment Committee, the GST Implementation Committee and also the GST Council, and who has contributed to make GST a good and simple tax, has authored this book titled "5 YEARS OF THE COB(WEB) ON GST THREADING THE NEEDLE". The book has chapters on Fiscal Federalism, Compensation, GST Design, GST Council, GST Law & Procedures, IGST (Integrated Goods and Services Tax) etc., and a reading of the book will give a fair idea of the developments which have taken place regarding GST and IGST during the last five years.

Mr. Shailendra Kumar has also written this book in lucid and simple English, and has avoided the technical language of the GST and IGST law. I have no doubt that all those who are keen to understand the developments of GST and IGST in India and the various issues relating thereto will find the book easy to read, interesting and informative. This is a book worth keeping in one's personal library as well as the library of institutions and government departments dealing with GST and IGST.

Justice A.K. Patnaik
Former Judge, Supreme Court of India

28th August 2022

Foreword

The GST was introduction in Europe over 50 years ago as a means of reducing the cost of doing business and facilitating exports, by replacing the turnover tax and many nuisance taxes that did not yield much revenue. It has evolved into an instrument for economic and national integration and generates information that can help reduce leakages from the income tax. Following the 2008-10 financial crisis, countries have increasingly turned to replacing taxes that add to the cost of doing business, including payroll taxes, by the GST/VAT. Mexico began to integrate the VAT base in 2014, and China followed in 2015 by consolidating the provincial taxes on services with the national VAT on goods. However, the advantages of the GST/VAT disappear with split bases especially across levels of government, multiple rates, and exemptions that introduce cascading and greater complexity.

As Shailendra Kumar's compendium illustrates, it is not easy to introduce a GST to replace taxes on sales, production, and trade that were split across levels of government by the colonial Government of India Act of 1935. Actions by people like Mr Kumar highlighted awareness of the problems with the dual VAT introduced in India and contributed to an understanding of what a GST should look like. This awareness led to the Constitutional Amendment five years ago.

Mr Kumar also provides an excellent description of the problems still to be addressed.

While progress has been made towards integrating the base and rationalizing rate structures, the difficulty in adjusting rates by States reduces the attractiveness of the GST as State own-source revenue, while creating complexity for taxpayers. Much more needs to be done to utilize GST for the creation of high-tech zones, as in China; or to reduce costs to benefit from nearshoring as in the case of Mexico and reduce the ability to cheat on the income taxes. The political economy of the reforms will require revisiting other revenue assignments and revenue-sharing arrangements, so that States have access to commensurate control at the margin on a significant tax base (e.g., using piggy-backs on a consolidated income tax, or on a national carbon tax). This will also address the problem of sunset clauses for compensatory transfers to States for the loss of VAT/GST revenues and generate greater State-level accountability and access to sustainable private financing.

I commend this volume for students and practitioners concerned with tax reforms to support sustainable growth.

Dr Ehtisham Ahmad

Formerly IMF, London School of Economics

Foreword

That the Goods & Services Tax (GST) was a transformational tax reform is well accepted. Overcoming constitutional hurdles, political challenges and merging myriad taxes was a herculean task. That it happened was testament to political determination, leadership, and the maturity of both the Centre and the States. The new tax with its emphasis on ensuring free flow of credit was to be technology driven. This paradoxically added to the complexity and teething problems. What all this meant was that the process was not smooth. Five years down the line we can all collectively look back and say, well, we pulled off a near miracle.

Shailendra's compilation captures the tumultuous GST journey in all its shades. The excitement, the expectations, the disappointments, the strain on federal relations, the compensation cess saga, the GST design, the functioning of the GST Council, the process of rate fixation, the functioning of the CBIC, the multiple legal challenges, the technological breakdowns and successes-in short everything one needs to know how GST has evolved.

Written in short easy to read chapters it is a valuable addition to the literature on GST. The book is appropriately titled. At the end of the day the GST process was indeed a delicate operation, balancing conflicting interests and requiring care and concentration - very much like threading a needle.

Well done, Shailendra.

Najib Shah

Former Chairman, CBIC, Ministry of Finance

Introduction

To the world of indirect taxes, GST fits the bill of what Billie Holiday once said: *'*We never know what is enough until we know what is more than enough'! True to the letters, the turnover tax, the purchase tax, the commercial tax, and the sales tax ruled the roost for long as something which was construed as ENOUGH! Then arrived a new epoch post-WW II, of soaring treasury spending on infrastructure, health, education, and many other welfare schemes for the citizens across the world. State coffers definitely necessitated more revenue to bankroll such programmes. This prompted the 'trigger-happy' academia to hunt for what might qualify as more than enough. And thus began the navigation for which the human mind proved the most important map of all!

In 1954, the French apparatchik, Maurice Laure, fathered the value-added tax (VAT), albeit it was theorised in Germany almost a century back! It was later built upon and chiselled into a more efficient system which increasingly ferried all the prevailing indirect tax variants to the gallery of tombs! Between the 1960s and the 1970s, its popularity rapidly spread, riding the twin tigers of revenue-raising DNA and the intrinsic properties of neutrality! Once the European Union embraced it, all its members switched to the new orbit with a threshold tax rate of 15 per cent. VAT took its bow in the UK in 1974. Since then, the EU-VAT rates have moved in just one direction. Taking a cue from the EU, several Latin American, African, and Asian economies also substituted their existing indirect tax systems, and its tentacles now sprawl through 166 economies in the world! A stronghold of GST-cracy!

If the GST is to be treated as an improved version of indirect taxes, it is largely owing to its inherent forte to ensure seamless and effortless flow of input tax credit (ITC). It is indisputably the 'living' soul of the value-added tax system. The onus descends on architects of its sub-variants to factor in socio-economic ground realities and the size of revenue mobilisation, and, accordingly, inject the ITC-throttling provisions into the law. Most political economies on the global map have designed their own versions of GST, depending on the local complexities of the polity; the stage of economic evolution; the quantum of revenue needed to uplift the excluded sections of the society, and many other compulsive policy leaves! India did the same when its ideologically-hued political constituents thrashed out Petri dishes of partnerships and opted to have a midnight tryst! The GST model laws, with some deft refinements, were vetted and a sprawling swathe of ITC was put under the scalpel vide Section 17 of the CGST Act, 2017. The rationale was to unblock such credits in a phased manner once the new tax system stabilises and begins bearing the fruit in synergy with their pumped-up but nebulous expectations.

On 1 July 2017, it was rolled out with the predictable political fanfare laced with the necessary live drumbeating! Though a gaggle of critical decisions preceded the official roll-out, the new-fangled constitutional forum, the GST Council, was grimly

determined to overcome legal and technical glitches which inevitably raise their heads out of invisible 'holes' in any continental-sized reform like the GST! And, ostensibly, a raft of technical and technological hiccups cropped up at an alarming pace, not only in the business processes and the laws but also in its IT platform—the GST Network (GSTN). To deal with day-to-day bumps sprouting in many hues on the compliance canvas, the Council had delegated routine responsibilities to the GST Implementation Committee (GIC), which adroitly demonstrated administrative resilience to find solutions to every slice of problems brought to its attention! Though plaudits cannot be denied, at times, it also, in a fit of the wobblies, went overboard and began swimming in the shallow lagoon of social media to clarify serious legal lacunae through tweets and Press Releases! Such tweets were found to be quick and palliative, ergo the taxpayers largely lapped them up! Since the GIC was gifted open slather by the Council, it went on mundifying grubby issues raised by the taxpayers. But, like every good time that comes to an end, the new culture of clarifying legal issues through social media came under judicial scrutiny at the Delhi High Court and the administrative approach underwent an orbital change!

If I put the history of the initial months of almighty mess in implementation somewhat athwart, the going was largely merry albeit a bit tough! Though the systemic bumps played the role of a Grinch in realising the optimal revenue collections, the Council deserves a clap on its back for containing the macro effect of GST on consumer prices. After a year, it was widely acknowledged that unlike the experiences of many federal economies, the Indian GST did not spawn any tailwinds for the inflationary curve! Though madcap cannot be wished away in any reform of this size, what may be relevant to capture here is the overwhelming realisation of a string of projected benefits such as digitalisation of tax payment; injecting efficiency in the supply chain; enhancing the competitiveness of Indian merchandise exports by neutralising cascading of taxes; ensuring healthy cash flow for the businesses and better capital management by the large businesses; one market and integrated economy; reduction in logistics costs; minimal discretions in tax administration and thus, a truncated window for wrong-footing; reduction in prices of consumer goods; greater transparency in decision-making; and improving not only Ease of Doing Business but transforming the way of doing business! In a nutshell, I can safely moniker it as not a tax reform but as an all-encompassing economic-cum-social-reform package!

Let me now come to the main question—Why this book? What were my prods? Leaving no wiggle-room for long rigmarole, let me take you straight to the time machine! It was December 2002. The Task Force, headed by the veteran fiscal economist, Dr Vijay Kelkar, had submitted its reports on the direct and indirect taxes. A racy glance at his indirect tax report had triggered a spontaneous 'longing' which had surreally popped up in my mind space, to study the concept of GST. Being a curiosity-seeker, I began trailing the dynamically-evolving VAT curve across the world. Then appeared on the horizon the constructive talk about the VAT reforms for

the Indian States. During this period, my 'yearning' rested more like a dormant volcano! Soon, the time for eruption of the 'volcano' tick-tocked, immediately after the then Union Finance Minister, Mr P. Chidambaram, made a substantive reference to the GST in Paragraph 155 of his Budget Speech in 2006 and also set a timeline of 1 April 2010 for the introduction of the new tax system. His announcement nudged me to immediately carve out a new Column on TIOL, which was monikered as '*ST se GST tak*'! Now that the 'scarlet' ribbon of red, hot lava had begun gliding down, it warranted much closer scrutiny and follow-up of every development which I kept on entombing in my weekly Column, 'The Cob(Web)'. When India finally had its tryst with GST on 1 July 2017, I was on the cusp of inking my first book on GST. In fact, I had finished two chapters but then realisation dawned that the GST was gliding too fast and the laws and business processes were changing spatial direction like a hurricane! This made me brood over, and an end to this process of contemplation came when the GST buggy chugged past its fifth anniversary!

The 5th anniversary of GST was one such event when the 'scarlet lava' in me peaked at a new boiling point, and quickly came an idea to piece together the best of my weekly column keyed in the past five years rather than making a serious bid to write a book straddling over a period of two decades, starting with the Dr Kelkar days! Secondly, I found that the last five years have been extraordinarily tumultuous and I had captured each event worth its upheaval-value in my column and a recapitulation of the same with my keen observations would be more useful for all the stakeholders—the Revenue, the law-makers, the taxpayers, the facilitators, and also the judiciary! I indeed had the good fortune to interact with the key architects of the GST laws and to also closely witness the dynamic process of the making of a robust constitutional body out of exceptional cooperative spirit and contestations! It proved to be a crucible to produce precious insights into the GST journey thus far! As a keen fiscal journalist, I did advocate many out-of-box ideas to overcome many of the insurmountable issues and I am happy to admit that many of them were curiously examined and also acted upon!

This book contains 14 Parts and each Part consists of certain Chapters going hand-in-hand with the strenuously-decided trope. Part 1 dwells on the two most prominent features of the Indian Constitution—federalism and democracy—and how both piggyback each other for efficient functioning; how GST has ended up strengthening the spirit of fiscal federalism notwithstanding a string of instances of frenzied contestations; enunciation of the nuances embedded in the 101st Constitution Amendment Act and Article 279A, which mothered the birth of the GST Council; how the States implemented all the decisions of the Council even though some of them were not spared howls of protest on the floor; how a dip in the revenue collections often turned out to be a litmus test for the spirit of cooperative federalism and how the voting on the issue of taxing state-run lottery dented a crack in the strong walls of federalism and how such holes could be puttied with a tinge of sagacity!

Part 2 has seven chapters revolving around the issue of compensation to be paid in lieu of revenue loss owing to the implementation of GST for a period of five years, which lapsed on 30 June 2022. Although the GST collections were not too healthy during the initial years, the compensation pool somehow managed to bridge the shortfalls in the revenue of the States. Sparks of some political sparring were unavoidable owing to delay in payments or settlement of IGST but the Centre somehow managed to honour its commitment on the compensation front. Then arrived COVID-19, which walloped the economic activities and thus the flow of revenue in the compensation pool. The Centre also slipped into a pickle and deferred the payment for a few months, and compensation turned into a poisoned chalice! The Union of India was accused of practising 'fiscal apartheid'. A legal wrangle followed when the Attorney General opined that there was no obligation on the Centre if the revenue loss was due to externalities like COVID! The issue was finally settled when the PMO stepped in and the Centre arranged borrowings from the RBI at a nominal interest rate and the GST Council extended the levy of compensation cess till 31 March 2026 to repay the loan with interest.

Part 3 has six chapters elaborating on tangled issues blowing a hole in the Basic Design of the Indian GST and how frequent changes injected 'Swiss cheese-like' distortions in the core design and why the Council negotiated at the cost of GST's future efficiency; how business processes in the form of GSTR-1, 2, and 3 proved to be a stiff cliff-climb for the GST Network; multiplicity of composition schemes for traders and service providers along with far many exemption thresholds for goods, and then services further 'infected' the fundamentals of the model GST legislation; bewilderingly, the Council further permitted specified States to opt for lower exemption thresholds; and how the basic design of the GST bore the brunt of implementational challenges during the past five years.

Part 4 dwells on the bumpy road on which the GST Council's motorcade sputteringly moved amid minimum preparedness of the key stakeholders; why it opted to not avail the constitutional space it had for a more organised rolling out of the reform; how rapidly it wheelbarrows past the milestone of the first anniversary; the audit conundrum kicking in a boisterous debate; the lethargy in revenue mop-up led to setting up of the GoM for rate revision; how the Council deliberated on tax vaccines during the COVID months; how the Council committed a folly on the issue of Composite Supply, which was later ruled against the Revenue by the Apex Court; and how a thick and 'moist' air of mutual distrust led to a stalemate over the issue of inordinate delay in the creation of the GST Appellate Tribunal.

Part 5 chaperones the readers through a maze of GST laws and procedures and the concerted efforts made to scale the fiscal cliff during the last five years; though there was no mischief in the Council's longing to match inward and outward invoices to curb misuse of ITC, the GSTN was not under-girded to accomplish the task; what prodded the Council to hasten the implementation of e-Way Bill and later also e-invoices; a detailed saga of mistakes made in relation to computation of automatic

interest on delayed payment of tax under Section 50(1); the chaos being enriched by the conflicting rulings coming from the Authority for Advance Rulings; the breakfast diplomacy to reinforce the spirit of cooperative federalism; and the taxpayer-friendly decision to do away with GST-9C for certain classes of taxpayers.

Part 6 promises 'deep-sea tourism' to cotton on the working of the 'Little Boat' theory of IGST; how States extracted an extra pound of tax jurisdiction up to 12 nautical miles in the territorial waters to levy SGST and why the then Finance Minister acceded to such a demand; how India carved out its own IGST model based on the Varsano's 'Little Boat' theory of VAT, which has become an enviable template for other economies to study and replicate; how an innovative architecture of credit ledger was designed to ensure seamless flow of credit; how the IGST Bill was designed to subsume several customs duties; and finally, how the rich data of GSTN is triggering scientific data analyses which are producing precious insights for the policymakers and intelligence for the Revenue offices in the field.

Part 7 lends a peep into the wider canvas of ITC and also the conundrum arising out of various provisions or even missing columns in the returns leading to denial of legit credit; suggestions of the Subramanian Expert Panel to rope in electricity as zero-rated supply so that the ITC could be availed by the power-generating companies; how an efficacious design of GSTR-1, 2, and 3 failed and what unspooled afterwards for the taxpayers to face even though it is a settled law that credit is a taxpayer's substantive right; how late filing of returns after frequent waiver from late fee led to denial of credit to small taxpayers; a dive into the bottomless pit of exports refund fraud, the fake invoice racket, and how fly-by-night operators coolly walked away with huge GST refunds; and how Revenue's field offices ended up committing excesses during verification of TRAN-1 papers.

Part 8 elaborates on the tantalisingly-narrow escapes of the GST from being lumbered with Cesses; how the Union of India mooted a proposal to levy sugar cess to palliate the pain of sugarcane farmers by compromising the original design of the GST, which is a better system only owing to its DNA to neutralise cascading of taxes; how the growing canyons of ideological differences forced the Chair to refer the issue to the Group of Ministers and detailed examination of the powers vested in the Council under Art 279A(4); how an attempt was made to include market-driven commercial calamities into the definition of disaster defined in the Act; and how another attempt was made to levy Cess after Kerala was torn into pieces by furious floods and the Council experimented with a new idea of 'let the State levy such a cess only on intra-state transactions'.

Part 9 highlights the soaring curve of ITC frauds and how the GST Council, being buffaloed, preponed the implementation of the e-Way Bill system even before the efficiency gains of the logistics sector could stabilise after the border check-posts being erased; how over 35 per cent of the total GSTR-3B filers are not filing GSTR-1 and how the same is kicking in a deepening mess for the recipient to avail ITC; a

peep into the sensational decision of the Orissa High Court permitting ITC u/s 17(5)(d); and the saga of new return formats with two annexures seeking exhaustive details to realise the goal of invoice-matching.

Part 10 glides through a series of chronicles on return-filing mess of history and how the ease of doing business was given short shrift; pestering demand of taxpayers to permit revision of TRAN-01; repeated failure to match inward and outward invoices but the Council not going for technology audit of the GSTN; the comforting tale of GSTR-3B, which was introduced only as a stop-gap arrangement but was later embedded into the GST laws as a long-term substitute for GSTR-3; how rich the GSTN data, which produced valuable insights for the key policymakers besides validating the common perception that MSMEs contribute more to exports than large corporations, is; why India cannot go for the best IT platform when the Governments' huge revenue collections depend on the tech-driven agency; and how GSTN, once again, created a muddle by cancelling the registration of over 8,00,000 taxpayers.

Part 11 feasts on a special tax regime for the real estate sector where the Council risked a distortion with the fundamental design of the GST and prescribed a tax regime without ITC; what compelled the Council to deny the option of ITC to developers was the widespread allegation and a report that the ITC was being trousered by the developers and the benefits were not being passed on to home buyers; what made the new regime water-tight was the prescription of super-area and the price of a unit under the affordable housing project; what made it tougher was the mandatory condition to source raw materials from the GST-registered suppliers so that real estate transactions do not contribute to the stash of black money in the economy; how the sector collapsed under the weight of its own financial wrong-footing; and how a good business sentiment was spawned when the Council exempted JDA, FSI, and TDR from GST.

Part 12 elaborates on how Revenue boffins borrowed a leaf from the much-debated demonetisation drive of 2016 and inserted a new Section in the GST law to expedite the process of formalisation of the economy; although the Reverse Charge Mechanism under Sec 9(4) was not in the Model GST Law, it was injected at the eleventh hour to pin down the 'hammer' of shadow economy by charging GST on supplies from unregistered suppliers largely consisting of micro entities and MSMEs; how such a provision profited the CBDT by widening its tax base; how the Supreme Court's decision on right to privacy had a direct bearing on the data protection policy of the GSTN; how, within two years, the GST had a magic spell for the income tax landscape when the CBDT reported an abnormal jump in the number of return-filers; how the introduction of e-invoicing changed the canvas of compliance cost and gave birth to a new API market; though Extra Neutral Alcohol (ENA), not fit for human consumption, was covered under the GST radar, the States battled within the Council for an exclusive jurisdiction; and how it became a sore wound for the liquor industry selling 'bottled intoxication'.

Part 13 explains the pain of exporters operating from SEZs as they were directed to take separate registration in different States; how the Revenue administration began swimming with the reach of social media by clarifying legal points through tweets and Press Releases; how Revenue messed up the claims made under TRAN-01 and the Judiciary finally passed strictures for lackadaisical approach; how Revenue demonstrated alacrity in resorting to the Doctrine of *Lathi* against composition dealers; how the *creme de la creme* of the Revenue bureaucracy centralised decision-making during the initial months and kept the CBIC specialists at bay and ended up creating an avoidable mess; and how frequent shutdowns of GSTN servers prodded the Council to take a decision to stagger the dates for GST return filing, which finally stabilised the compliance regime.

Part 14 palanquins readers to chapters on extraordinary efforts to mobilise revenue against the tumbling statistics of industrial production and other economic activities, COVID-19 gobbling up lives and livelihoods and the MSMEs left with scant amounts of working capital, challenging their survival; how the GIC tried to extend some relief to the taxpayers by extending due dates for return-filing and waivers from late fee and penalty; how, for the first time, the principles of *force majeure* was embedded in any tax law in India vide Section 168A in the GST law; how some measures were taken to stymie the threat of accelerated demise of MSMEs; and what nudged the Council to go for B2B e-invoicing right in the middle of the pandemic.

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About the Author

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He is also one of the first three recipients of World Customs Organisation (WCO) Certificate of Merit for his contribution to the world of Customs. He was awarded honoris causa Doctorate Degree in Public Policy, Public Finance & Taxation by the Prestigious French University, Ecole Superieure Robert de Sorbon and 'Bharat Samman' award for his contribution to Public Policy by the IIPPT Foundation, Noida.

He has also authored two widely-read & reported Books titled – "COVID-19 – Genocide Without Parallel" AND "It's Raining Black" on the issue of black money & tax haven.

Mr Kumar has given his distinguished services of over 33 years to many specialized domains such as online and print journalism; volatile world of startups and the business of knowledge-ware and public service to promote fiscal and legal compliance culture in India.

Graduated in Economics and Law (LLB), his favourite alma mater is the Indian Institute of Mass Communication (IIMC), Ministry of Information & Broadcasting, where he did his Post Graduate Diploma course in Mass Communication. Soon after, he joined The Indian Express Newspaper in 1990 and then The Economic Times in 1996 till 2000 when he laid the foundational bricks for India's first Media Start-up against the storm of Dotcom Bust!

The sole motivation to leave the comfort and ease of conventional journalism and to embrace the unchartered digital territory which led to the creation of TIOL was based on his unflinching desire to bridge the huge communication gaps not only between

the Tax Administration and the Taxpayers but also between the policy makers in the Lutyens' Delhi and the tax officials posted in the field across India.

His efforts in the taxation domain have been richly acknowledged by the Standing Committee for Finance, Lok Sabha, several Institutions such as CVC & NHRC and Government's Experts' panels such as TARC and Dr Ashok Lahiri Committee.

For the Goods & Services Tax (GST), Mr Kumar has been contributing to the 'making' of the historic tax reform since 2007. He works closely with the GST Law Committee, the Fitment Committee, the GST Implementation Committee and also the GST Council and contributes in terms of making it a good and simple tax.

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Fiscal Federalism - tales of Lo and Behold!

Introduction

The two most eminent features of India's Constitution are federalism and democracy. Though the constitutional purists do not tend to see it as strictly federal and that is because of the grains of unitary bias in the overall essence of the Indian Constitution, but for all practical purposes, it is federal in character. In fact, it has been eloquently, and also lucidly, elaborated by the Supreme Court of India in its decision in the case of *M/S Mohit Minerals Pvt. Ltd.*[1] that democracy and federalism are interdependent and symbiotically integrated for their efficient functioning! Indeed, it comes out copiously well if one analyses the realm of Cooperative Federalism through the prism of Goods and Services Tax (GST)!

Voila! Full credit goes to GST for commencing a new and glorious chapter in the boisterous world of fiscal federalism! The Constitution of India was amended vide the 101st Constitution Amendment Act to insert Article 246A, which vests powers in both the 'federating' units—the Centre as well as the States—to levy GST simultaneously on a single transaction. Thus rolled out the era of 'dual federalism' or 'cooperative federalism', which is also globally described by constitutionalists as 'competitive federalism' or 'marble-cake federalism'. The 101st Amendment Act also erased the 'Doctrine of Repugnancy' enshrined vide Article 254 of the Constitution but only limited to the GST—no question of conflict of legislations nor any room for overriding of the State legislation by the Centre!

To palanquin the realm of cooperative federalism to the ground level, a new constitutional body was mothered vide Article 279A—the Birth of the GST Council. All the powers and responsibilities to design model laws, exemptions, thresholds for exemptions, enforcement, audit, and assessment were vested in it in the literal sense of inclusiveness! However, since our Constitution prescribes fetters on the creation of a new body which may come in conflict with the legislature—the core of our Constitution and an inspiring embodiment of India's sovereignty—the Council was designed to be a recommendatory body. If one goes by the *obiter dicta* in the *Mohit Mineral* case, the Parliament delegated its authority for secondary legislation to the Executive but limited it to the rule-making powers. In other words, the Council's recommendations in relation to the making of rules will have a binding force but certainly not in all decisions!

Against this backdrop, the past five years of the dynamic working of the GST Council have produced many lessons worth imitating and inspiring to be learnt by federal Governments across the world if they wish to implement a courageous strand of efficiently working fiscal federalism in their countries! The Council, for a major

1. 2022-TIOL-49-SC-GST-LB.

stretch of time, transported the spirit of 'fiscal federalism' to almost close to an elusive pinnacle! Aha! To be precise—the 37th meeting of the Council! Political contestations and noisy deliberations always dotted the closed-door meetings but my 'treetop view' is that over 90 per cent of the decisions were taken by consensus! A few initial decisions also witnessed complete unanimity! Just one issue has thus far triggered the temperament-calming provision of voting! What a super-fragilistic run without a parallel for the Council!

But this is not to say that it did not go through its inescapable share of trepidation and cold sweat! A phase did come when several opposition-ruled States fulminated and openly excoriated the conduct of the proceedings and also some of the decisions backed by the majority! But, despite being at loggerheads, none has so far declined to implement its decisions taken on the floor. A feeble voice for setting up a dispute resolution mechanism as per Article 279A(11) was heard for some time but in effect, that qualified only as an act of humming and hawing! In fact, a few also talked about knocking at the door of the Apex Court but that also ended up as mau-mauing without ammunition! How exciting or nerve-steeling this journey has thus far been for the Council may come out of this part of the book, which carries strenuously chosen seven leaves of my weekly column, *The Cob(Web)*, published since the birth of the GST Council.

Chapter 1 delves deeper into deliberations over the finalisation of the audit aspect of GST and how the Union of India, for the sake of unanimity, sliced away a vital oversight body attached to the Parliament, i.e., the CAG of India, a constitutional body. Though it was a part of the Draft Model Law, many States sought exclusion of CAG on the ground that the GST laws had prescribed provisions for internal audit, fortified by the second layer of Special Audit, and the CAG would have been a case of 'over-jabbing' the 'subject'! Thus was the CAG chucked out! The Centre, in the bargain, forfeited its interest-protecting limb in effect! How? The pledge of compensation at the rate of 14 per cent growth was to be decided based on audited losses. When the CAG was ejected out, it would be naive not to expect that it would not be a loose and flippant exercise! A steep price to pay for bringing the States on the same page! But it was perhaps needed for the sake of enticing the spirit of 'cooperative federalism'!

In Chapter 2, I have touched on many substantive measures initiated for plugging the revenue leakage and also the sharing of big data between the different arms of the revenue administration. It provides a peep into how the Revenue managed to implement e-Way Bill from 1 April 2018 and, much to their credit, it was almost glitch-free! Since the GSTN was not fully braced up to implement various provisions of the GST laws, a large number of taxpayers had failed to upload their TRAN-1 for availing carried-forward credit but the Council relented and allowed delayed filing with an implication of ₹3,700 crores of revenue. I have also touched on a surfeit of excessively liberal decisions which were taken to usher GST into a largely compliant tax law! One such decision was to double the exemption threshold for composition

dealers unlike other countries, including the EU. Higher threshold had a serious bearing on the tax-base but it was done to calm the frayed tempers of small businesses, perhaps! A reference may also be found to the study done by the World Bank which provided insights into how the lists of exempted goods and services running into furlongs theoretically tend to chip away the efficiency of GST and what should be the road ahead to improve the same!

Chapter 3 vividly sketches the fear of cracks in the haloed realm of cooperative federalism when the State Finance Ministers had begun crying from the hilltop about the delayed payment of bimonthly compensation and the suspected deliberate procrastination of IGST settlements. Some of them had begun toying with Clause 11 of Article 279A, which refers to deciding modality for dispute settlement between the Centre and the States. What nudged the States to embrace such a hard-boiled adversarial approach was the rapidly-aggravating SGST collections and a dip in the compensation kitty! With the economy losing steam and the water levels in the compensation kitty significantly receding, the Council confronted an intriguing situation—whether to bring in more items under the Compensation Cess ambit to perk up revenue. One idea which was floated was to split the existing tax rate, such as 15 + 3 for 18 per cent and 3 per cent may be credited to the compensation kitty to buoy it up. However, it was found to be delphic and no good to gundy as the States were also losing a part of revenue in such a formula whereas the compensation was nonchalantly seen as the 'baby' to be exclusively looked after by the Centre! A safe pair of hands! But the issue remained stuck in a glue pot! *Oh mon Dieu!*

In Chapter 4, I have dwelled at length on one scary situation where the contraction in GST collections was more because of shrivelling of the IGST—inter-state trade. What further lengthened the shadow of amber lights and gave giddying time to the policymakers was the negative growth in IGST in the case of imports. When imports shrink in any economy, it is a bruising experience having a long-run bearing on the growth prospects. Along with the compensation kitty, the SGST collections also plummeted and it was a 'handcuffing' time for the States, which were struggling to lay their hands on money to pay wages to Government employees! I have also touched upon the terms of reference given to the Finance Commission which was enjoined to share nuggets of refreshing perspicuity to keep federalism unbruised! At this stage, many States had also demanded an extension of the compensation period. Then comes the stick—how early introduction of e-invoicing may enable the Revenue to curb the brimming bucket of ITC frauds.

Chapter 5 sprawlingly narrates the first scary bump the ever-growing unwritten convention of decision-by-consensus confronted when the State of Kerala obdurately camped in favour of voting on the issue of lottery. The State of Assam was in favour of a uniform GST levy on State-run and privately-operated lottery. But Kerala wanted positive discrimination in favour of the State. When Kerala unyielded to persuasion and coaxing, the Council resorted to voting, in which two Congress-ruled States abstained and Kerala's motion turned dud. Though one may tend to see it as a

bitter pill for Kerala, for its Finance Minister, it was a gratifying experience as he could report to his bosses that he left no stone unturned! In this meeting, the Council also took several decisions, such as blocking of ITC if GSTR-3B was not filed regularly and reducing the percentage of blocked credit by half under Rule 36(4). To encourage compliance, the Council also granted late fee waiver for filing GSTR-1 since July 2017.

Chapter 6 elaborately describes the pain and anguish expressed by one of the State Finance Ministers who ended up concluding with steams coming out of his ears—whither the GST Council! Protesting against the 'hurricane-style' of conducting the Council's meeting, his letter to the Chair howled many 'leafy' allegations, including attempts to muzzle his voice by muting his mic. At this meeting, the Punjab Finance Minister resorted to drumming over the decisions taken by the GST Implementation Committee (GIC) without the express consent of the Council. He detailed the number of decisions, running into kilometres of pages, and how most of them nibbled into the powers of the Council. Two glaring examples cited were Rule 36 and the insertion of Rule 86B. Strangely, his plaints were referred to the GST Law Committee to examine the legal aspect but what the Chair overlooked was that the Law Committee was subordinate to the GIC and it could not have 'cultured' fresh tissues in its spine to indict its own bosses! Strangely or, one may say, wittingly, the Council had frugally saved its ink detailing the powers and responsibilities of the GIC, which was widely construed to be created for dealing with urgent procedural issues.

In the last chapter, Chapter 7, I have highlighted how the Council was chided by the Apex Court for unexplained delays in setting up the GST Appellate Tribunal. Even after four years of GST, the Government's reluctance or the missing spirit was seen as a cryptic curveball by most legal brains in the country! Against this backdrop, the Council scheduled its physical meeting after a long hiatus triggered by the COVID-19 and it was widely speculated that quiversful of poisoned arrow tips may await the Union of India over the issues of compensation and the powers of the GIC. Strangely, the GST Secretariat has become a subordinate office for the Revenue Secretary, who is naturally expected to be more loyal to his original employer—the Union of India—and this infuses elements of unavoidable bias in his role as the ex-officio Secretary to the Council! An institution founded on the principle that 'what is good for the goose is equally good for the gander'! Mwahahaha!

1

CAG Audit Guillotined? Should the Parliament Necessarily Go with the GST Council?*

The GST Council is scheduled to meet today and it is expected to endorse the legally-vetted SGST and UTGST Model Laws. In all probability, it would be done today as there is not much to debate over. First, they are almost mirror images of the CGST. Secondly, all major bones of contention were put to rest at the last meeting as the Union of India virtually accepted all the demands of the States. But a close post-mortem of the solutions hammered out to get over many issues may appear to be serious lapses from the Constitutional perspective. In a rush to implement GST, which carries a huge political capital quotient for the demonetisation-smeared Government, the Union of India has tangibly diluted the unitary bias character of the Constitution.

First, it conceded a large chunk of its administrative turf to the States so far as the tax base below the ₹ 1.5 crore threshold goes. Secondly, it 'gifted away' its jurisdiction in the territorial waters to the Coastal States. Thirdly, it went beyond its constitutional *Laxman Rekha* and once again performed the act of 'gentleman's gifting' by offering IGST jurisdiction on a platter. And the latest one which bodes ill for the emerging indirect tax regime in India is the unanimous and conscious decision to keep the constitutional oversight body of the CAG miles away! The proposed Section 65 (Power of the CAG to call for information for audit) in the Model GST Laws is learnt to have been guillotined in a French *ishtyle*! It is learnt that when the Council was discussing each Section of the legally-vetted Model Law, virtually all the States breathed fire together against the proposal to allow the CAG to seek information for the purpose of revenue audit. The poor Union of India, which is largely held as the custodian of the interests of Constitutional institutions in the country, failed to honour the wishes of our immortal Constitution-makers, and the legal sanctity to allow the CAG in the GST regime was quickly given a burial place in the dustbin. I am told that the final GST Bill, which is going for Cabinet approval for tabling the same in the Parliament, would not have the proposed Section 65.

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* TIOL - COB (WEB) – 545, 16 March 2017.

What may upset the constitutional purists is the contempt and disdain being demonstrated against this critical oversight body in new legislations by our democracy-minded governments! How they legitimise such decisions can be good folklore for tomorrow. How do our elected legislators wield their arguments to put up a shield against the role of the CAG when it happens to be the most powerful eyes and ears for the institution of the Parliament? Is it not a dent in the privilege of the Parliament itself? Does it not amount to dilution of the powers of the Parliament, which alone is going to permit the right to compensate the States for possible revenue losses? Who would audit the leakage of revenue in the SGST regime? Should the Union really rely on the locally-audited loss figures of the States for compensating them with a promised growth rate of 14 per cent? When the Parliament is going to pass the Compensation Bill, should it really forego its right to debate over audited figures? The tax authorities will have their own audit in place for their own purposes and they can even go for a Special Audit (Section 64 of the Model Law), but why should the Parliament allow the NDA Government to trade its privileges to satisfy the whims of the States? Is it because they have the majority in the Lok Sabha? If so, does it mean that the Parliament's own identity has gotten diffused in the Government?

The CAG is the most important constitutional oversight body in our system. As per Articles 149 and 279 of the Constitution, it has its role nicely defined and cut out for ensuring transparency and correctness in our governance umbrella. But it can increasingly be seen that most modern governments tend to cut the CAG into size. When the GST is going to be such a complex IT-driven tax regime where the Central and the State revenues are going to be decided based on a huge volume of data, the exclusion of the CAG from having a say in its audit is certainly baffling.

But the most fundamental question is: Why did the State Finance Ministers gang up against the CAG? Is it a case of fear psychosis originating from the good work done by the CAG during the UPA-II regime? One of the possible reasons could be the dominant mindsets of the States that since the next five years are going to be a cosy time for them and not-so-cosy for the Centre, which has committed itself to compensate them for all possible losses, they need not allow a very professional audit of their revenue generation efforts at least for this golden period of five years. The second possible reason could be - they know for sure that their tax administrations (in the States) are corruption-prone and prefer to work in an ad-hoc manner which certainly suits politicians politically and also socio-economically. In this fashion, they would have *ladoos* in both their hands!

If this is not the case, then why should a Constitutional body be humiliated by excluding it out of this historic reform? How can it be ill-treated when the Central revenue is at stake? Is the NDA Government going to chase the CAG out of its other revenue domains, such as customs and corporate tax also? When it is the most professional oversight body, why should the Union really agree to dismantle all its supervisory arms? Is it going to rely totally on the GST Network-collected data to

know how much Input Tax Credit under the IGST and the CGST has been availed to pay SGST? More interestingly, even the GST Network has recently refused the CAG entry into its premises. Since it enjoys the status of a private sector company, it thinks that it has all the legal rights to shut its doors in the face of the CAG.

A bad precedent is indeed being created against a Constitutional body and our Parliamentarians need to sit up and mull over it before they endorse the decision of the GST Council. The Union Cabinet is unlikely to take a contrary view as one of its Cabinet Ministers is a party to this decision. But the two institutions which need to flag queries are the *Rashtrapati Bhawan* and the Parliament. It is tough but important to restore the privilege of the House, which cannot be sliced away in this fashion, scheme by scheme, and legislation by legislation. It is equally important for the Government of the day to restore the confidence of the enlightened taxpayers in the proposed reform by offering a role to a respectable constitutional body like the CAG.

Before I wrap up and make an appeal to the Prime Minister and the Parliamentarians to bring back the CAG into the GST-fold, let me share the views of a well-informed netizen. He has observed *that the CAG is being victimised for puncturing the Government's claim that giving up LPG cylinders led to savings worth ₹ 22,000 crores. It was followed by a serious hole in the NDA's claim relating to the coal block auction. Then, the CAG questioned the Government's investment in the KG Basin.*

I guess in today's information-dominated era, any elected Government can only ill-afford to ignore an oversight body like the CAG.

●————●

2

GST Future Reforms: A Litmus Test for Cooperative Federalism![*]

April 1, generally celebrated as a Fool's Day, a bizarre global tradition with very few vestiges of reliable history, also happens to be the first day of the new financial year in India, and it was, contrary to the global tradition, celebrated as a 'cool day' in the corridors of power in the North Block. The tangible reason, which was later shared by the Revenue Secretary, Dr Hashmukh Adhia, with the media persons, was the unbelievable story of revenue target realisation by the CBDT. It was indeed an uphill journey but the CBDT did not halt at its pre-determined destination and walked past it by a decent '15 kilometres' to collect the final tally of ₹ 9,95,000 crores—a joyous moment for the revenue strategists in the Modi Govt!

On the GST front, Dr Adhia shared the monthly collection statistics, including the projected revenue for the month of March—which would be paid by 20 April as per the law—and disclosed that his average is close to ₹ 90,000 crores. Though it is below the red-flagged benchmark, it is manifestly not being seen as too despairing! One of the planks he has been banking on to buoy up his future collections is the e-Way Bill, which also came into force for the Inter-State movement of goods on 1 April. Thankfully for Dr Adhia, the only known face, or call him the lone 'force one' behind the GST, the collective IT preparations this time did not disappoint him. The e-Way Bill system had a smooth and glitch-free take-off!

Taking a cue from the number of sincere endeavours made this time, unlike the 1 February aborted experiment, the Government yesterday 'liquidated' close to 100 writ petitions relating to IT-based glitches on the GST Portal by issuing a circular for grievance redressal. Netizens may recall that a good number of taxpayers had failed to file their TRAN-1 on the GST Portal for various reasons and they had no option but to file writ petitions before various High Courts. A good number of High Courts had given direction to the GST Council to address this issue and redress the taxpayers' grievances relating to the filing of the GST forms. It was a tough call for the GST Implementation Committee (GIC)—whether to extend the due date for all or to facilitate only those taxpayers who had genuinely suffered or failed to file their TRAN-1 because of the glitches at the GSTN portal. Since the revenue trend is a

* TIOL - COB (WEB) – 601, 5 April 2018.

little lacklustre, the GST bosses could not take the risk of extending the date for all, and thus, this benefit is available only to 17,573 identified taxpayers and the revenue implication in terms of the ITC is about ₹ 3,700 crores. It is indeed a welcome decision and the solution-finders do deserve kudos as it would immediately lessen the pressure on the High Courts. Close to 100 cases out of about 190 GST-related writ petitions pending would be liquidated.

For the remaining cases, I would urge the GST Council to find realistic solutions for some of them. For instance, the issues involved in the pending writs range from the IGST levy on services by banks in India to overseas branches or head offices; double taxation under GST on imported goods stored in customs-bonded warehouse; and exports benefit under GST to delay in announcing a subsidy scheme by the States in lieu of duty exemption scheme during the erstwhile regime. A good number of these cases may not ultimately survive but they hardly involve any constitutional issues which may entice decision-makers to wait for final decisions as they could be useful input for fine-tuning GST laws.

Let me now make a reference to Mr Arun Jaitley's tweet*: 'The impact of demonetisation and GST implementation has resulted into higher formalisation of economy. This is further substantiated by filing of more than 1 crore IT returns by tax payers during FY 2017-18 (6.84 Cr ITRs) in comparison to FY 2016-17 (5.43 Cr ITRs)'*. Despite some reservations about the figures, the Government undoubtedly deserves a pat on its back for almost doubling the direct tax base from ₹ 3.4 crores to ₹ 6.8 crores in three years' time. Though the 'fruitful' component of this tax base would be much lower, the fact that there has been over 16 per cent growth in the filing of personal income tax returns, a good chunk from *muffasil* towns, it calls for a detailed fiscal study, perhaps by the NIPFP. Let it be known to what extent GST contributed to this formalisation of the economy. The findings of this study would be a valuable insight for better policy-making in future.

This brings me to another observation made on the occasion of the first anniversary of GSTN on 28 March. The Chief Economic Advisor, Mr Arvind Subramanian, said that there is a need for the Government to develop a clear protocol for sharing GST data with other government departments. But, why a protocol only for the GSTN data? Now, the fact that the CBDT has also captured close to seven crore taxpayers, there is a need for a comprehensive protocol to be applicable to all tax departments and other government departments for not only detecting tax evasion but also re-designing a better delivery system for public services. Data can not only improve tax collections but also improve the overall governance paradigm in India.

Let me now recall another observation recently made by Mr Arvind Subramanian at Bangalore. He advocated that cooperative federalism, which led to the implementation of GST, has become a proven tool for policy reforms in India. Though it is too early to say that if one goes by the recent statements of some of the State Finance Ministers, including the Andhra Pradesh Finance Minister's recent criticism, there is no harm in pinning hope on this evolving 'consensus apparatus' for

bigger reforms. Leave aside other reforms for which the States are to be tested with patience in future, it would be a worthwhile exercise for the Union of India to evolve consensus on the post-2019 general elections GST reform agenda and the two major 'heads' which must find a place on such an agenda are the need to lower the threshold for the composition dealers in a phased manner and reducing the number of exemptions granted so far. Though there is no list which compiles the number of sectors and sub-sectors granted an exemption under the GST regime, it is an easy guess that this number is too large. Secondly, it has been a political mistake on part of the States to raise the threshold from ₹ 75,00,000 to ₹ 1.5 crores for the Composition Dealers if we look at the international benchmarks**.**

Let us take a cue from the World Bank's recent study on India in which it has observed that the more the number of exemptions, the lesser would be the benefit of GST to the economy. Since exemptions inevitably result in intrinsic cascading, they are generally kept at the minimum. They also eat into the efficiency of the GST implemented by an economy. Secondly, going by the standard threshold adopted by most economies either in the EU or outside the EU, it may appear that the Indian threshold for composition dealers is too high. In most EU economies, it ranges between € 10,000 to € 15,000 but in the case of the Indian GST, it works out to be close to € 2,00,000! In terms of sheer number, it is close to 19,00,00 out of 1,00,00,000 registered taxpayers which, is above 20 per cent if we deduct the NIL return filers and the surrender cases. Such a large chunk of taxpayers is not availing the ITC and remains outside the credit chain. This not only eats into the effective GST tax base but also impairs the seamless flow of credit.

Therefore, the actual test of cooperative federalism, which was obtained at a premium price of 14 per cent growth rate in the compensation package, would be the future GST reform path. Reducing the number of exemptions, lowering the threshold for the composition dealers and bringing under the purview of GST all such items which are outside the regime today, such as real estate, electricity, liquor, and petroleum products, would be the obvious and natural destinations for the future reform which the GST Council needs to undertake. Once these milestones are achieved by the cooperative federalism apparatus—the GST Council—one may like to buy Mr Subramanian's confidence in such a tool for more policy reforms in other sectors of the economy!

3

GST: Tough Times Lie Ahead for the Spirit of Cooperative Federalism![*]

When the GST was implemented in July 2017, followed by a series of GST Council's meetings (as many as thirty-seven so far), full credit was given to the spirit of cooperative federalism for its success. Since it was the initial phase, the States and the Union of India did not create much fuss about the shortfall in the revenue collections. In fact, the Union of India, which had promised 14 per cent growth to the States for the next five years, did not confront hard times as the economy was doing reasonably well! But things have turned unpleasant for all the stakeholders and the fabric of cooperative federalism has begun to experience serious strains. Though the degree of 'wrinkles' in the federal relations matrix may appear to be manageable, if left unattended, the same may lead to ugly cracks!

What indicate a step in such a direction are the recent combined statements coming from many Opposition-ruled State Finance Ministers who have begun to cry hoarse over delays in the release of compensation funds and also the IGST settlement funds! With the economy contracting and revenue collections predictably going down, it is indeed a very tough time for the Central Government. What makes it tougher are some of the fiscal sops offered to leg up growth in the economy. It was very succinctly described at the ***TIOL National Taxation Awards 2020*** event by the Finance Commission Chairman, Mr N.K. Singh, as clear-cut signs of lack of buoyancy in revenue collections.

Since the slowdown has led to substantive contraction in the compensation cess collections besides the soaring deficit in the SGST collections for the States, a serious bone of contention may be seen emerging on the horizon which may upset the hitherto good relations between the Centre and the States. It is learnt that the perturbed State Finance Ministers have begun to explore legal avenues against the Union of India. If that happens, the GST Council would have to set up a body to settle disputes between the Centre and the States as per the 101st Constitution Amendment Act, 2016.

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* TIOL - COB (WEB) – 686, 21 November 2019.

Given the fact that the Compensation Cess collections have plummeted along with the CGST and IGST collections, even the Union of India does not have much revenue to pay the States. One may recall that the Compensation Cess Act was enacted only to fulfil the 14 per cent growth in revenue for the States, for a limited period of five years, but what is to be done now when the collection of such a cess is inadequate? What options are available to the GST Council? One option could be to levy such a Cess on many more products to buoy up the revenue to bridge the gaps. But such a decision is fraught with serious political implications as the industry may brand the Modi Government as an 'industry killer'! At this stage, when most of the sectors are 'swimming overtime' to keep themselves afloat, any move to impose a fresh levy would definitely go against the settled principles of fiscal sagacity. It would not be welcome by not only the industry but also the global rating agencies and multilateral agencies. It may even run the risk of being branded as an example of poor governance!

This brings us to the second option which could be a massive back-end computation exercise. The GST Council may take a call to split revenue from all such commodities which attract 18 per cent tax rate, and the splitting can be 15 per cent + 3 per cent. 3 per cent may be diverted to the compensation pool to shore up the revenue collections of badly-bruised States like Punjab, Kerala, and others. The remaining 15 per cent may go to the divisible pool. But here, the States may object to the fact that they would also have to sacrifice 1.5 per cent of their revenue to the compensation pool. Similarly, a 12 per cent tax rate may be split up between 10 per cent + 2 per cent and 2 per cent may go to the compensation pool. This option may appear to be a bit complicated or a challenge to even a block chain technology but this can be a short-term solution for a year or so till the economy is back on track. This option would also save the Union of India as well as the States from the ignominy of being called anti-business.

Meanwhile, after the launch of GST, the CBIC organised its first Chief Commissioners Conference of all twenty-one Zones at Bhubaneswar recently. The senior revenue mandarins split their hairs over many issues, including the declining revenue collections; the growing scam of fake invoices; and how to persuade assessees to file tax returns, regularly! The summit also concluded that the real estate sector is not doing as badly as it is being projected in the media. The restaurant sector is another area of major revenue leakage. Having analysed the facts on records, the CBIC is going to recommend to the GST Council to bring them back under the sweep of the ITC, which they have also been demanding for long!

At the Conference, it was also decided to go for *suo moto* cancellation of registration of all such taxpayers who have not filed returns from the date of registration. The Revenue is going to invoke the powers u/s 29 of the CGST Act, 2017 to issue notice for cancellation. The CGST officers have so far not gone for cancellation but they are going to be a given green signal to do so.

Poor compliance is one of the reasons for subdued GST collections. The tally of GSTR-3B returns has never exceeded the ₹ 76,00,000 figure albeit there are about 1.2 crore registered assessees. Another measure which is going to be implemented from next month is the barricading of e-Way Bill generation if any assessee has failed to file returns for two months in a row. This is likely to be a very challenging scenario even for the industry. A large assessee, engaging several vendors for transport of goods, will have to ensure that their vendors have regularly been filing returns. As per the CBIC direction, such a blockage would get triggered in either scenario—consignee or consignor defaults! In other words, if a consignee defaults, the goods supplied by the consignors would get stuck. A much more serious flip side of this scheme is that in most cases, consignees take an advance and if e-Way Bill generation is blocked, the working capital of consignors would get stuck. So, any move to penalise a consignee would also amount to hardships for the consignor for no fault of theirs!

So, what is the solution? I guess, the solution lies in Section 149 of the CGST Act, 2017—compliance rating. The Govt will have to undertake a compliance rating exercise against notified risk parameters and such a list should be available in the public domain. Once it is done, the Revenue would discharge its liability to make the industry aware of poorly-rated vendors and if the industry still gives them business for certain reasons, they can do it at their own cost! They cannot blame the Revenue for taking such an avoidable risk and a short-cut solution for deciding parameters for rating compliance can be the decision to pick up some of the risk parameters listed in the Audit Manual released by the Revenue. I am hopeful that the CBIC would not jeopardise the sluggish economic activity by invoking restrictions on e-Way Bill generation before some fair-looking steps are undertaken!

4

GST: Dip in Revenue Collections— Time to Redefine Fiscal Federalism!*

For the Union of India and the States, so far as the present trend of revenue mobilisation goes, the current fiscal year 2019–20 is turning out to be *annus horribilis*! Though the recently announced corporate tax relief is yet to be reflected in the computation of tax liability of India Inc., the present trend of personal income tax and overall direct tax growth rate is predictably dismal. October collections indicate a further dip in the direct tax mop-up. The H1 growth rate is recorded to be less than five per cent for the direct tax collections.

For the indirect taxes, equally dismal is the trend so far. The overall growth in GST revenue is barely 3.4 per cent. The CGST growth is estimated to be about 12 per cent but the source of palpitation for both the Centre and the States is the sharp fall in the IGST mop-up—a neat 2.5 per cent decline. What appears to be triggering an additional bout of concern to the Revenue Department is the negative growth in the IGST component of Customs—minus 6.3 per cent. This clearly means a shortfall of over ₹ 11,000 crores to the Kitty.

The continuing slump in the GST collections and in particular, the Compensation Cess, has eroded the comforts of the Union of India to meet its commitment of 14 per cent growth to the State revenues. With no cushion at its back and no adequate revenue in the Compensation Kitty, the delays in releasing bimonthly compensation funds were inevitable. But what has also become an unavoidable reality is the treasury crisis being confronted by many of the States who depend on such funds to meet their salaries and wages obligations. The financial crisis in some of the States like Punjab and Kerala has deepened so rapidly that the Punjab Chief Minister was forced to tweet to the Prime Minister and the Union Finance Minister for early release of their funds.

Peeved by the delays, five of the Opposition-ruled States even went on record to say that they may explore a legal way out if the Centre further defers the release of their compensation amount. Such an uninspiring scenario clearly leaves behind the rich consensus-based decision-making legacy of the GST Council. Though the

* TIOL - COB (WEB) – 687, 28 November 2019.

Punjab Finance Minister, Mr Manpreet Singh Badal, has emphasised that the GST Council is not a body for doing politics, the soaring revenue discomfort may prompt many of the States to exit the glasshouse of decency or political etiquettes and launch an ugly spat over policy decisions taken so far. There is already a shade of unease among many VAT Commissioners who feel that cherry-picking of goods for lower rates, in the past, has bruised the cause of tax buoyancy in GST collections and they feel that a bit of rationalisation is required to stay afloat with the rapidly deteriorating economic matrix in the country.

Keeping in mind the plummeting revenue kitty and also the wrinkles emerging in the framework of Fiscal Federalism, the Union Cabinet yesterday not only extended the tenure of the 15th Finance Commission up to 30 October 2020 but also altered the period to be covered for making its recommendations. Besides submitting an Interim Report for the fiscal year 2020–21, the Commission will now make recommendations for the financial years 2021–22 and 2025–26. While making these alterations in the terms of the Commission, the Union Cabinet underlined two expressions—comparable estimates for financial projections in view of reforms and the new realities for the period 2020–26. The Cabinet took the view that the impact of the economic reforms initiated in the current financial year would be manifested in the data by the end of the first quarter of 2020-21.

Such alterations in the coverage period are indeed pragmatic and wise in view of the overt change in the nature of the governance paradigm in the country. Though some States may be harbouring a grudge for having transferred their fiscal powers to a common Kitty of pooled sovereignty, such an event had its origin in the fundamentally changed characteristics of the polity where average Indians have become more aspirational and do seek better quality of life from their governments. The conventional matrix of fiscal federalism, which had its moorings in the Government of India Acts, 1919 and 1935, has given space to more a cooperative and competitive nature of federalism.

In this context, the Finance Commission Chairman, Mr N.K. Singh, recently said at the ***TIOL Awards 2020*** event that there was a need for harmony in the working of the GST Council and the Finance Commission—two important Constitutional entities. He has rightly pointed out that a coordination mechanism has to be built between the two for symmetry in their recommendations. It would have been ideal for the Union Cabinet to include in the terms of the Finance Commission the recent demand of the States to extend the period of compensation under the GST by another five years. Since demand has been made by none other than a senior State Finance Minister from a BJP-ruled State, the Commission would have applied its mind to it while working out the details of the divisible pool and the tax buoyancy prospects till 2026. It seems such a demand has been overlooked because the Union of India is not in a position to make up its mind. Though a decision can be taken in the future, the Finance Commission may have captured the zeitgeist of the present time and

suggested a more empirically gratifying solution, such as linking compensation to the nominal growth in the GDP.

This brings us to the rapid-fire review meetings which are being held to overcome the GST conundrums. The Revenue Secretary chaired a full-day meet of senior Central and State GST officials at *Vigyan Bhawan* and took a decision that the early launch of e-invoicing from 1 January 2020 for assessees above ₹ 500 crore turnover and from 1 February 2020 for assessees above ₹ 100 crore turnover would help reduce the number of fake invoice rackets which seem to have dented the monthly revenue collections. The e-invoicing is going to be made mandatory for all from 1 April 2020 and it would have unique numbers with QR codes so that fake invoices could be eliminated before ITC is availed. I sincerely hope that all such measures with a robust IT platform are put in place quickly so that the GST caravan could be brought back on tracks!

5

GST Council's 38th Meeting: Lottery Eats Away the Spirit of Cooperative Federalism!*

For the GST Council, the unwritten rule which had almost become a healthy convention was decisions-by-consensus! It happened not only during Mr Arun Jaitley's tenure but also for a couple of meetings chaired by the Union Finance Minister, Ms Nirmala Sitharaman. Full credit needs to be given to Ms Sitharaman, who apparently tried to invoke the spirit of consensus even at the 38th meeting of the Council yesterday. But as destiny would have it, bitter political winds blowing across the opposition parties' camps sneaked into the federal body and some of the Members insisted on 'reading' the rules rather than being guided by the convention! Though some States, acutely aware of the impending fate of invoking the Rules, tried to work out an honourable exit for the Kerala Finance Minister, obduracy did not pave the way for sagacity! In fact, the Kerala Finance Minister was equally aware of the fate of a voting option but he was adamant and had no fear of being 'alone and vanquished' and he rejected the mid-way course proposed—12 per cent for State Lottery and 18 per cent for State-authorised lottery! In fact, his adamancy brought the curtain over the expression 'cooperative federalism' which ran an unhindered course for thirty-seven meetings of the Council.

Unwillingly, the Council Members, for the first time, cast their votes. The Assam Finance Minister was predictably supported by the Union of India, which carries one-third weightage of the vote. A couple of States like Punjab and Rajasthan abstained. Out of twenty-eight votes, Kerala could muster only seven with the support from some, not all, Congress-ruled States and also Maharashtra. Assam interestingly got the support of even Telangana and Andhra Pradesh. Twenty-one votes went in favour of Assam, which had proposed a uniform tax rate on lottery—a sin good! For a decision to be consummated, only eighteen votes were required as per the voting rules detailed in the 101st Constitution Amendment Act. Kerala lost it in a big way. Although it was advised by the West Bengal Finance Minister, who deals with both—State-run as well as State-authorised lottery—Kerala perhaps wanted to see how many States may support its cause or if it had to fight its battle alone!

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* TIOL - COB (WEB) – 690, 19 December 2019.

One possible implication of ending the much-cherished convention of consensus would be the frequent invocation of the voting rules at future Council meetings. It may trigger some sort of the issue-based groupings within the Council and it may be too difficult for the Chair to avoid politics within the federal body. Taxation is, by nature, a contentious subject. It becomes more disputatious when revenue collections are subdued and given the fact that the present fiscal scenario is grim in the country, more intense politics may turn out to be the future rule of deliberations at the Council. Though politics as such is not essentially a bad creature, politics cooked with revenue cause may not be sumptuous, at least for the taxpayers!

Let me now move to other issues which were deliberated and some were junked for the lack of solid rationale. Though the Council approved certain amendments in the GST laws (to be made a part of the Union Budget 2020), one proposal which was questioned by one of the State Finance Ministers was related to the amendment of Section 17(5) to explicitly extend the benefit of the ITC to oil and gas rigs**.** Strange as it may sound, such a practice does exist in the industry and all assessees do avail the ITC but the CBIC wanted to carry out an amendment in the law because certain assessees had merely expressed their apprehensions**!** Anyway, it was quickly and rightly axed as it lacked rationale. One amendment which has been approved is about holding the kingpin of fake invoice rackets by the collar. It seems the Revenue field formations were facing some empirical problems and greater clarity was required to drag kingpins out of their 'bunkers'! Revenue has gathered enough proof which shows that rickshaw pullers and gardeners are being used as guinea pigs by masterminds to open dozens of fake companies for issuing fake invoices.

During the revenue analysis presentation, the fake invoice racket was flagged as a serious menace. To deal with the rising incidence of such scams, the Council has approved certain measures to block the ITC on such sham invoices in certain cases. Once the circular is issued, it would be clearer as to in what situations, harsher measures would be taken against the recipient of such invoices. Since the compliance records have not shown marked improvement, the Standard Operating Procedure is going to be issued to take action against cases of non-filing of GSTR-3B returns. It seems that Revenue is about to issue notices in thousands very soon!

One of the substantive industry-friendly decisions which the Council approved yesterday was to halve the blocked ITC percentage from 20 to 10 under Rule 36(4). The ITC to the recipient in respect of invoices or debit notes that are not reflected in his FORM GSTR-2A shall be restricted to 10 per cent of the eligible credit available in respect of invoices or debit notes reflected in his FORM GSTR-2A. I guess that the Council was forced by the low compliance indices not to completely remove such restrictions. Though such blockage of credit may have been done in different ways to cause minimum hardships to honest taxpayers, the consensus perhaps favoured the earlier amendment in the Rule. The most significant relief has come for those who have not filed their GSTR-1 regularly. Late fee waiver has been granted from July 2017 to November 2019, provided one files all the GSTR-1. Against this backdrop,

the due date for GSTR-9 and 9C for FY 2017–18 has also been extended as reported by TIOL a few days back. The Council also approved the proposal to block e-Way Bill generation if GSTR-1 is not filed. In place of blocking e-Way Bill generation, it would have been ideal to block credit in such cases, perhaps!

Another important decision the Council approved is to set up Grievance Redressal Committees (GRCs) at Zonal/State level with both CGST and SGST officers and including representatives of trade and industry and other GST stakeholders (GST practitioners and GSTN, etc.). These committees will address grievances of specific/general nature of taxpayers at the Zonal/State level. The Council also granted an exemption to the upfront sum payable for long-term lease of industrial/financial infrastructure plots by an entity having 20 per cent or more ownership of the Central or State Government. Presently, the exemption is available to an entity having 50 per cent or more ownership of the Central or State Government. This decision of the Council is certainly not a very good example as it goes against the principle of the ITC. I wish that the Council would have avoided breaking the chain of seamless flow of the ITC while granting relief to any sector. It is high time that while working on fresh measures for revenue augmentation, the GST officials keep in mind that the core strength of GST—which is the ITC—need not be tinkered with!

6

Whither GST Council! Muting Mic and GIC Crossing Rubicon Fray Tempers of State FMs![*]

World over, politics is known for packing surprises. Surprise, surprise! At times, it can be abrasive and divisive! So, taxpayers have no spicy 'meatball' on their plates to experience 'haemorrhage' over the recent news reports detailing furlongs of grave allegations racing from multiple lips about the conduct of the GST Council proceedings! The powerful and also haloed tax theatre of India, the GST Council, was never conceived by its 'mothers' to be a politically serene and genetically barbless forum! By co-opting the States, governed by different political parties, the Council's 'mothers' had packed enough political 'steroid' in its constitutional design so that no allegations flying out of the closed-door meetings trigger any alarm or surprise to taxpayers—'whither the GST Council'! This is how the West Bengal Finance Minister, Mr Amit Mitra, has concluded his painfully 'hatched and dispatched' letter addressed to the Union Finance Minister.

Murmurs of wailing noise were always heard right from the first meeting of the Council. What may surprise a section of taxpayers is the soaring scale of a howl of anguish and anger coming from different corners of the country! In contrast to occasional and isolated tornadoes in the past meetings, a trend was noticed triggering scattered thunderstorms in later meetings. Finally, saplings of a new culture were sown where overtly hawkish and hurricane style of conducting proceedings have been openly mouthed by the members from the States ruled by opposition parties. A quick study of the statements given by the mascots of different States in recent years tends to reveal that some of the loquacious State Finance Ministers always found themselves caught between the hammer and the anvil! With many of them hardening their stand on singeing issues, a confrontational line always came out in the open even before in-person or virtual meetings of the Council were held.

Mr Mitra has alleged that he was denied access to the floor; his voice was muzzled and somebody withered him by muting his mic and, rubbing salt to his wounds, the virtual link was witheringly snapped! Unmasking more details, he has written to the Council's Chairperson that though several of his observations were referred to by name during the meeting, he was left gnashing his teeth in rage! He further points out

* TIOL - COB (WEB) – 768, 17 June 2021.

that a Rubicon was crossed when the U.P. Minister sought deletion of his observations and the Chair readily agreed to it without giving him a chance to defend them! According to him, the entire proceeding was thoroughbred crazy!

Let me now swing from the Eastern Indian State to one of the Northern States—Punjab. Its Finance Minister, Mr Manpreet Singh Badal, had dispatched a longish and anguish-filled letter to the Chairperson, demanding a 'GST with a heart' against the sinking business prospects in the country! What had fazed him more irritatingly were the furlongs of decisions taken by the GST Implementation Committee (GIC)—to be precise, a magnum opus of 50 pages, from page 96 to page 146 of the Agenda of the 43rd Council Meeting. All such GIC decisions taken between October 2020 and 28 May 2021 were placed only for information, NOT for sanction of the Council. He poignantly underlined the fact that the GIC is neither constitutional nor an offspring of GST law. Its seeds were sown as per the executive decision taken at the 14th meeting. However, it has turned out to be an unworkable boondoggle which has allegedly usurped the pooled sovereignty of the States!

In his exhaustive missive, Mr Badal has pointed out a raft of decisions which are substantive in nature and were taken by the GIC. Key highlights contain approval of notifications trimming the ITC by amending Rule 36 and insertion of Rule 86B; suspension and cancellation of registration on ground of unapproved parameters; truncating the validity of e-Way Bills; and extending e-invoicing to companies with turnovers ranging between ₹ 100 crores to ₹ 500 crores. He notes that all these changes are substantive and require amendments by State legislatures. He has urged the Chairperson to define the powers of the GIC and draw a clear-eyed *Laxman Rekha* to stymie its reckless and autocratic working! He has also demanded that the decisions taken by the GIC should either be reversed or placed before the Council for approval with retro effect. Without elegantly clothing his threat, he has stated that Punjab would not make parallel amendments to its SGST law without the approval of the Council.

Articulating his list of suggestions, he has called for immediate operationalisation of Article 279A(3)—election for filling up the post of Vice-Chair by one of the State representatives; activation of dispute resolution mechanism as per Article 279(11); fixing of floor rates to enable States to bridge yawning revenue deficits as per Article 279A(4)(e); framing of rules to deal with suggestions of the States; circulation of the GST menu at least seven days in advance; and appointment of Ombudsman to deal with swelling complaints of harassment. Many of these suggestions do deserve healthy debate within the Council rather than binning with disdain! The historic wisdom ought to be kept in mind that an institution evolves only by debating and not abating issues!

Let me now race to one of the Southern States. The latest 'gate crasher' to oppose the recent decisions of the Council not to 'zero rate' COVID-related items is the Kerala Finance Minister, Mr K.N. Balagopal. He failed to show up for the GoM meeting as he was stuck with the State budget presentation. He, like Mr Mitra and

many others, cast his vote for zero-rating of COVID-related goods but the majority (majoritarianism in Mr Mitra's lingo) favoured the Centre's proposal based on the rationale that domestic supplies are never zero-rated. This is more so when there are going to be dozens of vaccine or other drug manufacturers who would need to avail the ITC. A dimly understood term, perhaps!

If we skip the squabbles behind the rate fixation logic which is usually more like Swiss Cheese containing large holes, many other issues of substance do warrant early solutions in the spirit of cooperative federalism. Having a tin ear to not suggestions but opportunities to speak on the floor turns the air 'saline' in the closed-door meetings. Being a convivial leader of the Council, the Union Finance Minister, who has honed her skills to 'walk alone', needs to pay a smidgen of extra attention to issues which drive a wedge between the Council members. Voila! Many of them would compulsorily and also habitually look for a gift horse in the mouth but since the greater slice of the onus is on the Chair, the Union Finance Minister should focus more on binary possibilities and soak the grumpy and adamantine ones with kind attention to their views. It is true that murky waters of politics may sometimes put her in a pickle but it is also not always good to do what is written on the tin! As a seasoned politician, she needs to oxygenate the atmosphere through 'photosynthesis' and rebut any idea that the Chair does not care a straw!

One of the immediate and highly kosher issues which the Council's Chair needs to take up is the ultra-loose 'electrons' of the GIC. Mr Badal is absolutely right in pointing it out before the GIC becomes a serious splitter for the Centre. Its powers and contours of Rubicon need to be defined to alkalise its tendency to take acidic decisions! Similarly, the Chair needs to pull the plug on the rising proclivity to circulate the GST menu barely 48 hours prior to meetings! Adequate time needs to be given to the States to come up with fascinating deliberations rather than a barrage of spiky barbs. Some 'pharaohs' would always come up with canards and the prevailing mood of conviviality would wax and wane but the Chair, which faces the blowback, needs to choose between two time-tested maxims—'silence or muting is complicity' and 'boring is indeed reassuring'! No matter which maxim the Chair may choose but there is no silver bullet to deal with a rollercoaster of challenges worded by the State Finance Ministers!

7

GST Council's 45th Meeting: Quiversful of Stinging Arrows Await Union of India![*]

COVID or NOT, the Goods and Services Tax (GST) is a real scorcher! Nothing can dim its potential to dictate the fingers of media persons on their keyboards! Even before the GST Council could hold its 45th meeting on 17 September at Lucknow and commandeer the headlines, the Apex Court's observation on the monumental delay in the constitution of the GST Appellate Tribunal has been lapped up by the media and the taxpayers alike across India as a heart-soothing rebuke to the Government. The Chief Justice of India orally told the Solicitor General that *'there is no question of filing counter, you have to constitute the Tribunal, that's all'!* Even after four years, the GST Tribunal appears to be parked in extended limbo, uncared for and diabolically ignored! Several High Courts have given directions but only to be cursorily read and coolly put on the back burner—strange—not even a sliver of repent or compliance! The Apex Court is now going to hear it again on coming Monday and, going by the mood of the Bench, no charm offensive is likely to placate the Bench! A time-bound direction is likely to be mandated!

For the Centre, which has undone several Apex Court orders on the Tribunal reform issue, what is holding it back from notifying the GST Tribunal is an impenetrable enigma! I guess, it is certainly not the Madras High Court order? Strange, though the Modi Government is known for its fetishism against avoidable litigation and has taken several laudable measures to peel off litigation and reduce the pendency of cases in courts, on the issue of setting up either the GST Tribunal or a Dispute Resolution Forum by the GST Council for disputes between the Centre and the States or among the States themselves, it has been presenting itself in a kaleidoscopic cavalcade of funny scenarios! But why? Even a crystal ball may suffer utter cloudiness to answer this question! It is a curveball thrown at all legal brains, perhaps!

Let me now quickly move from the judiciary to the Executive and the possible to-do list for the next GST Council meeting. It appears that the Centre is destined for more arrow attacks—this time, from the State Finance Ministers! Quiversful of stinging arrows, perhaps, await this meeting! Netizens may recall that several State

* TIOL - COB (WEB) – 780, 9 September 2021.

Finance Ministers, such as those from West Bengal and Punjab, had ratcheted up the rancorous issue of the GST Implementation Committee (GIC) illegally stealing the heft of the GST Council by amending several Rules without its consent! Dr Amit Mitra, in his missive to the Chairperson, dated 23 June 2021, underlined that *'... when the GIC was meant only for procedural issues, it has amended Rule 8 and 9 on Registration, Rule 21 and Rule 21A, Rule 59, Rule 86B and Rules 138 & 138A on the vital issue of e-Way Bills. You will agree that such amendments and their implementation by GIC are undermining the powers of the GST Council'*.

A similar sentiment in flavour and hue was expressed, without mincing words, by the Punjab Finance Minister in his letter dated 24 May to the Chairperson. How did the Centre grapple with such serious charges? It is learnt that it was referred to the crystal gazers of the Law Committee to pinpoint the exact Rules which have been violated by the GIC! Nothing could be more apocalyptic! How can the Council refer the issue to a forum which is subordinate to the GIC? Secondly, Rules need to first exist on paper before one can examine any charge of defiling them! I am not aware of such rules being ever framed. If framed, why are they not in the public domain? Was there a political mandate to create a body clothed in 'fabrics' of obscurity and non-transparency? Going by the letters of the State Finance Ministers, it comes out clear that the GIC was set up only to deal with a gaggle of procedural issues to remove difficulties confronted by the taxpayers during the initial phase of GST implementation.

Then, how did the GIC begin nibbling into the powers of the Council? Why did not the GST Council Secretariat bring it to the notice of the Council? Not so quizzical answer is that the Council made a fatal error of making the Secretariat subordinate to the office of the Revenue Secretary who, at best, cannot be more accountable to the Council than his own original employer—that is the Union of India! Ideally, the Secretariat should be an independent body to play a bipartisan role and assist both the Centre as well as the States rather than playing in the hands of one dominant stakeholder! Such mortal follies need to be set right if the Council Members are keen to rely on an additional pair of eyeballs to keep them abreast about fiscal poltroonery! I am sure that the GIC issue is going to be a searing point of debate at the next Council meeting and it is not going to be a slam dunk race for the Union of India! However, I am also quite sanguine about an amicable solution—it is very much a peelable problem provided nettle stings are not touched lightly, but grasped firmly!

Apart from these issues, the Council may like to review its decisions taken in relation to COVID-related items. The fact that one more tide of COVID-19 is projected to be 'closer home', India needs to gird for a long haul with all-round preparations. Lower tariff would help hospitals, citizens, and state governments in keeping warehouses of medicines and equipment in a healthy state to battle out the lurking doom and successfully eff it off! Yet another brawl-prone issue which may alter the constituents of the air in the meeting room is that of extension of

Compensation Cess. A deep canyon exists between the perceptions of the Centre and the States on this issue. However, a ropeway can be engineered to solve this 'fiscal cliff' provided fiscal 'guerrillas' are kept under check and both the stakeholders keep partisan politics at an arm's length!

However, what surprises me (and the same may trigger tides of palpitation for a few) is—Why Lucknow? After long gaps, the Council is going for a physical meeting and Lucknow appears to be out of plumb as a venue unless there are other unseen layers of its 'fiscal seductiveness'! Till the time these 'layers' are known, an eerie calm pregnant with many political overtones may prevail! Given that Uttar Pradesh would be going to polls early next year, non-BJP State Finance Ministers may see 'political neurons' in venue selection and may desert all scruples to openly attack the Centre on this issue!

Secondly, merely holding the meeting at Lucknow may not really generate any G-force on the needles of political prospects for the ruling party! Ideally, venue selection for the Council, a forum born out of cooperative federalism, should not provide fuel to polemicists, frequently seen on idiot-box political debates! Being the pivotal engine for creating a positive eco-system surrounding the GST, the Union of India should nudge away such ideas which may not even promise any 'political crumbs' leave aside the question of a crispy topping, crumbs! I sincerely hope that the venue selection does not become an infernal nuisance to the real issues awaiting decisions and it is no exaggeration that it may trigger more fissures in the rapidly fraying relations between the Union of India and the States. Furthermore, it is not a speculative 'Nebular Hypothesis'! It may prove to be a turn-off issue and a rundown for the long-term interest of the GST as an 'efficaciously-tamed' tax system! Incidentally, might makes right all actions! Enviable, indeed!

●————●

Compensation:
A Long Length of 'Cord'—Yup! Discord!

Introduction

Woo-Hoo! Here terminates the intriguingly audacious, angst-ridden, and also, on many occasions, palpitating journey of five years! An era of high-decibel hoo-hah ended on 1 July 2022—jaw-droppingly, with a whimper! But, of course, not without harangues at the 47th meeting of the GST Council at Chandigarh! This is the story of the most critical lynchpin of the strategy adopted by the late Arun Jaitley to entice the bellyaching States into the crucible of a new indirect tax system in India—the Goods and Services Tax (GST). The legislative promise to compensate States for any revenue loss owing to the new reform and also the carrot of 14 per cent incremental growth proved to be a doughnut too delectable to be resisted! So deep was the trust in the revenue-generating potential of the new tax system that its versatile architect had probably thought of rolling it out with the proverbial dish of protein-rich fish and had certainly expected from the States that once they learn how to cook a fish, they would feed themselves for a lifetime!

It all began well with the levy of Compensation Cess! Some initial hiccups were inevitable in terms of delays in settlement and disbursement from the dedicated compensation fund but heartburns and wrinkles on foreheads were conspicuously missing! Then came the hurricane from the clan of the coronavirus—the global pandemic. Lives and livelihoods perilously confronted a baleful existential crisis. Economic wheels of India ground to a screeching halt! The mercury of Cess collections dipped with a thud! Once the States regained their normal senses after a pitched battle with the pathogen, they scrambled for their compensation dues. With the revenue hitting a new low in the kitty, and many States repeatedly missing the salary dates for their employees, a swampy and boggy political ground surfaced on the horizon of cooperative federalism. The issue turned into a stick of fiscal dynamite after the Union of India disputed the claim for compensation when there is no fund in the dedicated kitty due to the pause in economic activities triggered by the pandemic.

The issue became more incendiary when the Union of India sought the views of the Attorney General (AG) who took a legal view that the Centre was not liable to compensate for losses arising from externalities like the pandemic! The AG also shared his legal opinion that the onus descends on the GST Council, not the Centre, to find a way out of the hellhole! This sparked high-octane fury which threatened to knock at the foundational bricks of the edifice of ‘marble-cake’ fiscal federalism! The Ministry of Finance demonstrated intransigence to bridge the differences with the States but before it could sink to Mariana Trench depths, the PMO stepped in! A realistic solution was thrashed out—borrowing from the RBI at a nominal rate and extension of the levy so that the compensation kitty could repay the principal and the interest to the lender till 31 March 2026. Though other options were also explored on

the principle that there is more than one way to skin a cat, they were finally not pursued. These options were: the States themselves taking loans from the RBI and shuffling a few goods from the 18 per cent basket to the 28 per cent basket! They were weighed extensively but thankfully, not favoured against the rising silhouette of miseries in the economy!

As soon as this bone of contention was sorted out, another saga unfolded with a battle cry—the extension of Compensation beyond 1 July 2022! Though States had kosher reasons for such a demand as their revenue collections had not normalised and most of them were running in deepening deficits, the revenue position of the Centre was equally dilapidated. Having no wiggle room to cushion the pain of the States, the Centre apparently decided to play hard-boiled and also stone-deaf! Though the State Finance Ministers did not leave any stone unturned to sledgehammer their demand, it did not work and the curtain over the bellicose chapter of compensation was brought down with a deep sigh of relief! A long of cord of internecine discord is thus coiled, perhaps, forever!

In Chapter 1, I have dealt with the funny business of States accepting the noisy statistics of a dip in the economic activities and thereby the revenue, but not in the compensation kitty; the story of the bimonthly settlement system; the Union Finance Minister churning out details of a shortfall in the compensation pool on the floor of the House; the Revenue Augmentation Committee calling for putting more goods under the Cess bracket to gin up revenue for compensation; the Centre advising the States to borrow to overcome the deficit scenario but the States seeing the same as a debt trap; the 15th Finance Commission finding the 14 per cent compounding growth rate in compensation as being too rapacious and thereby, unsustainable; and sustained vitriol against the Centre by some of the States.

Chapter 2 narrates the details of the Revenue Secretary's statement before the Rajya Sabha Committee on the issue of compensation; the AG's legal opinion bailing the Centre out if the dip in the compensation pool is attributable to a slowdown in the economy; a PIB Press Release letting the cat out of the bag: the Centre paid compensation out of IGST pool; the Consolidated Fund of India, which sparked outrage and was dubbed as statistical jugglery; the debate over Constitutional guarantee v/s legislative promise; chances of success if a bid is made to re-negotiate the 14 per cent annual growth rate in compensation revenue; and whether once compensation kitty runs out of legislative sanction, the GST Council would convert the same into a non-lapsable national contingency fund so that 'birth defects', like food cess could be avoided in the GST basic design!

Chapter 3 provides a peep into how the compensation kitty fell victim to the raging pandemic; Chief Ministers and State Finance Ministers, stuck in throes of no-penny scenarios, making fervent appeals to the Centre; the details of the AG's legal opinion: States may borrow and pay from the future revenue stream and also why Centre is not liable to pay if losses originate from any catastrophe like the pandemic; if expanding the canvas of Compensation Cess will help and whether the targeted

sectors would not plead for euthanasia; whether India being a signatory to the WHO Convention should further extract more from tobacco and pan masala sectors, which also need to cushion the collapsing health infrastructure in the country; the Punjab Finance Minister favouring ad valorem rate in place of specific duty on such items; and the possibility of extending the Cess for a longer period!

In Chapter 4 dwells at length into the fusillade of political vitriols being launched against the Central Government and furlong-sized missives being droned down to the Prime Minister and the State Finance Ministers darting the Union of India with the accusation of backpedalling on the promise given by late Arun Jaitley; how the Centre was flayed for turning into an emperor without clothes; how Arun Jaitley got the timely pearl of wisdom from the late Pranab Mukherjee about how and why not to make compensation a part of the Constitutional Amendment so that the sovereign is not held hostage to the vagaries of future revenue collections and any instance of default and how this resulted in Mr Jaitley pedalling for a separate compensation bill; though Mr Jaitley weaponised his skills for consensus politics and shaping up the framework of cooperative federalism, which the States dubbed as being transformed into coercive federalism; and the Ministry of Finance advising States to go for borrowings but the same being rebuffed!

Chapter 5 details the compensation saga where a solution is being worked out by the Centre, like Trojans, but is being seen as a 'Trojan Horse' by the States and how a battleline was drawn between the Centre and the States as the latter wanted the borrowing deal between the Union of India and the RBI and also threatened to move the Apex Court on this issue; how the sparring stakeholders moved closer to the voting option and the issue being viewed as an ego-hassle by the industry; the tale of 3 Ps where the money has to twirl out of the taxpayers' pocket to the compensation kitty—so, why this fuss?; why the Centre should get into the trivial business of making a distinction between the losses arising out of the implementation of GST and the losses owing to the pandemic when the ultimate burden is to be borne by the taxpayers; where was the need to make it a battle of infected egos and shadow-boxing and how the North Block goofed up in computing the projected losses; and the future projections of losses by factoring in the 14 per cent growth rate.

Chapter 6 deals with how late Arun Jaitley built the edifice of GST on the keel of compensation and how the rare occasion surfaces for Ms Nirmala Sitharaman to seize the 'Jaitley Moment' to craft her own doctrine of rapprochement and ensure that this keep is not uprooted; how COVID-19 bestows a chance on Ms Sitharaman to play the role of 'big brother' for COVID-walloped pauperised States; how Ms Sitharaman can set a fine example of political quietism even if her decision may drill a hole in her fiscal wallet and restore the kilter within the GST Council; and also the issue of local cess proposal coming from the State of Sikkim which needs revenue and wants to impose cess on intra-state trade of medicines and also electricity

Chapter 7 provides a peep into how the Centre makes a courageous attempt to pass the camel through the eye of the needle by setting up a GoM for revenue

augmentation so that the States stop rattling the cage for extension of compensation provision; a decision being taken by the Council to extend Compensation Cess till 2026 but only to pay the principal and the interest on the borrowed sum to pay compensation—though no official utterances were made on the issue of extending the compensation period, even the BJP-ruled States were heard talking sotto voce about such a demand; and how States declined to even talk about extending the levy of GST to the petroleum sector until a decision is taken on the issue of extending the compensation period.

1

GST: Plunging Compensation Revenue—States Unfairly Assault the Union of India![*]

The Indian economy, as per the Q2 data, has plunged into a recessionary cycle. Several key sectors—such as automobiles, FMCG, electronics, and others—have reported a dip in sales. Naturally, the core sector has also slowed down! When the major sectors of the economy are experiencing a downturn in their sales, statistically fuelled by slowing consumption in the economy, it would be *naive* to presume any significant growth in the GST revenue collections. Consumption and GST revenue are intertwined phenomena. If the normal GST mop-up is down, how can one expect much growth in Compensation Cess revenue?

Though the downturn in SGST and CGST collections is well accepted, a group of State Finance Ministers appears to be doing serious politics over the issue of compensation to States in lieu of revenue loss in SGST collections! The origin of such a political brawl lies in the GST Compensation to States Act, 2017. Section 3 of the Act states that the projected nominal growth rate of revenue subsumed for a State during the transition period shall be 14 per cent per annum over the base year 2015–16. On top of 14 per cent, it is the compounding growth rate. Only after the Union of India committed such a heavy dose of compensation through an Act of the Parliament did all the States come on board for the introduction of GST from July 2017.

Let us now analyse the cause of an unpleasant political brawl. As per Section 7(2) of the Act, the compensation payable to a State shall be provisionally calculated and released every two months and shall be finally calculated for every financial year after the receipt of the final revenue figures—as audited by the Comptroller and Auditor-General of India. A dispute arose from this Section that mandates the Union of India to release compensation on a bi-monthly basis. Since the Centre did not do so for the months of August and September in the October month, it was a strong enough reason for some of the States to give a battle cry! At least five State Finance

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* TIOL - COB (WEB) – 691, 26 DECEMBER 2019.

Ministers also talked about exploring legal options, including moving the Apex Court on this issue.

Let us examine some of the latest statistics and the legal avenues available to the States. Empirically speaking, as per the Finance Minister's speech in the *Rajya Sabha* on 12 December, in the first six months of the current financial year, a sum of ₹ 41,574 crores was collected as Compensation Cess and a sum of ₹65,151 crores was released as compensation. At the end of the H1 period, there was a fund balance of ₹ 23,695 crores. After payment of over ₹ 35,000 crores—a day prior to the GST Council meeting on 18 December—there was a projection of a deficit of about ₹ 63,000 crores by the end of the fiscal year in the Compensation Kitty alone. If one goes by even 5 per cent growth in 2020–21 and 8 per cent growth in 2021–22, there is likely to be a shortfall of about ₹ 1,35,000 crores in this Kitty.

Now, the question is—Where does the solution lie? One simple option is to bring more goods under this category and collect more Compensation Cess revenue. This is what was suggested by the Revenue Augmentation Committee of officials. A suggestion was made to revisit the rates on some of the items which were shifted out of the 28 per cent slab. But, thankfully, given the state of the health of the economy, the Council did not favour it. In fact, Mr Sushil Modi has gone on record stating that the States now favour rate revision only once a year. It is indeed a good decision as it gives time to the tax regime to stabilise.

If the Compensation Cess rate is neither going to be hiked nor more items are going to be brought under its purview, what other solutions are possible in this scenario? As per some of the opposition-ruled States, the Union of India should borrow funds from the market and compensate them. *Prima facie*, borrowing funds from the market is a patently bad idea as it involves a debt-servicing cost which would in turn be passed on to taxpayers. Secondly, if it is to be funded through loans, let the States show patience when it comes to the standing arrears and the same can be paid beyond 2022 by extending the levy of Cess for one or two more years. Such a practice was common when we had a CST regime. In one instance, Mr P. Chidambaram had even gone back on his promise after committing compensation for reducing the CST rate from 4 per cent to 2 per cent. In the backdrop of such a history, if the States expect the Centre to see a rise in its domestic borrowings and a concomitant increase in its interest expenditure, it is far-fetched optimism!

More importantly, the States should give up being too rapacious about the 14 per cent compounding growth rate in their revenues when the economy is down in the dumps (hopefully, for a short period) and listen to what the Finance Commission Chairman, Mr N. K. Singh, talked about at the Council's Goa meet—a review of the compensation formula: $100 \times (1 + 14 \div 100)^3$. He was right in suggesting that when the Centre itself is staring at a shortfall of over ₹ 3,00,000 crores in the current fiscal year, the States need to be more realistic in their expectations about compensation.

Let us now visit the GST Compensation Act and find out about the *Laxman Rekha* drawn by its provisions. Section 10(1) refers to a non-lapsable fund known as the GST Compensation Fund. Section 10(2) states that all amounts payable to the States shall be paid out of the Fund. This clearly means that the Union of India is not legally obligated to mobilise funds through other means and pay compensation. The entire power is vested in the GST Council to levy Compensation Cess and enrich this Fund which is to be used only for the purpose of compensation. If there is no money left in the Fund, it is certainly not the Centre alone which has to panic and mobilise funds. The onus is clearly on the Council to discuss and recommend ways to collect more revenue for this Fund. In such circumstances, the State Finance Ministers should logically raise their voice within the Council rather than launching an assault on the Centre.

Secondly, the repeated threat of the State Finance Ministers to take the dispute to the Supreme Court of India also appears to be empty in substance. As per Article 279A, Clause 11, the legal mandate rests with the GST Council to establish a mechanism to adjudicate any dispute between the Centre and the States or between two or more States. So, the Apex Court's doors are not immediately open to the States as they are required to first raise this issue in the Council which is obligated to set up a dispute resolution body and once the verdict comes from such a body, an appeal may be filed.

Since all the powers as per 101st Constitution Amendment Act are vested in the GST Council, including the powers to deal with disputes and also to enrich the Compensation Kitty in case of any shortfall, launching a vitriolic attack on the Centre is indeed unfair and taking undue advantage in the name of the spirit of federalism. The Centre is merely one of the thirty-three stakeholders in the Council and it also abides by the Council's decisions like any other State. Like many States, the Centre is also struggling to cope with the contraction in CGST collections. In such a scenario, mixing partisan politics with the revenue cause would certainly not serve the interests of healthy Centre-States relations. The GST Council, the new kid on the constitutional block of powerful bodies, alone can find a solution to the compensation issues and certainly not the Centre alone! It is also not desirable for the States to treat the Centre as an adversary insofar as fiscal issues are concerned!

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GST: Compensation Cess Turning into a Poisoned Chalice for the States![*]

The big-bang and, at least the theoretically scrumptious indirect tax reform, in the form of GST, is turning ugly and fiddly. The key actors in the theatre of battle are nary the predictable taxpayers and the Revenue, but they are truly 'State Actors'—fiscally battle-scarred, too! The lone issue for the disconsolate group of States is the over-orchestrated opinion of the Attorney-General of India—there is no obligation on the Central Government to pay the GST Compensation shortfall! The Attorney-General's opinion seems to have put *ghee* in the fire ignited by the highly flammable observation made by the Revenue Secretary, about a month back, before the Parliamentary Committee, that the Centre may not be able to pay compensation to the States in the near future as revenue collections have gone out of kilter. Reacting to big font-sized headlines in the media, several State Finance Ministers have shot off acerbic missives to the Union Finance Minister, reminding him that compensation is an 'unfunny business'!

The health of the GST Compensation Kitty had begun looking precarious from the second half of 2019. With the economy plunging into torpor, the Union of India had shown visible fiscal wrinkles in keeping pace with the bi-monthly payment cycle. What eminently looked difficult but manageable till early January now promises grubby politics and a thwack to the much-cherished spirit of cooperative federalism! Compensation has indeed turned into a poisoned chalice for the States. A mortal blow was struck to the esoteric group of micromanaging North Block bureaucracy by the Coronavirus. With the lockdown throwing all economic activities topsy-turvy, the message on the wall was unmistakably graffitied-eyed—a much sharper deficit in the State Compensation pool. And the pervasive miasma warranted two-pronged strategy to create egregious impediments for the States: (1) A legal wrangle and (2) Running amok with fiscal terabyte data with the GSTN!

That is how the Revenue Secretary and his 'satraps' first opted to make a reference to the Attorney-General's office, which consumed a considerable amount of time to draft what may appease the 'Lord'—no obligation to pay if the loss is on account of COVID-19, economic slowdown, or a natural disaster! However, the

* TIOL - COB (WEB) – 723, 6 August 2020.

Council may recommend to the Centre to allow States to borrow the strength of the future receipts from the Compensation Fund. Since the legal opinion took some time to come, the Revenue Secretary played leery with his words before the Standing Committee of Parliament and expressed fiscal handicaps to pay States for their losses in the coming months. A chain of such events, suffused with a clear mind not to yield, led to ruinous delays in clearing the pending sums of compensation. Then came the statistical masterstroke (please refer to the PIB's Press Release of 27 July 2020). The Second paragraph reads:

> *To release the compensation for 2019-20, balance of cess amount collected during 2017-18 and 2018-19 was also utilised. In addition, Centre had transferred Rs. 33,412 crore from Consolidated Fund of India to the Compensation Fund as a part of an exercise to apportion balance of IGST pertaining to 2017-18.*

It sounds indigestible that the IGST Fund was diverted to pay compensation!! The IGST fund is to be split between the Centre and the States. Naturally, the fund which has been diverted for compensation is the legitimate share of the deficient States to whom it was paid less for the fiscal year 2017–18. If that is so, what is that extra which has been paid to them out of the Consolidated Fund of India (CFI)? How can IGST revenue be utilised for compensation when the 'Apportionment of Tax & Settlement of Fund' is tucked in the IGST Act, 2017 for the same and a dedicated fund also exists. There *prima facie* appears to be some sort of statistical jugglery in this case!

Anyway, the fact of the matter is that the economy has backslided but the Union of India remains committed to compensating the States for their revenue losses after they relinquished their fiscal autonomy, of course voluntarily, to what India borrowed from the lexicon of the EU architects—cooperative federalism! The Union of India may be bang on when it claims that there is nothing said about the 14 per cent growth rate in 101st Constitution Amendment Act. In fact, Clause 18 of the Amendment Act dealing with compensation does not find place in any Article of the Constitution. At that time what was politically palatable was promised by the NDA Government to bring all States on the same page. Several State Finance Ministers have tweeted their indignation and also suggested measures to bring items removed from the 28 per cent slab basket under the Compensation Cess basket. Given the rickety state of the economy, any overture to do so would lead to a shambolic scenario in the market. Clearly, the policy makers are left with no more tools in their toolbox. This has incensed many State Finance Ministers, including those from the BJP-ruled States, and they have demanded an immediate release of compensation.

So, what is the way out of the imbroglio which may threaten fiscal fragmentation or internecine litigation? A pragmatic solution lies in the constructive deliberation of the issue by the GST Council and a consensus may be evolved over re-negotiating the 14 per cent growth rate to 7 per cent-or-so for the remaining two years of the five-year period. For GST compensation to States, the law was made on the

recommendation of the GST Council, and can also be amended on its recommendation. No doubt that the compensation was given for three years based on one particular formula. Why cannot it be different for the next two years?

For the demand of an extension of the period for compensation, ideally, no Cess shall be there in the GST regime. But, to further compensate the compensation-scarred States, a National Contingency Fund in place of the Compensation Fund may be created and kept at the disposal of the Council rather than the Union of India—and such a fund may be leased a shelf-life of five years beginning with the fiscal year 2022–23. This can be utilised to set off losses of the States during floods or other natural calamities and its prosperity can be nourished by an array of decisions taken by the Council from time to time.

Such a fund would also help obviate the need for what the State of Kerala has done and the GST Council has also injected a 'birth defect' in the Model GST Legislation—the imposition of Flood Cess. Cess, by any name, is an anathema to the basic nature of GST which subsumed India's miasma of multiple Central and State levies. At present, the States of Assam and Bihar are severely reeling under the devastating impact of floods. Given the fact that Kerala has been allowed to levy cess for reconstruction, the Council may run out of rectitude to deny similar demands from Assam and Bihar. If States are allowed to levy cesses on one or the other pretext, no matter how legitimate they may be, it would amount to injecting, perhaps intravenously, flaws in the GST design which may cost eye-wateringly to the cost-efficiency of the economy in the long run.

Secondly, the GST Council should also hurriedly set up a dispute resolution body as per Article 279A(11). Since bouts of litigation appear to be lurking in the air, there is no valid reason to further delay the birth of such a body. Further, since there is a provision for the States to choose or elect one of the State Finance Ministers as Vice-Chairman of the Council, it is high time that the States do so and let the Vice-Chairman articulate and communicate their issues to the Centre, more forcefully! What is equally important is that the GST Council needs an independent Member Secretary to play fair in the game. He should have the confidence of the States and not just be a representative of the Centre. The Revenue Secretary, being ex-officio Member Secretary, appears to be failing in his duty to play neutral if one goes by his statement before the Parliamentary Panel. In the last GST Council meeting, one of the senior Finance Ministers reminded him that he is ALSO Secretary to the Council! Such 'birth defects' in the design do need timely correction for the healthy evolution of federalism.

I believe that the Prime Minister's Office is also aware of the rising temperature over the compensation brawl. His attention was drawn to it during one of the lockdown extension meetings with the States. The PMO is learnt to be treating it as a serious threat to his reformist credentials. For GST, the nation has not forgotten the chest-thumping by the Prime Minister on 1 July 2017. He is also learnt to be personally keen to enrich the fiscal unification of India and not to fritter away the

benefits that GST offers to an otherwise tangled indirect tax system. The PMO is also sieving through inconsistent and inept policy-making which is now beginning to tell on many fronts. It is high time that the PM steps in before compensation and many other GST-related technical issues reduce the much-vaunted tax reform from being a game-changer to merely a name-changer!

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3

GST: Sparring Over Compensation—Hybrid Solution Lies between Selective Tariff Hikes and Borrowings![*]

For humanity, the COVID-19 has proven to be purgatory with the global death toll inching close to 8.4 lakhs! For close to 60,000 Indians, death indeed rode a fast camel! Worse, the collateral damage it has wreaked on the global economy is not only humongous but also without a parallel! With close to 33 lakh cases, India ranks third in the global tally of positive cases. The pandemic has ruthlessly wrenched the Indian economy to its nadir and the economic stimulus injected so far seems to have vapourised against the pandemic size of economic woes India has skidded into post COVID-19! With the economy down in the dumps, one predictable victim has been the Compensation Kitty under the GST.

The Union of India has gallingly been failing in compensating the States for their revenue losses. Some of the State Finance Ministers have written to the Union Finance Minister, detailing the litanies of their fiscal woes and how they are failing to pay full salaries to their personnel, leaving aside the much-needed public welfare schemes. Their gnawing revenue deficits range between 40 per cent and 60 per cent, and their only sliver of hope is tethered to the Compensation Kitty! In view of the swelling distress calls, the GST Council has called for its 41st meeting, dedicated to a single agenda item of compensation, today. It is learnt that more than seven States, including a couple of BJP-ruled ones, have penned bitterly-worded missives (no waffling, at all!) to the GST Council Chairperson. The Bihar Finance Minister, Mr Sushil Kumar Modi, went on record to say that the Centre is morally committed to compensating the States even if it boils down to borrowings. With frayed temper running high, the Council may witness some fireworks and political callisthenics before the *'marijuana'* (compensation solution) may calm them for some period!

What seems to have acted as a powerful ingredient stewing in the pot is the adverse Attorney-General's legal opinion on the issue. The Attorney-General is learnt to have communicated that the Centre is under no obligation to pay compensation shortfall! The ball has been hurled back in the lap of the GST Council,

* TIOL - COB (WEB) – 726, 27 August 2020.

which alone can decide on making good the shortfall by providing a sufficient amount in the Kitty. The Attorney-General is reported to have cooed that the Council may recommend to the Centre to allow States to borrow on the basis of future inflows in the Compensation Fund but the onus would lie on the Union of India under Article 293(3) of the Constitution.

The Attorney-General has provided a plain interpretation of the constitutional provisions—compensation for loss of revenue on account of IMPLEMENTATION of GST. The Union of India is under no obligation to compensate on account of COVID-19 or economic slowdown or natural calamities because they have no direct nexus with the IMPLEMENTATION. The First Law Officer of the Union of India has also pointed out that the Parliament had binned in 2017 an amendment which had sought to put onus on the Centre to pay from the Consolidated Fund of India.

The Attorney-General's opinion has clearly delineated the boundaries for deliberations in the Council today. Now, the trickiest question is—how should the Council proceed? What options should be proposed on the floor? Given the dilapidated conditions of most of the sectors in the economy, expanding the ambit of Compensation Cess to more goods or perhaps services would be akin to pushing such sectors to a point where they may plead for euthanasia! The present time is certainly highly perilous for most sectors except for the 'sin goods'. If we analyse the basket of 'sin goods', the two goods which have qualified the threshold of 'untouchable' in the near future are automobiles and aerated drinks. This leaves two items—*pan masala* and tobacco. These two do enjoy high credentials of being serious threats to public health. They do owe allegiance to the clan of coronaviruses, figuratively, in terms of putting extra strain on the public health infrastructure (smoking costs ₹ 800 billion to the nation and kills over 16 lakh people annually). Stung by the impact of the pandemic on India's clunky health infrastructure, the Union of India is committed to overhauling it as per the Prime Minister's statement and it is going to be eye-wateringly expensive. So, let *pan masala* and tobacco pay for it!

Numerous studies have also proven that sin taxes do make people healthier. They do change behaviour. Economists and even the WHO have come to believe that a 1 per cent rise in prices of tobacco products is linked to a decline of about 0.5 per cent in sales. That is another issue that ciggy biggies tend to absorb the rising costs by either reducing their own margins on low-cost products or extracting the same from luxury brands. India is a signatory to the WHO's Framework Convention on Tobacco Control and it calls for a minimum 75 per cent tax burden to curb rising consumption. Higher taxes not only garner extra revenue for the Exchequers but also reduce the burden on the public health system. That raising taxes would lead to an increase in smuggling is the common refrain of pro-tobacco lobby but global studies have found that the rise in smuggling is less than 10 per cent as compared to the contraction in consumption. The WHO has captured data from France, Turkey,

Uruguay, and many other countries which have begun to implement its six-point agenda of MPOWER Scheme, 2017.

Anti-tobacco organisations have represented to the Government that if the GST Council raises the Compensation Cess as per the ceiling envisaged, it may generate close to ₹ 50,000 crores in revenue. Though I am not sure about the quantum of revenue, any appreciable hike in the cess rate would enrich the Compensation Kitty in the prevailing grim time. The Punjab Finance Minister has demanded that in place of a specific rate, a way needs to be worked out for *ad valorem* which would be more realistic. I personally favour a hike in the tax rate on all tobacco products including *bidis*, so that India complies with the WHO suggested threshold of 75 per cent tax and the Government could allocate more resources for public health.

The second option that the Council needs to work out is to first reduce the annual growth rate from 14 per cent to 7 per cent, which would be more realistic and attainable. Once a consensus is arrived at such a rate, the Centre and the States may agree for extending the period of compensation from five to eight years. This would provide a comforting cushion to the sparring States and lesser burden on the economy too! Thirdly, the Council may recommend to the Union of India to allow States to borrow against the future receipts of compensation in the short run. Or, if the Union of India is keen to avoid any allegation of backpedalling on its historic promise, it may access the market and the debt-servicing can be done through the Compensation Fund! This appears to be more a viable and less fracas-causing option as even the Centre faces a serious liquidity crunch in its direct as well as indirect tax kitties. States need to take a holistic view that like them, the Union of India is also grappling with the most critical fiscal slippage perils in recent decades. Though political pyrotechnics cannot be wished away, given the average political wisdom of the State Finance Ministers, a realistic solution to the compensation imbroglio appears to be lurking in the corner!

4

GST Compensation Acquires Hues of 'Fiscal Apartheid'!*

For the Union of India, GST compensation is fast turning into a Sisyphean project! A blizzard of misinformation, coupled with acerbic comments from several quarters of political reckoning, has further muddied the already-turbid waters! Going by the number of open letters being sent by the State Chief Ministers to the Prime Minister, a streak of political hysteria appears to be gathering avoidable momentum over the weeks. Many State Finance Ministers have been howling at high decibels and calling the two options proposed by the Centre 'acts of fraud'! About a dozen States are now on record, describing the pre-GST commitment of the Centre as the one that rings hollow today! Vilifications and pillories have clearly come out as poisonous agendas for many! One of the Chief Ministers, failing to cloak his partisan political view, went to the extent of suggesting a backpedal to the older regime as he thinks that GST is not working and the States are being subjected to 'fiscal apartheid'! In another case, the Centre has been accused of incessant lying on the searing issue.

In a nutshell, the Union of India is being showcased as if the 'emperor' has no clothes! For many States, including some BJP-ruled ones, the cocktail which followed the introduction of GST in 2017 is fast losing its potency! GST has become a much-maligned tax system as it has failed to yield the required tax revenue @14 per cent for the States! But the larger question before the nation is—Is such fearmongering without any substance? Has the Centre really erred in handling such a politically-sensitive issue? Was the commitment of compensation built on political strawmen? All such questions and accusing fingers, I am sure, must be turning and tossing Mr Jaitley in his 'bed'! Though richly-effusive remarks were made about him on his first death anniversary recently, what would perhaps have amounted to honest tributes to his 'consensus-filled soul' was a sincere attempt to nip in the bud the boiling controversies over the compensation issue!

Mr Arun Jaitley was not only an affable politician but also a quick learner, and he had learnt many lessons from Pranab *Da*. When the issue of compensation was, for the first time, pushed on his table in the Finance Minister's room, he had called for a *tête-à-tête* with key officials in 2011. Many had suggested that the empowered Committee's demand to put it in the Constitution Amendment Bill may be conceded but the political acumen in *Dada* advised him that any default at any point in time

* TIOL - COB (WEB) – 728, 3 September 2020.

shall amount to Sovereign default but Sovereigns, by character and definition, are above all defaults! Rather, default is an alien expression for the Sovereign! Thus, a consensus was built to legislate the same but not to put it in the Constitution! So, when the time ripened and the forces of history sided with Mr Jaitley, who brought all States on the same page, he did not sidestep the lesson learnt from what Pranab *Da* had done in the past! The compensation issue was not annexed with any Article of the Constitution and put as Section 18 of the 101st Constitution Amendment Act, 2016. An exit route was designed in the form of a separate legislation which created a dedicated fund with a faucet, i.e., Compensation Cess on sin and luxury goods!

It was a masterstroke from Mr Jaitley, who had refined his art of weaponising his ability to build consensus. Politics by consensus among the Sovereigns resulted in pooling of sovereignty (the taxing rights) which finally produced GST. It also came to be described as 'cooperative federalism' which many State Finance Ministers now think is being weaponised into 'coercive federalism'! Consensual politics is known for its virtues but it also has certain 'vices', such as extracting promises of discipline from the politically 'indisciplined'; shedding the skin of autocratic decision-making; showing respect for part of sovereignty, already pooled to a larger bucket; and not to fecklessly politicise policy issues! Unfortunately, fuller expressions of all these 'vices' appear to be emanating from the ongoing skirmishes! Tweets by some of the State Finance Ministers have literally invented a troll factory! An outrageous outbreak of contemptuous comments is spreading across social media!

Let me now play the role of a keen scrutineer of the strategy adopted by the Union of India. At the last Council's meeting, the North Block honchos came prepared with two options which have largely been rejected not only by non-BJP-ruled States but also by many BJP-ruled ones, albeit 'silently'! Many shocking holes may be identified in their exhaustingly-narcissistic strategy! The besotted North Block team missed the underlying theme and laid a lopsided focus on borrowing in place of re-negotiating the promised annual growth rate of 14 per cent. It should have been the linchpin of their strategy. Rather than focusing on an 'Act of God', i.e., COVID-19, which has 'infected' the coffers of all the States since April 2020, it should have floated the idea of lowering the growth rate to 8 per cent and an extension of the committed time period by another three years. A hard-bargaining may have pulled it down to 10 per cent with eight years or eight per cent with a ten-year time frame! Once such a milestone would have been attained, the second proposal should have been the offering of two borrowing options coupled with a partial hike of tariff on some of the sin goods like *pan masala*, tobacco, or even luxury goods from a future date!

Ideally speaking, the second option should not have found a place in its offering platter if the North Block mandarins would have given some credit to the political as well as financial acumen of State politicians! At the first glance itself, the second option struggles to qualify as an artificially-designed option, merely to distract attention or to misleadingly cloak into a reliable option! No State, even in its

'inebriated state' would go for a spine-dismantling borrowing with huge debt-servicing costs! As a magnanimous 'big brother' and also as an ace negotiator, the Centre should have pleased the States with a Hobson's choice—the Centre would borrow and the States would relish! Instead of making it an irritatingly legal and technical challenge, the entire issue should have been viewed through a political prism. Finding a political solution is less fractious than a legal one! This should have been much cosier in the shadow of cooperative federalism!

When the borrowings under Option-I are proposed to be serviced by the Compensation Kitty, why make an artificial distinction between losses having an origin in GST implementation and in COVID-19? All such technicalities have not served the interests of the history of decision-making by consensus. Mr Jaitley had created a trail of such decisions by consensus only because he was willing to pay a higher price for five years. Since the Centre represents the Sovereign, it also needs to behave like a Sovereign! Both the options indeed do not mirror the unquestionable dignity of the Sovereign. A quick glance at the quirky skeletons of the borrowing calculus gives me the impression that while playing hardball tactics, the Centre is trying to act not as a partner in the entire chain of fiscal haemorrhage impacting the States but as an insouciant broker for a banking entity!

I am sure that the compensation issue is going to dominate the next GST Council meeting on 19 September and it has the ruinous potential to derail the entire agenda of legal and procedural reforms, if any! If the Union of India is keen to see its plan going through smoothly and swimmingly, it needs to come up with a simplistic borrowing solution funded by the Compensation Kitty with no interest-string attached as it is an extraordinary situation and all the borrowers are vital 'atoms' of the large whole called the Sovereign! I sincerely hope that the stalled talks over the issue are resumed and the much-needed financial relief does not remain on ice— or, many 'shrimp-size' States would sink and 'whale-size' States would be grievously bruised further!

5

GST Compensation: A Tale of '3 Ps' Blustering for no Kosher Reason![*]

Worldwide, politicians are known for their adeptness at scissoring through red tape and quick negotiations! They are also capable of launching a torrent of falsehoods, infodemics, tax avoidance, imprecisions, and obfuscation *a la* Donald Trump! If something has to be done, they hardly act coy about making a bonfire of rules! If rapprochement is the goal, they can be do-gooders and may build hard-nosed consensus even on tetchy issues. Or, they are equally capable of playing on an endless loop! This is what appears to be happening on the GST compensation issue! Although the North Block mandarin appears to be creating optics that they are working like Trojans to find a solution, a good chunk of State Finance Ministers seems to be viewing 'Trojan Horses' in their solution designs. Such a deep-seated perception differential has drawn the battle lines between the Union of India and the non-BJP-ruled States.

Even after a couple of dedicated meetings of the GST Council, the efforts to break the impasse seem to be going nowhere! In fact, the marathon deliberations from last Monday seem to have sown seeds for grimmer chaos for the coming Monday—the 43rd Council meeting! Had the sparring parties moved a few inches forward, the borrowing issue would have been wrestled to the floor with collective action! But it did not happen! The Centre stuck to its guns—only two options are on the plate. There is no question of discussing a third option, as demanded by as many as ten States—and that is borrowing by the Centre alone. Though the virtual meeting ended inconclusively with a thud, the State fiscal combatants left a clear-eyed message—voting cannot be stymied! Even if the Centre manages to garner 75 per cent votes, losing States may not be dissuaded from moving the Apex Court!

Meanwhile, political machinations are underway with full force! The camp opposing the Centre is trying hard to win over some of the States like Maharashtra, which has eye-rollingly opted for Option-I! Similarly, Orissa has also done the same. The camp led by Punjab, Kerala, and West Bengal Finance Ministers appears to be putting to use their 'art of plucking' to move a few opposition-ruled States from the list of States supporting the Central plan. Since the support of a minimum of nineteen States would be required by the Centre to sail through the muddy waters, the next few days would definitely witness some covert persuasion tactics in play! Oof! The North

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* TIOL - COB (WEB) – 732, 8 October 2020.

Block also appears to be making it an ego issue—and this is after making a series of accounting gaffes relating to the IGST settlement and the Compensation Fund.

Before I embark on explaining these accounting flaws, let me first try and explain the apple of discord for the legions, and how simple the solution can be! The problem revolves around the story of Three Pockets! The first pocket (P1) to be pinched is that of the taxpayers through Compensation Cess; the second pocket (P2), into which taxes flow from the first, is ONLY maintained by the Union of India; and the third pocket (P3), which has as many as thirty-one sub-pockets (twenty-eight States and three UTs with independent legislatures), where the money is to be put gingerly after granular computation of revenue loss, is the last one where money gets parked. Thanks to the pandemic which has grievously gobbled up the economy, the flow of money has slowed down as there was not enough cash in the Kitty. This is the mother of dagger-drawing posturing! Since sub-pockets of P3 cannot go dry, they want P2 to temporarily borrow from the RBI and recoup their Kitties. The servicing of such borrowings with interest is to be done from the funds available in the Compensation Kitty.

Since the entire burden is going to descend on this Kitty alone, where is the legitimacy for all the fussy drumbeats being created about who should borrow? Why should the Union of India get into the trivial distinction between the loss arising out of the implementation of GST and the loss owing to the pandemic? When the common recipe for the renaissance of the economy is greater spending by the States to ratchet up demand, how would borrowing—whether by the Centre or the States—matter to the common taxpayers? When the Compensation Kitty is to be enriched by the taxpayers even beyond 2022, the issue need not be allowed to put the economy on fire! The Centre's attempt to keep a domineering grip over the borrowing solution is a fruitless exercise!

Anyway, the fact of the matter is that the Centre has seemingly turned the issue into a battle of 'infected' egos and shadow-boxing to put the drumbeating States on the mat! If we leave aside the issue of ego-sparring, the North Block seems to be goofing up consistently in its calculations of the shortfall and the computation of IGST shares of the States. First, a ₹ 97,000 crore shortfall was projected by reckoning a 10 per cent growth rate which was, at the last meeting, reduced to 7 per cent. Given the economic jitters in the country, 7 per cent is again an unrealistic projection! Secondly, the Union Finance Minister has admitted after the CAG audit para that a good swathe of funds was wrongly paid to certain States as surplus and also to the Consolidated Fund of India. How can the accounting of such a large sum be messed up when the North Block during Mr Hashmukh Adhia's time was aware that the money did not belong to the Centre? Now, the question is—How will the Centre deal with it if the States which were paid less during FY 2017–18 demand interest on such payments? Since surplus paid States now want to pay back in instalments, is the Centre going to ask them for interest? It is indeed going to be the recipe for a second round of political wrestling!

Let us now talk about the projected ₹ 3,00,000 crore shortfall for the States. Why is the GST Council not discussing the next year's shortfall when the quantum of the

Compensation Fund would grow by at least by 14 per cent? Leaving this tangled issue unsorted at this stage would entail exacting pulmonary function tests for all the stakeholders in future meetings of the Council! Secondly, an eye-watering volume of breaths may be wasted unless a consensus is arrived at now over the order of fund utilisation from the Compensation Kitty. The Centre has turned obdurate about a particular sequence—interest, principal sum, and then compensation to States. A good number of States have rolled their sleeves over such proposals. Since the compensation is to be paid only till 2022, the States may not share the element of concern expressed by the Centre, which is the promisor in this case. If such a payment is to be made from the Compensation Kitty and the levy is being extended beyond 2022, they are of the view that they should be compensated first, and then interest and principal may be repaid out of the leftover. This sounds unfair as it would lead to more burden on the industry which would be required to nourish this Kitty. But all the taxing stakeholders ought not to forget that plucking the goose for the largest number of feathers is desirable only with the smallest possible amount of hissing!

Another bone of contention is going to be the demand for setting up a dispute resolution mechanism. Since the 101st Constitution Amendment Act provides for the same, the States feel that its time has come and it should not be delayed further. The Union of India is reluctant to do so as it knows that the creation of such a forum would dwarf the chances of forging consensus in the Council. At present, a good number of States, even if they disagree or find themselves in minority, have no remedy but to sit in the same boat with their voices muzzled—and this has led to levelling of brutal majoritarian rule charges against the Centre. Though the North Block may take a few punches at the validity of the States' demand, the Centre's approach is also akin to sticking plasters that may cover up the dissonance over their decisions rather than dealing with the root causes!

Now, to conclude this Column, the GST Council deserves kudos for some fundamental changes in the compliance regime for the assessees with turnovers of less than ₹ 5 crores. Taking a close look at the dynamic inefficiency of the present compliance matrix where a small taxpayer had to go through the travails of multiple return-filing, a quarterly return option is a welcome move. This is more so as it does not hurt the interest of the Revenue. A roadmap for auto-population of GSTR-1 and GSTR-3B and implicitly junking the new returns proposed is a sagacious move to cause minimum discomfort to the present compliance modules. With the facility of GSTR-2B, the taxpayers will be under obligation to chase their suppliers to file GSTR-1 before they reconcile their ITC utilisation. In days to come, the new module would also eliminate the chances of fake invoices and ensure better control over ITC utilisation by the taxpayers. I sincerely hope that the steady reforms of the compliance matrix would one day encourage more taxpayers to file their returns regularly and would also shore up the culture of honest admission of their tax liabilities!

6

GST: Compensation Cess—Time to Avoid 'Putting Lipstick on the Pig'!*

For the industry and trade, it is indeed going to be yet another GST Council meeting on Friday —perhaps, with some degree of 'fitment-driven' despair and excitement. In terms of number, naturally, 45th comes after 44th, that's it! But for the Union Finance Minister, Ms Nirmala Sitharaman, it is going to be a rare occasion to seize the 'Jaitley moment' of India's GST history on the much-brawled issue of Compensation Cess! This is one of the ammunition-packed issues which may either throw the summit out of kilter or provide a *felix culpa* experience to Ms Sitharaman, who may end up crafting a new doctrine of fiscal rapprochement like Mr Jaitley. Compensation is the keel on which the edifice of GST was erected by Mr Jaitley. It is now Ms Sitharaman's turn to ensure that this keel does not get uprooted and the GST does not stop humming! It is indeed a swampy and boggy political ground which may veer into a protracted conflict between the stakeholders! Yes, it is a stick of fiscal dynamite which warrants retooling of strategy on part of the Union of India. If the mire is to be kept at an arm's length, the simmering issue is not to be airbrushed—an inescapable hellhole! There is a mountain to be climbed! But there is also more than one way to skin a cat!

Ms Sitharaman just needs to step out of her cosy sanctuary and cap this issue with psychedelic perfection–a 'pigs can also fly' experience for the States! My impression is that most States are abundantly melancholic after being mortally bruised by COVID-19 and many of their local welfare schemes may flatline for the lack of resources. A good number of States are so colossally pauperised that they have no choice but to look up to the 'big brother' to rescue them from the stifling chokehold! Ma'am, it is your turn to play the role of a 'big brother'—of course, not chosen by you but pre-ordained by the Constitution of India—and the entire onus lies with you to mould the course of discourse on Friday!

If her doctrine is not fuzzy and her furious energy is funnelled to find an amicable solution even at the cost of a hole in her walled fiscal garden, it is going to be a fine example of political quietism! I am sure that she has spotted the canary in the coal mine from a number of statements coming from the States on this issue! A poignant notwithstanding, *aha*! The States are not fibbing about a possible *kuddelmuddel* if the Union of India tries to 'put lipstick on the pig'! Rather than getting whipsawed on

* TIOL - COB (WEB) – 781, 16 September 2021.

this searing issue, Ms Sitharaman should grasp the nettles firmly and restore the kilter within the Council, only to afford the last laugh for herself—of course, at a price, *Mwahahaha*! But is she ready? If she listens to her *junta* of advisers, she is likely to develop cold feet and may even strike off the compensation issue from the Friday Agenda! But she is bold and wise enough, she would not procrastinate the inevitable! Why? Because the butt end is always the taxpayers, *Ouch*!

Let me now deal with some of the revenue-friendly issues which have strangely been screaming out for policy actions but stoic indifference has been the official response. The change in tariff rate for metal scrap—inordinately delayed action! Mounds of dossiers have been submitted about industrial-scale input tax credit (ITC) frauds by dealers from unorganised sectors but the Council did not find time to take a call on the ongoing fiscal pauperisation of the Exchequer. A couple of State Finance Ministers have, this time, written to the Chairperson to either exempt such supplies or reduce the tax rate from 18 per cent to 5 per cent to disincentivise the scamsters. For instance, the Punjab Finance Minister has noted in his letter to the Chairperson that *'the issue of fake billings to claim ITC is one of the biggest challenges for tax administrations all over the country. In fact, the modus operandi, globally known as Carousal Frauds, causes losses running into billions of Euros in EU VAT'*. He has pointed out that with no choice left, the Revenue approaches manufacturers of iron and steel products, the rolling mills, to make good of revenue losses but courts have granted relief to the taxpayers. He has suggested two options—either reduce the tax rate or exempt such supplies and bring them under RCM for the manufacturers which would eventually avail ITC. Such a decision would make the entire supply chain more efficient. Ideally, RCM works better for evasion-prone sectors and the net gain to the Exchequer may be in the range of over ₹ 7,000 crores. Whether the Council will have time to bury this problem in sand dunes is a matter of speculation. The general perception among the States is that most of such issues are never debated in the Council and a few officials in the Centre tend to ensure that no discussion takes place! Going by this yardstick, my hunch is that the Centre may even avoid a discussion on the GIC issue which is hot and of urgent nature from the States' perspective.

What may deserve to find a slot on the agenda of the 45th Council meeting is the QRMP Scheme which the Centre had proposed at the 43rd meeting to re-configure as the QRQP (Quarterly Return Quarterly Payment) Scheme. A large swathe of States had opposed it as their revenue has hit the nadir and any such change may further deprive them of a sliver of monthly collection needed to run the State's routine affairs. The issue was apparently referred to the Law Committee to have a wholesome peek into it and make recommendations. Let us wait for an official version of this issue. My gut feeling is that it is not a futuristic policy silhouette and the Centre should stealthily and quietly discard it into a bin of rejects! It is more because this Scheme promises to create an army of payment-laggards when small taxpayers have inculcated the habit of monthly payments, which is always a more reliable funnel for the Exchequer. Secondly, in a country of unsavoury fiscal compliance, no government should defer tax

payment as it results in organised swindling! Thirdly, the States are right as it would hurt their monthly cash flow—perhaps mortally!

Another issue which is likely to form a part of the agenda is the demand of the State of Sikkim to impose COVID Cess on energy and medicines. The Council had formed a Group of Ministers (GoM) which is slated to submit its report to the Council. Though the report is not yet public, on the basis of piecing together 'sherds' of clues, it appears that the GoM has recommended one per cent Cess on intra-state trade of medicines—quite stupefying! The GoM has, however, left the issue of Cess on electricity which is, in any case, outside the ambit of GST. However, I expect sanity to prevail over the Council and no such Cess should be allowed to be levied by any State. It devours the toothsome elements of GST such as ITC and simple compliance procedure. If Cess is levied, it acts as a disincentive to the industry. Denial of ITC means an additional column of product costs which in turn mitigates its competitiveness in the market economy. Attracting industry to the North-East itself is a Herculean challenge and what may drive them out are the short-sighted measures like levying Cess! Ideally, the Union of India should change the tack and bankroll such demands by doling out a few thousand crores as financial aid. This is the price the captain of a ship should not feel shy about paying to protect the GST ship from getting rude bumps!

Another GoM report which may be taken up for discussion on Friday is that of capacity-based taxation and a special composition scheme for certain sectors. If the Courts' orders are to be respected, the Kerala High Court's direction to consider the inclusion of petrol and diesel may be taken up for discussion. If time permits, the Fitment Committee's and Law Committee's recommendations for many goods and services may be taken up.

Before I wrap up today's Column, one issue which is certainly not going to figure in the Agenda is the latest recommendation of the Apex Court in the case of *UoI v. VKC Footsteps India Pvt. Ltd.* In the context of Rule 89(5) read with Section 54(3) of the CGST Act, 2017, the Bench has albeit validated the fiscal rule but also highlighted certain anomalies which inevitably result in inequities. The Bench has urged the GST Council to revisit the formula prescribed to grant a refund in case of accumulated ITC owing to the inverted duty structure and has noted that the formula is not ambiguous or unworkable. However, the practical effect of the formula may result in certain inequities. Whether engendering such inequities against COVID-19-wreaked taxpayers is the intent of the legislature or the Government may like to pay refund to poor taxpayers notwithstanding being a conqueror is to be examined by the Council. I sincerely hope that the Council would skip producing tasteless dough of decisions and would resort to some cajoling to deal with the ornery of the State Finance Ministers by capping the bucket of searing issues! A quick MRI of pending and in-tray issues would certainly enable the Council not to treat them as sacks of potatoes! A drool-worthy word of wisdom—let them not stir up regulatory hornets' nest!

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GST Compensation: Politics Often Goes Beyond the Perimeter of What is Engraved in Law![*]

How should one describe the outcome of the 45th GST Council meeting on the bank of the asphyxiating Gomti river in Lucknow last week? One of the answers can be—it literally rained 'tariff'! If one recalls the folklore of the Union Budget Day of yesteryears, the announcement by the Council's Chairperson was no less spectacularly intriguing and punctuated with enthusiastic vim to push the fiscal envelope for higher GST collections! She appeared to be pretty gruntled about having 'effectively' dealt with the compensation-riding pushback coming from the States and putting many fractious issues in the twilight zone such as GIC powers and GST Appellate Tribunal! For quite some time, the Union of India has been mulling over the mid-course correction of the GST rates but for the precocious mutation of COVID-19 which had rudely snatched away the fiscal leeway of the Central Government!

With the internal audit eminently demonstrating a series of tariff-follies throwing the monthly GST collections in a fiscal gutter, the Union Finance Minister was stiffly determined to raise the tax rates on a large bucket of goods and services—somewhere close to the Revenue Neutral Rate (RNR) of 15.5 per cent, or even higher in some cases. She is partly there, by correcting the inverted duty rates on many goods and by spiking the rates on revenue-promising goods and services such as fruit juice, scented *supari*, renewable energy projects, cloud kitchens, ice-cream parlours, mining rights, and many others.

Cometh the hour, cometh the 'woman'! She also cajoled the States to set up a Group of Ministers (GoM) largely mandated to come up with the ideas for revenue augmentation—a lollipop the States do not wish to miss! The Centre knows for sure that unless the GST collections steeply leapfrog by another ₹ 50,000 crores to ₹ 70,000 crores in the next one year—a courageous attempt to pass the camel through the eye of the needle—the States would not stop rattling their cages for the extension of compensation provision! The Centre's view is crystal clear—increase the tax rates above RNR on as many goods and services as possible in the next few meetings and strengthen its plank to negotiate with the States baying for an encore of

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* TIOL - COB (WEB) – 782, 23 September 2021.

compensation! If the regular GST mop-up grows significantly, the States may be left to howl at the moon!

Whether such fiscal gluttony would be sustainable in the long run largely depends on the concomitant recovery of economic growth post Covid! Anyway, the taxpayers are certainly headed for a punch-drunk time! The policy-makers are now sternly resolved not to show much remorse irrespective of factors which may be stifling the businesses such as supply chain bottlenecks, rise in input costs and insipid consumer demands! Why? Because the North Block believes that some of the sectors have had a pretty long run of good times in terms of lower tax rate and it is now their turn to enrich the emaciated revenue kitties! The GoM on Revenue Augmentation is going to submit its report within two months—virtually co-terminus with the next Council meeting and, many more surprises or even shockwaves may spring out of their magic wand!

What one is destined to witness is a much stricter fiscal regime in terms of denial of ITC and punitive procedures as the Council has also set up another GoM to discuss ways and means of using technology to further improve compliance. The eye is going to be on e-way bill systems, e-invoices, FASTag, data and strengthening the institutional mechanism for sharing of intelligence and coordinated enforcement actions by the Centre and the States. GST scofflaws need not be reminded that the GSTN has bolstered its systemic prowess to generate gigabytes of intelligible data which can be deadlier in enabling revenue sleuths to knock at their doors—more effectively, even with a smidgen of improvement in coordination between CGST and SGST authorities! Going by the spectrum of the mandate assigned to the GoM, it is blindingly obvious that the abusers of GST can see a sort of storm gathering against them!

Let me now swirl to the most squabbled issue of compensation. Going by the official statement, the time period for collection of Compensation Cess has been extended till March 2026—but only to repay the borrowings and the interest thereon. There is no official utterance from the Union of India on the issue of extension of prevailing compensation to the States. Going by the post-meeting statements of many States ruled by the opposition parties and also *sotto voce* muttering of even BJP-ruled States, there is near-unanimity on this issue, and since the Centre parried the issue and did not yield even an inch, the States were deafeningly emphatic in jettisoning any discussion on the issue of inclusion of petroleum products under the GST. If there is any glimmer of hope in any corner of the economy on this issue, it is time to loosen the grip on one's unchained imagination—not going to happen in the near future!

States are unlikely to spare even a cursorily sympathetic glance at even a truncated proposal to make a ceremonious beginning with the aviation turbine fuel or gas as they themselves seek the attention of the Centre towards their doomed resources turning leaner and thinner, and 3they expect the Union of India to careen toward pulling them back from deepening fiscal abyss! They evidently see petroleum

products as their last straw of fiscal freedom to be clutched firmly so that they could play with the tax rates against any fiscal calamity! Given the poignant ground reality that most States have been managing their wallets with high tax rates on liquor and petroleum goods, they are almost united on the issue of extension of compensation for some more years. A good number of them have been insistent on a five-year extension. The only odd but largely sensible voice advocating only three years came from the Punjab Finance Minister.

Though ambivalence prevails—whether the compensation issue has also been referred to the GoM—but the Union of India knows from inside that if the multilateral forum is to be preserved from any possible fractures, a rapprochement is to be hammered out. Charting a solo course not only exemplifies fiscal brinkmanship but also promises a crisis of trust! However, the Union Finance Minister is right when she talks about the Constitution guaranteeing it only till June 2022 but the politician in her knows for sure that politics is a vocation beyond the perimeter of what is written in the law. No commitment is said to be of sanctimonious nature in Politics! Nothing is written in stone!

Multilateralism, inevitable for the survival of a forum like the GST Council, is all about digesting poison pills for the long-term good of the GST. Escalating hostility and dividing the Council into rigid blocs would later entail fence-mending of Brobdingnagian proportions! Distrust and exasperation persist more among the smaller States (Sikkim's COVID Cess demand is just one example) as the marquee compensation summit promised by the Centre is yet to be held! Battered they may look, but united they do stand on this issue! The leadership of a multilateral forum warrants sacrifice which creates values tethering all the stakeholders together and such tethering is mirrored in the future decisions originating from the unity at the forum!

I can clearly view that the Union of India's go-it-alone approach would bring in only strife and kerfuffle and it would have to scoop up the courage to cagily move forward a few inches and let the issue be a rule-busting event which may defile fiscal sobriety to an extent! Let it not be a bureaucratic trench war! A compromise, of course not at the rate of 14 per cent growth in annual revenue, is not too distant, notwithstanding the fretting and sabre-rattling by the States for the same 'intaxicating' growth rate! Perhaps, for a shorter period of two or three years! All the Centre has to do is to examine the size of its wiggle-room without getting too excited! The harmony within the Council should not be allowed to rest on a few percentage points on a spreadsheet! Political maturity lies in managing the unforeseen consequences of the collision between fiscal economics and politics!

Apart from torpedoing these issues, what was expected of the GST Council has apparently been ignored stone-cold! A discussion about the constitution of the GST Appellate Tribunal! Though the judiciary has done its job by picking up a wrench to tighten the screws on the Executive, an issue, so close to the taxpayers' hearts, was

clearly underplayed. It was not even on the agenda of the Council! The Centre has left it to its battery of legal eagles to defend its non-action! Similarly, the singeing issue of GIC impinging on the powers of the Council was overlooked and, strangely, the States also did not find time to rake it up this time. Many issues referred to several GoMs have also been snugly overlooked despite finding a place on the agenda! By extending the shelf life of the NAPA, the Council has once again proved that it devotes little time to debate on the rationale of its decisions which may rattle taxpayers' peace of mind! I sincerely hope that the next Council summit would not treat taxpayers' issues as sacks of potatoes and pay an equal amount of heed to them as it does for revenue augmentation! It is more so as COVID-19 has not yet bid sayonara!

GST Design:
Sandwiched between Conservatism and Liberalism

Introduction

Every tax reform necessarily means either a far-reaching change in the existing design of a tax system or an outright substitution by a new architecture! A new tax design and a multi-storey building may look much of a muchness but the former technically conceals many complexities and it warrants a periodic whale's-eye view underneath its basic design! No new tax reform can be squeaky-clean! So, the story of the Indian GST is no different! It was launched with an impressive bout of the big bang and showboating and, of course, with an inherent advantage of being a completely IT-driven tax system—no manual filing, please! Tee-hee! Its business processes were designed on the bedrock of invoice-matching to rule out any space for misuse of Input Tax Credit (ITC)—a sweeping improvement over the erstwhile indirect tax regime!

Lo and behold, what was projected to be its strength, finally turned out to be its Achilles heel, and among many factors, lack of time for proper groundwork was perhaps the most severe one. The business processes spectacularly failed the initial run of the new tax system! Putting the entire blame on the GST Network would indeed not meet both ends of justice—the political decision to usher in a new era was another key factor! Then came a long train of frequent changes and the young coding nerds of the GSTN vendors could not quicken the pace of their limbs to match the changes and the cascading obligations on the taxpayers spawned an ambience of angst and fear! Dark clouds of doom and gloom descended across the economy! Time to go bananas! The irresolute period was predictably followed by a windy and griping storm which, in turn, infused giddiness and cued fireworks on the floor of the GST Council! This further nudged the decision-makers to embrace a shortcut which proved to be the 'longest route' to attain the objective! A bewildering whirlwind of a vicious circle! Many initial decisions proved to be like turkeys voting for Christmas!

The Council discarded the original goalpost of invoice-matching and came up with the idea of GSTR-3B—a simple return to restore the confidence of the GST taxpayers in the new tax system. Plumb crazy! Though a valiant and bellicose attempt was made to introduce a fresh gaggle of GST returns, given their furlongs of annexures, they were quickly guillotined, based on bittersweet feedback! Such a decision cushioned the GSTR-3B to gain stability and the stability in return-filing with regular payments enabled the Revenue to turn on a dime *a la* GSTR-2A and 2B. Such manoeuvring has, to a large extent, helped overcome the setbacks engendered by the inability to match inward and outward invoices!

Interestingly, the GST was also expected to pick up the thread where 'demo' (demonetisation) had left. One of the stated rationales was to lend momentum to the 'curated wind' for the formalisation of the economy. Since the GST was launched

closely on the heels of demonetisation, macro experts were of the view that it may incentivise small units operating in the informal sector to cross over the bridge to the formal sector! Thus, the tax base would grow and greater equity and level-playing would be achieved in a major part of the economy! However, the hope of realising such an elusive objective was dashed off after the complicated chain of business processes proved to be barely short of a continental-size disaster! Poor IT literacy also chipped into the mounting pile of crises! Weird but true! *Plus ca change*! What emerged as a calamity for the Revenue and the taxpayers, actually proved to be a mammoth bonanza for the community of facilitators. A new BPO industry worth ₹6,000 crores was born within a few months with a specialisation in uploading returns on the difficult-to-onboard IT platform! A good number of 'GSTR-Porters' were also accused of price-gouging and 'hijacking' of official communications sent to the taxpayers but the same was not being ferried forward by the facilitators, resulting in poor compliance!

Much along the line of predictive analytics, the GST Council raised the thresholds for goods (not services), the composition scheme for goods, and a new composition scheme for services! Lifting the exemption limit was indeed in tune with the designs followed by other countries, including the EU VAT. But having multiple composition schemes (without ITC) and lowering GST rates on certain non-compliant sectors like real estate and restaurant service without ITC was akin to 'infecting' the basic structure of the GST with new bugs! Yet another design flaw which was later set right was the ultra-conservative idea of creating multiple cash ledgers—as many as fifteen, for tax payment, interest, penalty, and late fees! At one stage, if one mistakenly ended up paying IGST in place of CGST and SGST, the only way to retrieve the money was to file a refund claim!

Thankfully, the foibles of the payment architecture were admitted and corrected into a single cash ledger and the GSTN software culling data from the returns for the payment settlement purpose among the Centre and the States. One more distortion which was wittingly injected into the GST design was the permission to the State of Kerala to impose Calamity Cess on inter-state transactions—an avoidable challenge for the GSTN and also the businesses; though the market and statistical rationale for such a decision were glaringly missing—only 35 per cent of total transactions was inter-state in nature! So, it was not clear how much revenue Kerala may have mopped up! Secondly, such distortions tend to nudge businesses to shift to a lower tax jurisdiction—a mirror-reflection of the sales tax and VAT era! But, I guess, the GST Council was largely experimenting with this idea to test building up consensus on the floor so that a precedent may arm it with the ease of taking decisions in the future if a situation demands so! Amen!

Against this backdrop, Chapter 1 provides the readers with a peep into instances of tongue-lashing by the opposition-ruled States when the business processes initially developed too many chinks in the armour; the Group of Ministers made vital recommendations to improve the ease of doing business for small businesses by

trimming tax rates; two Committees of experts were set up to interact with the trade and industry and also suggest priority amendments in the GST laws but shockingly, no committee was set up to review the villain of the event—the business processes; how the GSTN failed to keep pace with the frequent changes as the policymakers kept on resetting the alarm clocks repeatedly; and how the multiple GSTRs spawned a new BPO industry of return-filing across the economy. Oops!

Chapter 2 highlights how the GST Council set up multiple committees to pull the caravan out of quicksand; a special drive to grant refunds was launched to lower the din created by the exporters and also assessees availing the area exemption scheme; a massive overhaul of the cash ledger architecture; and how the dogmas of officers whose ideas had not worked but were allowed to resist meaningful changes by a set of new officers put in the review committee! Humph!

In Chapter 3, I have delved deeper into how the Council made a faux pas by injecting a flaw in the GST design by approving Kerala's demand for imposing Calamity Cess—1 per cent flood cess permitted; the PM favouring higher exemption threshold for MSMEs; Composition Scheme being recast to grant relief to traders, based on recommendations of the GoM and a proposal is mooted for a new Composition Scheme for the services with lower tax rates but the need of the hour is a unified Composition Scheme, which is easier even for the tax administration to enforce; debate on a new tax regime to revive the moribund real estate sector and bring labour contractors and security agencies under the ambit of the RCM; and the Council needs to wall off avoidable stress on the revenue kitty as pressure mounts from cement and automobiles sectors.

Chapter 4 highlights how some of the Council's decisions run into conflict with the basic design of GST, such as Calamity Cess and also the option being given to the States to opt down the exemption threshold which eats into the uniformity of the tax system; strangely, the Union Cabinet has approved the GST Appellate Tribunal but the final birth remains parked in a limbo; raising the threshold to ₹40,00,000 is a welcome decision as it trims compliance cost for small businesses but giving leeway to States to opt for lesser threshold in addition to the ₹10,00,000 already in place for North-East is a bad idea; multiple thresholds nudge businesses to shift operations to neighbouring States besides posing a stiff challenge for the GSTN to keep track of varied data; although Article 279(4) refers to a threshold for goods and services, the same is being erroneously interpreted in violation of the golden principle as freedom to propose different thresholds for goods and services; even the 101st Amendment Act talks about goods and services and not goods or services for prescribing exemption threshold; and multiple Composition Schemes are an antithesis to the GST design as VAT is internationally more efficient only because it allows seamless flow of ITC.

In Chapter 5 unfolds the hundred-day reform agenda of Modi 2.0 but not much on the GST front except for some earlier approved amendments which made their way into the Finance Bill; the Punjab Chief Minister writes to the Prime Minister and

wonders why, with overpowering majority in the House, the Modi Government cannot make GST a world-class tax system and wants easing out of complicated processes roiling the reform process; how blocked ITC may give additional revenue to the Exchequers but makes imports cheaper to the extent of 3–5 per cent and hurts the domestic industry; measures needed to give an impetus to the competitiveness of exports and bringing SEZ and EoU exports at par with physical exports; the Chief Minister insists that in case of B2B transactions, if any exempted sector wants to avail ITC, let them pay 12 per cent tax; time has come to align GST provisions with the income tax laws such as penalty, interest rate, and dispute resolution; centralised registration may be allowed to certain services like the service tax regime; the Council may explore a MAT-like system called Minimum Mandatory Tax by restricting ITC up to 95 per cent; and efforts need to be made to define 'building' under Entry 49.

Chapter 6 narrates the details of the first lot of decisions under Modi 2.0—hike in the exemption threshold for goods to ₹40,00,00 and to ₹50,00,000 lakhs for service providers besides a few amendments in the GST laws; a peep into the interim report on e-invoicing; discussion on the new GST return—RET-1—but more feedback needed from ERP users; the Punjab Chief Minister expressing pain over the ill-designed ITC hurting the 'Make in India' Scheme and exporters losing competitiveness; how the excluded sector, electricity, which is based on either coal or gas, remains outside the GST ambit and how such a cost is having a cascading effect on the industry; need for a level-playing field for petroleum products; no legitimate reasons for carving out two categories of construction service—one with completion certificate and the other without; and need to encourage payment of GST with ITC for higher efficiency of the new tax system.

1

Business Processes have failed GST! Council needs to 'Reboot' it!*

YESTERDAY was the first anniversary of the Demonetisation (DeMo) Policy of the Modi Government. And, with the polls scheduled for two of the States in the coming weeks, it was expected to be an eventful day. The Opposition parties did their job dutifully by observing it as the 'Black Day' and the ruling BJP marketed it as 'Anti-Black Money Day'. Certainly this is plain politics but both the mega disruptive economic reforms initiated by the Modi Government, today stand caught in the eye of the election-driven political storm. Realpolitik may be mercurial by character but it is certainly not good for the economic and fiscal decisions taken for the good of the economy. One live example is the demeaning politics being played over the long-jump that India has taken in terms of improving its ease of doing business rank. It is a global fact that the World Bank's parameters largely remain the same and India has done well for itself by undertaking eight major reform processes as listed by the Report. And, every Indian should take pride in it but the Opposition parties have once again failed to make a distinction between what is good for the country and what is really good for their future!

Anyway, GST, the second mega reform, at one point of time had indeed surged ahead on the goodwill of cooperative federalism but after four months of its implementation, it has lost the goodwill. With the taxpayers feeling caught in impractical business processes designed by the law-makers and venting their grievances to the Government, the Opposition parties at the Centre and the regional level have let loose their '*manchala*' tongues to settle their political differences. The president of one regional party went to the extent of describing it as 'Great Selfish Tax'! A national party leader urged his party-ruled States to forge a common front at the next GST Council meeting to make certain demands.

If we leave aside the changing shade of the much-talked about cooperative federalism, the GST which was expected to pick up the thread from the point where the DeMo had left it, is unlikely to realise this goal. Netizens may recall that the GST was designed to be a policy response to curb the practice of cash generation by encouraging the informal economy to join the organised sector. But going by the experience of the past four months, the GST has reached such a point of backbone-

* TIOL – COB (WEB) – 579, 9 November 2017.

breaking debacle that it now calls for a fresh set of initiatives to make it look like 'nicely rebooted'!

Let's now examine some of the announcements and official initiatives taken on the GST front before I draw a conclusion so as to call it 'rebooted'! Prime Minister Narendra Modi early this week said that the recommendations of the Group of Ministers (GoM) are going to be accepted by the GST Council to ease the hardships confronted by the small taxpayers. Union Finance Minister Arun Jaitley hinted at mega slashing of the highest bracket tax rate of 28% for a large number of goods. I congratulate both the leaders for their announcements but **is the prevailing set of problems specific to small taxpayers? Are the key patrons of the revenue kitty, the large taxpayers, very comfortable with the present goings-on? Isn't the industry looking for some changes in the GST laws?**

I am indeed aghast to find that the Union Finance Minister and the GST Council members have taken four months to realise that the 28% slab was not designed for the commodities of mass consumption. Right from the beginning it was designed to be the 'eternal punishment' for the **demerit and sin goods**. Then, on what basis, did the Council approve the no-homework-done recommendations of the Fitment Committee when it proposed more than 200 items for this slab. Why did the Central leadership take four months to diagnose this *faux pas*? Anyway, better late than never is a time-tested axiom and let's welcome it.

Let's now analyse two surreptitious developments of the last week. The Govt is believed to have set up two Expert Panels - one for taking feedback or looking into the representations of the industry and trade, and the other for glancing through the legal provisions of the GST laws. I am surprised by the fact that a social media friendly Government is yet to issue an official press release about the constitution of such committees. The GST Council Secretariat should have done it to make the nation aware of such committees and their terms of references. As per my inputs, one committee, headed by former Joint Secretary, TRU, Gautam Ray, is to collect inputs from the industry and trade and then make some recommendations. And the second committee, also headed by a former Joint Secretary, TRU, Mr Vinod Kumar (he is now Chief Commissioner), is to do crystal-gazing through the GST laws.

The fact that the Govt has failed to set up a committee on the most vital issue of REVIEWING the cruelly disruptive 'Business Processes', it evidently shows that the Government has failed to diagnose the disease correctly. If we leave aside the 'pain points' in the laws, the real irritants presently are the complex return-filing processes. It may give the impression that the entire architecture of GSTRs was designed under the influence of either forces of ignorance or architects of a large Compliance Industry which has today become not less than a **Rs 6000 Crore industry** (**Too many GST BPOs have come up in many parts of the country**). I fail to understand why shouldn't the Government simplify the processes to such an extent that this neat sum of Rs 6000 Crore comes to the Exchequer's kitty and the life of the

taxpayers becomes truly simple. I am sure Revenue Secretary, Dr Hashmukh Adhia, who feels for both the taxpayers as well as the Revenue, will agree with me!

The present sequence of return-filing - the GSTR-1, 1A, 2, 2A & 3 - is not working. The valiant attempt to capture all possible information through these FORMS and then invoice-matching has done a great deal of damage to the cause of GST as a reform. Theoretically speaking, there is no flaw in it as a concept. But the flaw lies in poor preparations and equally poor timing. No new tax reform, driven by tax technology, should be implemented with such a complex business process. This is more pertinent for a country like ours where the IT literacy and the diversity among the taxpayers are too sharp. Then comes the behavioural pattern which can be amended only through carefully designed psychology-tinged policy tools. But, ignoring all these ground realities, the design-makers, driven by their self-praising thoughts, wanted to score success overnight! They also forgot that the revenue is the real oxygen for the Institution of State. That is why they linked the tax payments with successful return-filing of GSTR-3. Now, what has happened is widely known to all - a good number of taxpayers want to pay taxes but since they did not get the support of the GSTN to file their returns, they failed to pay taxes.

Thus, the revenue kitties of the Centre and a good number of States have run dry. Because of the fact that the GSTN did not get enough time to design the complex business processes, a good number of taxpayers failed to file their returns. This was bound to trigger litigation and create sustained doleful cry. To assuage the ruffled feelings of the taxpayers, the GST Council went on granting relief after relief. This was the second bout of mistakes as each amendment or change made in the procedure or law required a fresh beginning for the GSTN coders who went on experiencing their clocks being reset too often. Rather than diagnosing the actual problems with the business processes, the election-driven political leadership is busy replacing the 'bricks' of the GST's original edifice. I am not sure where it is going to end but what I am sure about is that the GST's original architects would not be able to recognise their own 'creation' in months to come!

My only suggestion for the GST Council would be to admit to the Nation that the Business Processes have failed the GST, and a high-powered committee should be set up including representatives from the industry & trade, a seasoned jurist, an economist and a couple of taxmen to redesign the same. Only with a simple return-filing module the GST should be officially 'rebooted' for generating a feeling of a good and simple tax. If it is not done, the poor disruptive reform which is burdened with the task for kick starting the economy again (let's not forget about two per cent additional growth rate), may finally end up 'disrupting' the entire society with the job markets going dry!

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2

Tax Payment - GST Council needs to guillotine Multiple Ledger System*

FOR the next few months the edifice of GST would continue to be on a sticky wicket. Woefully inadequate preparations which went into the operational design of the GST now stand fully exposed and widely vilified - a major setback for the otherwise business as well as consumer-friendly tax system. If one goes by the latest indicators from Gujarat it may not result in an electoral setback for the Modi Government but the teething problems have grounded the wheels of GST caravan into a quicksand-like turf! The GST Council has set up multiple expert committees, in addition to the existing committees, to find credible solutions to pull the GST-cart out of the quicksand. There is a committee headed by Mr Gautam Ray and it is to cull out inputs from the industry and trade. In addition to the existing Law Committee, another panel has been set up to review the GST laws and identify their sharp and blunt edges which may not fare well on the scale of fairness. There is another committee to review the business processes. And it is headed by the Acting GSTN Chairman.

The decision to set up multiple committees tends to indicate the seriousness and the sensitivity of the Government about the taxpayers' woes. Although exporters continue to cry over their stuck money in refund, the CBEC appears to be making desperate efforts to disburse the same at the earliest. If it is not possible through online means, manual option has also been activated. Even for the budgetary support scheme in lieu of the area-based exemption scheme, manual filing of refund claim has been notified. A detailed SOP has been put in place. Going by the hectic parleys among the Members of all these committees, it evidently appears that the officers and the trade representatives involved in the exercise do not want to leave any stone unturned this time. And whatever amendments are finally approved by the GST Council, they would not only last long but would also be widely acceptable to the taxpayers.

In this background I would also like to share a few suggestions for all these Committees' Members. My first suggestion is for the political leadership of the Government. It is high time that the performance of key officials who played critical innings in the original roll-out of GST should be strictly scrutinised and the assignments of some of them should be changed. If this is not done, their original

* TIOL – COB (WEB) – 582, November 30, 2017.

dogma about certain provisions or procedures would certainly come in the way to completely remove the irritants. It is a well-established theory that every human being is a prisoner of his or her psychological blocks and such blocks do not change overnight. If they are allowed to hold the rudder of the ship, their psychological blocks would certainly come in the way of major alterations in the design. This is not to say that they need to be punished! But the utility of their ideas and thought processes have perhaps outlived and do not go hand in hand with the ground realities of the economy.

Extending the same logic further, it is important that the report of the New Law Review Committee should not go to the existing Law Committee for further examination. If this is done, there may be a serious attempt to dilute the changes proposed, and the existing dogma would dilute the course-correction efforts. A large part of the present mess is attributable to the faulty thought process of the old law committee, which has clearly not shared the modern vision of the political leadership for a New and Aspiring India. They have not exited from their hoary 'glass house' to realise that a healthy economy is the proven antidote for not only several social ills but also poverty. Given the population explosion and more than a million job seekers joining the job market annually, every political leadership is under tremendous stress to engage them gainfully. In this backdrop, all modern tax reform initiatives and tax laws need to be designed in such a manner that they encourage non-taxpayers to come under the tax net and contribute to the growth of a healthy Nation.

I believe the New Law Review Committee is seriously looking at the possibility of doing away with some of the troubling provisions like RCM, TDS and TCS. In principle, they are not bad. They are in fact needed in an economy like ours but they need to be implemented at the right time and in the right manner. The procedures need to be simple and easy to comply with. The sectors for their application need to be chosen carefully. These provisions should not be enforced across the canvas. They are to be used selectively as powerful 'missile' like Brahmos! Fastening them on the head of small traders or SMEs or even MSMEs is not a good idea. It must be remembered that ours is an economy of SMEs and traders whose numbers run into millions. They contribute to the economy in their own ways. They generate jobs for the unskilled and semi-skilled who need to be protected in every political dispensation. However, in a few years, the GST administration would be gathering valuable statistics to identify all such layers of taxpayers who may invite invocation of these 'Brahmos'. Till the time the GST reform process gets cemented, all such 'Brahmos' should be kept within the fold of laws as only precious 'armoury'.

Let me now make a simple suggestion to overcome the present mess of business processes. Invoice-matching is a good idea but it is a case of an idea being put to test prematurely and without matching IT platform. It requires a robust and extensively-tested IT tools. Then, it also calls for a selective or graded implementation schedule. It should not be applied across the taxpayers' canvas. Secondly, it should be kept in reserve for future usage. At present when the GST has earned so much of discredit, it

would be more desirable to keep it dormant and merge the present two forms of GSTR-1 and GSTR-3B. What is there in the GSTR-1? Nothing more than details of sales invoices. All such data can be sought through the GSTR-3B which has gained wider acceptance and even the GSTN is more comfortable with it. So, what I am hinting at is that the Committee reviewing the business processes should deploy all its mental energy on this form and redesign it in such a manner that it contains all necessary inputs required for assessment and preventive audit to curb possible misuse of ITC.

Another key suggestion for this Business Process Committee is that it badly needs **to take a hard look at the payment ledger architecture which has turned out to be a mega 'TRAP' for small taxpayers**. How? Let me share one such instance which involves an SME. The taxpayer was to pay CGST and SGST but ended up paying IGST by mistake. The sum was more than Rs five lakhs. After realising the mistake the taxpayer wanted to discharge its tax liability but could not do it as it had no more funds in its account. And, the wrongly paid tax can come to his rescue only after a refund claim is filed as per the GST law. So, this is a case where there is a willingness to file return but one error which has parked his money in the wrong ledger of the Government, makes him a defaulter as he is left with no funds to 'invest' a similar sum for paying the taxes under the correct ledger. Such instances are many and the **DESIGN is painful** from the small taxpayers' perspective.

Let's take a look at the present tax payment ledger architecture. There are three major cash ledgers besides the Credit Ledger - the CGST, the SGST and the IGST. Under each head, there are **sub-ledgers for penalty, interest and late-fee**. In total, there are more than 15 such ledgers which a taxpayer is required to keep a track of. As per my understanding the rationale behind such a complicated ledger architecture is to go for quick backend settlement of revenue between the Centre and the States. It appears that to make it easy for the account controllers, the **entire onus has been shifted on the taxpayers which is patently wrong** from two perspectives - first, a good number of taxpayers or even their professionals are not adroit enough to avoid errors, and secondly, the Governments have more wherewithal to undertake such exercise of keeping track of tax being paid as compared to taxpayers.

Ideally, the Government should scrap the multiple ledger system and create just **one CASH Ledger** and a taxpayer should be allowed to simply discharge one's total tax liability by paying through such a ledger and also the Credit ledger. So far as the issue of settlement of tax payments goes, it can be tabulated by the GSTN software on the basis of the details furnished in the GSTR-3B for CGST, SGST and IGST. Based on the declarations, the controllers can have **auto-compiled data of revenue realised** and the same can be distributed among all the stake-holders. Such a decision would make the system of tax payment quite easy and error-free. Secondly, it obviates the need to go through the drill of claiming refund of wrongly paid taxes. The present process is thoughtless and a proven instrument to waste valuable time of

the GST Tax administration as well as taxpayers whose working capital also suffers a setback - whether it is a small or a large taxpayer.

Let's hope that these committees do not end up making another round of errors or not do anything about the flaws in the laws or the business processes. If it happens, the taxpayers who are now on the run from the GST system, may not pardon the political dispensation again. **Building image and reputation for a reform takes many years but destroying it does not require even four months!!**. So, it is important that the Committee Members take a cue from the ground realities and if they fail to, the political leadership should be sensitive enough to examine them based on common sense and common convenience principles so that the GST is widely accepted as a viable and good tax system!

3

GST - A Common Composition Scheme for Goods & Services more desirable![*]

THE GST Council is scheduled to hold its 32nd meeting today. Given the tight time schedule, first, for the Union Budget and second, for the Lok Sabha elections, it is likely to be the last most important rendezvous of the Union Finance Minister and the State Finance Ministers for taking radical decisions. Though it is unlikely to be as newsy as the previous one but the industry is looking forward to some significant decisions. One of the key issues which is likely to be debated is the Report of GoM on MSMEs.

Netizens may recall that Members of the two GoMs met in the National Capital last Sunday and arrived at a consensus to recommend 1% Calamity Cess on SGST component for the State of Kerala. But it was not made very clear whether such a CESS would apply to all transactions or only a class of goods to be notified. Another significant decision was to raise the exemption threshold to Rs 50 lakhs so that a large number of small businesses belonging to the MSME sector could be helped to avoid the pain of GST compliance. Though some of the States and also the Prime Minister, favoured higher thresholds with a lump sum annual tax but the **last word rests only with the Council.** The astrologer in me predicts that the final threshold may not exceed Rs 50 lakhs as it would hugely shrink the tax base earned so far!

If Rs 50 lakhs is going to be the new threshold, the Council will have to take a fresh call on the turnover latitude for the Composition Scheme. The GoM has recommended major simplification of the scheme besides enhancing the limit to Rs 1.5 Crore like the SSI exemption in the previous regime. Besides the new limit, the GoM has also called for Annual return-filing along with the quarterly tax payment system. A new *avataar* of the Composition Scheme would indeed provide tangible relief to the MSME units, which have suffered mortal blow in the past 18 months.

Besides the Composition Scheme for the goods, the Council had, at its previous meeting, discussed about a similar scheme for small service providers. I believe Rs 50 lakh threshold was agreed upon but what had eluded unanimity was the tax rate. And the same was referred to the combined group of Fitment Committee and the Law Committee Members. Now that a higher exemption threshold is going to be

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* TIOL – COB (WEB) – 641, 10 January 2019.

decided, the Council will have to take a fresh call on a new composition for the Scheme for small service providers. Although some States wanted a higher tax rate of 8% as they believed that the value-addition in cases of services is higher, but the GoM has favoured only a 5% tax rate.

In this background, what is now more relevant is that rather than introducing two different Composition Schemes for Goods and Services separately, the Council should debate on the feasibility to introduce a unified and single Composition Scheme for Goods & Services. Such a decision would not only eliminate the need to make a distinction between goods and services but also minimise the pain of tax administration. So far as the tax rate goes, it can also be a single rate or specific tax for turnover upto Rs 1.5 Crore. This would go a long way in its palliative effect for the services sector. Since services sector accounts for a greater share of the GDP it needs to be cushioned and pampered for some more years before the economy is brought back full throttle on track!

In this context, I would also like to suggest that the Council should also debate on the possibility of reviving the real estate sector by bringing residential construction units under the Composition Scheme. In fact the Prime Minister also talked about it yesterday at Agra. What is closely linked to real estate is the security services. The Central Association of Private Security Industry has demanded that the entire sector including body corporate should be placed under the RCM. Since they provide jobs to unskilled and semi-skilled labour force it would be a booster dose for them if they are spared from the compliance burden and a registered entity pays GST for them and avails ITC. Since we are talking about RCM, it would be equally desirable to bring **Labour Contractors under the sweep of RCM.** There are contractors who provide temporary or semi-permanent jobs to thousands of labourers for specific projects and if they are also brought under the RCM, it would save them from complex data keeping and return-filing hassles.

In addition to these issues, the Council also needs to deliberate on lending **more powers to the IT Grievance Redressal Committee** so that it could address non-technical errors. There are several court decisions where directions have been given to this Committee to look into non-technical cases but since this committee lacks in authority, no immediate relief could be provided and the taxpayers have no choice but to go back to the courts.

On the revenue front, I am sure the GoM on Revenue Mobilisation would make its own detailed presentation and suggest measures to buoy up the deficit-stricken kitty. In this context, making use of e-Way bill data may come handy to identify tax evaders. Though RFID has been introduced and some data is now available but such data is not being used for the enforcement purpose. The Council needs to take a call on such vital inputs for strengthening preventive measures.

On the tax rate front, I guess the discomfiture is so acute that it would be ‘revenucidal’ to tinker with the tax rates of either Cement or automobile parts.

Though there has been hectic lobbying by the auto industry but any reduction in rate-cut may wait for a few months. The Council should allow the recent changes to trickle down to the ground-level and give some breathing time to the GST caravan to stabilise. Any further cut in tax rates would bring in undesirable stress on the fiscal kitty where deficit has already ballooned to 115% of the annual target. Let's hope that the Council would now focus more on continuity and stability of the GST regime rather than frequent tinkering!

4

GST - Three Exemption Thresholds! - Constitutional validity? - Has the Council goofed up?*

THE Indian GST Design is going through a 'hammering' time! It is poll time and to please different blocs of taxpayers, the GST Council's 'not fully thought-out' decisions have evidently been eating into the vitals of the 'basic structure' of the GST. If I leave aside many such decisions taken in the past, the two notable examples are the recent decisions relating to the levy of Calamity CESS and offering a choice to the States to opt down from the new exemption threshold of Rs 40 lakh. Before I delve into how both the decisions are going to bruise the laudable goals of the GST, let me first talk about the Union Cabinet decision to set up the National GST Appellate Tribunal in Delhi. The Cabinet decision also refers to appointment of a Technical Member (Centre) & a Technical Member (State) besides the President. How exactly this Tribunal is going to function - Whether it would also have Benches at least in six big cities or would there be any Judicial Member at all or, the States will convert their VAT Tribunal into SGST Tribunal and only conflicting decisions would be referred to the National Tribunal? There are many pertinent questions which go unanswered today as full details, perhaps yet to be worked out, are not known!

Anyway, let me now focus on how the latest decisions of the GST Council, taken at its 32nd Meeting, run counter to the very basic premise on which the GST Design rests? The Council has decided to raise the exemption threshold for registration to Rs 40 lakhs from the present limit of Rs 20 lakhs. Going by the global empirical wisdom it is a welcome step as lower threshold only amounts to higher compliance costs for smaller businesses and no revenue for the Exchequer. So far so good! But what has resulted in widespread consternation is the decision to offer a CHOICE to the States to opt for either Rs 20 lakh or Rs 40 lakh threshold. And this is in addition to Rs 10 lakh threshold which is available to the North-Eastern States.

The first victim of such a decision is the **UNIFORMITY** in the indirect tax regime! Some of the mainland States like Kerala has opted for Rs 20 lakh threshold. Since the deadline for communicating one's option to the GST Secretariat has been extended, it cannot be ruled out that more mainland States are not going to opt for

* TIOL – COB (WEB) – 643, 24 January 2019.

lower thresholds! Practically speaking, there are going to be three different thresholds in India. Even if we leave aside the issue of **EQUITY** which is in any case a stranger to the world of taxation as per settled judicial decisions, such a large spectrum offers harrowing times for the GST Network which has to design and activate functionalities for the taxpayers. Apart from migration of certain percentage of businesses to the neighbouring States which may have higher thresholds, it 'abuses' the glorious slogan of 'One Nation, One Tax'! A fundamental change of undesirable nature in the GST Design is - We are heading for 'One Nation, Multiple Thresholds'.

Let me now examine this decision of the Council against the Constitutional Provisions. Is it the correct INTENDMENT of the provisions of the 101st Constitution Amendment Act? Let me reproduce some of the clauses of Article 279A which read:

> *"(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on -*
>
> *(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax ..."*

Applying the golden rule of legislative interpretation, the plain reading of Clause (d) refers to a SINGLE THRESHOLD LIMIT for both Goods AND Services. The expression ***"The threshold limit"*** cannot be, by any stretch of imagination, interpretated as multiple threshold limits which is the scenario today!! So, can it be said that the Law Committee Members did not do their homework properly before presenting the same to the Council. Though many Council Members are legal eagles but they apparently relied on the recommendations of the expert committees and the most vital expression in Article 279A was perhaps overlooked! Such an interpretation can also be sustained against the fact that Clause 4(g) talks about special provision with respect to the Hill States and that is how we have Rs 10 lakh exemption threshold. That is another issue that some of these Hill States later opted for higher threshold of Rs 20 lakhs. So, at best, it can be said that Article 279A empowers the GST Council to have a **maximum of TWO THESHOLDS ONLY**! If one goes to the General Clauses Act, 1897 (words in the singular shall include the plural, and vice versa), it may not help here as the Legislature has been very categorical in carving out a clause to treat differently the Special Category States. Had there been such INTENDMENT of the Legislature, it would not have gone an extra mile to talk about only the Special Category Hill States!

Let me now throw some more light on another important expression used in Clause (d) - **"goods and services"**. When the issue relates to fixing of the threshold limit of turnover, the Constitution empowers the Council to stipulate perhaps JUST ONE THRESHOLD for both Goods AND Services! But what the Council has done is to prescribe two different thresholds for Goods (Rs 40 lakhs) and Services (Rs 20 lakhs). The two different thresholds tend to make an artificial taxonomy of Goods &

Services whereas the GST laws clearly remove all such distinctions between goods and services. One of the hallowed purposes of bringing in GST was to eliminate any discriminatory legal treatment of goods and services and put them at par!

In this background, perhaps the two different thresholds for goods and services are not only legally invalid but also undesirable. This brings us to another ticklish issue of two different Composition Schemes for goods and services. In the first place, **any Composition Scheme is an antithesis for the basic design of the GST which is globally seen as the most efficient indirect tax system because it facilitates seamless flow of Input Tax Credit.** The fact that a Composition Scheme rudely cuts the thread of credit in the economy, it is, theoretically speaking, not desirable. Even if it becomes a political imperative, all efforts should be geared up to phase it out as soon as possible. What the GST Council has done is that in place of one scheme it has approved two schemes with two different thresholds. A bellyaching proposition for any tax administration! Ignoring the ground realities, the Politicians in the Council have rendered a mortal blow to the basic design of the GST. Ideally, the Council should review its decision and a **SINGLE COMPOSITION SCHEME** should be introduced with Rs 40 lakh as uniform threshold for Pan-India and Common for both goods and services.

Another notable aberration from the GST original design is the levy of **Calamity Cess**. The stated INTENT is to help the State of Kerala garner additional revenue for reconstruction of its floods-devastated infrastructure. But, the larger question is - how much sum will such a levy imposed on all intra-state transactions may yield for the State coffer? Whatever is going to be the estimate, it is certainly not going to be a substantial amount! So, why to complicate the GST Design along with the GSTN functionalities? When the revenue to be garnered is not worth the pain, what **other motive could be behind allowing Kerala to impose such a CESS?** Though the Council can legally authorise any State to collect such Calamity Cess as per Article 279A but when it is known to the Council as per data provided by the GSTN that about **65% of all transactions are Inter-State in nature**, not much revenue can be collected from the remaining 35% intra-state trade. Secondly, making such an exception for a State when the situation appears to be under control, **carves out future possibilities for the Union of India to impose CESSES.** Given the fact that the Ministry of Law has made it clear that the GST Council may approve imposition of CESSES as there is no legislative handicap to do so, the Centre would perhaps be more prone to make use of such levies against staring revenue deficits. I just hope that the Council exercises more caution before approving any new scheme or levy which amount to serious aberrations from the basic architecture of the GST!

5

GST 2.0 - Time to align provisions with Direct Tax Code-in-making*

A palpably widespread hope from Modi 2.0 is that the GST 2.0 is in the pipeline! Though the Goddess Durga-like arms of the Union Government were busy piecing together a 100-day agenda during the general elections and overhauling of the GST was expected to be one of the major reform areas but not much has officially come out as yet. The only noticeable developments in the past few days are - a series of Law Committee meetings, lending clothes of words and phrases to the various hitherto unimplemented decisions of the GST Council such as amendment to Section 50 and a possible meeting of the Council towards the end of the month. Though one school of officials favours that the proposed amendments can be made a part of the Finance Bill on July 5 after the formal approval of the Council but another school feels that there is no urgency to bundle all such amendments with the Finance Bill. After proper *manthan*, a separate and comprehensive GST Amendment Bill may be moved later.

Meanwhile, reacting to the landslide majority that the BJP has earned in the Lok Sabha, the Punjab Chief Minister has written a letter to the Prime Minister along with as many as **101 changes** which he thinks, are required to be done to bring back the economy on a healthy growth path. He has underlined that with such overwhelming mandate for the Government and a consistent support from the Congress Party, there is no reason why India should say NO to a world-class GST, which will significantly improve India's competitiveness in international business, help create jobs and reduce the pain of dispensable compliances.

It is true that the GST was widely billed as one reform which would perk up India's GDP by at least 1.5 per cent. But today, our GDP has hit a new low with 5.8% growth in Q4 of the last fiscal. And one least speculated reason for such a demotivating state of affairs is that after the GST was introduced, imports gained an upper hand over the domestic businesses! But how? Due to cascading of taxes and a large number of exemptions, local industries end up paying more taxes than imports which are subjected to a tax rate, not burdened with embedded taxes. Where does such cascading come from? And the simple answer is - denial of ITC and blocked credit as per the GST laws and exemptions thereunder. As per some studies, such

* TIOL – COB (WEB) – 662, 6 June 2019.

cascading of taxes works out to be in the **range of 3 to 5 per cent,** which imports do not suffer from.

So, if India's competitiveness has to be sharpened, certain changes which are required to be made are – a) minimise cascading of taxes on inputs; b) identify major import items and subject them to additional tax by following the principle of equivalence; c) bring deemed exports on par with exports; d) EoUs and SEZs be kept on the same footing as physical exports; e) reimburse embedded taxes to small exporters and f) treat export of services more fairly, respectively.

Another good suggestion from the bunch of 101 changes suggested by the Punjab CM relates to making provision to pay tax even in cases of exemptions. Several tax jurisdictions like EU give an option to a taxpayer to pay tax in order to pass tax credits in B2B transactions. Such a provision would remove cascading in many sectors due to exemptions. Such a provision may envisage a tax rate of 12% on all exempted supplies where the taxable person wants to avail ITC to pass on the pass through tax to his customers thereby avoiding cascading of taxes. This would certainly improve compliance and competitiveness of Indian businesses.

Taking into account the intent of the Modi Sarkar to revamp the Direct Taxes, a suggestion has been made to align and synergise various provisions of GST with the Income Tax law at the stage of making of a new law itself. And the rationale is - GST is a value-added tax and income tax is a tax on value-addition minus labour and finance costs. Similarly, Customs is a tax on inward supply. So, there are various provisions such as interest rates, penalties and dispute resolution which can be seamlessly synergised with the income tax law. And this would certainly improve the ease of doing business.

Another concept of income tax which may be borrowed for the GST is the general Exemption Threshold. Rather than fixing a limit for registration, the GST law should have a common threshold of exemption for goods and services both. The general perception today is - no GST is payable upto Rs 20 lakhs turnover. But if one registers, the tax is leviable even on a turnover of Rs 100. The threshold of Registration concept hurts small businesses when one's turnover goes below Rs 20 lakh and they are required to go through the drill of de-registration. Since many do not do so, they are treated as tax evaders whereas the ground reality is that their businesses have suffered major setback and their turnovers have drastically nosedived.

Since we are talking about Registration issue, the Punjab CM is in favour of Centralised Registration of specified supplies of services. I do agree with him as this is the need of the hour. There are many services like telecom, aviation, railways, and banking which have to go through avoidable registration in every State, which puts unnecessary compliance burden. They can be allowed Centralised Registration whereas each State can claim their taxes through a specially designed mechanism. They can also be allowed to allocate ineligible credit at the centralised office to

branch offices on pro-rata turnover basis. This can better facilitate audit and business growth for the assessees.

Taking a cue from the concept of MAT in the income tax, he has also floated the idea of **Minimum Mandatory Tax (MMT)**. And his logic is that there are a large number of taxpayers who are paying NIL tax because of heavy capital expenditure or other reasons. So, a new provision may be inserted to restrict credit use to a maximum of 95% of outward liability. Thus, one will be forced to pay in cash and it can take care of the revenue buoyancy.

On the issue of Real Estate, his suggestion is to **DEFINE land,** which has been put as no-supply in Schedule III of the GST laws. However, land also includes certain minerals and structures as per settled laws. The CM has also wished that the benefit of exemption of long-term lease of land for more than 30 years should also be put on the same footing as land. Empirically speaking, all States collect stamp duty on such lease. In addition to this, GST @ 18% makes the cost of leased land prohibitive. Here a business has to suffer the double whammy of no credit for stamp duty and now, no ITC of GST paid as per the latest Advance Ruling. All such developments hurt the business development, which needs land to set up factory or construct a commercial space.

As regards the building, he has suggested that it must be defined to bring clarity in taxation of immovable property other than land & building. He is right in his demand as the word building is capable of varied interpretations in the context of Entry 49 of List II of the Constitution. Though building has been described as no-supply under Schedule III except where under-construction but a proper definition would certainly help in taxing it other than land and buildings like parking lots, advertisement hoardings, towers, dams & ports.

There are many more good suggestions in the letter of the Punjab Chief Minister which, I would like to cover next week. For the Union of India, it is worth setting up a small team of knowledgeable officials who could examine the feasibility of implementing some of the suggestions in the months to come. A neat and clean GST law with minimum procedural compliance should be the goal if Modi Sarkar is keen to launch GST 2.0!

6

GST 2.0 - Let's not make ad hoc changes till the Roadmap is designed!*

THE 35th meeting of the GST Council, the first for the NDA 2.0, has been scheduled in the second half of June 2019. The fact that it is going to be barely for a couple of hours and to be chaired by the New Chairperson, the efforts are on to keep the agenda items to the minimum! Some of the likely agenda items are going to be the past decisions of the Council relating to amendments in the laws. The Law Committee has finalised the much talked about amendments in Sections 8, 10, 44, 50, 52 & 168. Noteworthy and taxpayer-friendly ones are - a spike in the registration threshold for goods to Rs 40 lakhs; Composition scheme for service providers upto Rs 50 lakhs; Levy of interest only on payment made through electronic cash ledger and also the formation of a Centralised Appellate Authority for conflicting decisions of Advance Ruling Authorities.

Another important but new agenda item is going to be the interim report of the Committee of Officers on e-invoicing system. It is likely to be presented before the Council and there are chances that a **Group of Ministers may be formed to further polish this proposal**. I am not expecting any quick decision on this issue at this meeting. This is more so because too many IT-driven new proposals have been conceived in the past two months and it would not be wise to rush into all such behaviour-related changes in an avoidable haste!

Here, what adds an element of uncertainty is the new roadmap for implementing new GST Returns. A couple of days back, the Ministry of Finance released a roadmap, subject to approval by the Council. Although the industry and trade were aware of the impending new format of GSTR but it appears that too many changes are being 'stuffed' in too little space of time! For instance, only three months have been allocated for the pilot of GST RET-1. A little more time should be given for the pilot and feedback should be taken from the large taxpayers about its fall-out on their ERP systems. Since it is finally going to be the common return format for all taxpayers from January 2020, some sort of comfort-feedback needs to be measured to avoid any fuss.

As regards the GSTR-9 & 9C, though the taxpayers and their consultants continue to struggle with various data and technical glitches but the Council is unlikely to

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* TIOL – COB (WEB) – 663, 13 June 2019.

extend the due date. One reason is that some Associations of industries have not favoured such extensions and they have communicated the same to the Government through letters. However, it may be considered, provided some State Ministers raise this issue before the Council. And I strongly feel that the due date can be **extended by at least 15 days** as it would do no harm to the Revenue.

Let me now pick up the last week thread generated out of the Punjab Chief Minister's letter addressed to the Prime Minister on 101 possible changes to better the system of GST. The crux of his letter is that in the present design of the GST, the cascading of input taxes is not being neutralised and it is hurting the 'Make in India' efforts of the Union Government. Indian businesses have suffered on account of exclusion of certain vital sectors of the economy. Secondly, it has hugely bruised the competitive edge of the Indian exporters in the international market. Thirdly, it has made imports cheaper than the domestic products. He has also given detailed sector-wise examples such as,

++ Electricity: It can constitute up to 30% of the production costs in certain sectors and in any case remains a key input for nearly all sections of industry. As a result, big businesses which set up their own captive power plants, are benefitted while others (generally MSMEs) who buy electricity from stand-alone supplier are disadvantaged. This also results in proliferation of coal-based plants rather than gas-based, as **coal is a part of GST**. The present structure – whereby electricity is exempted, besides being subjected to electricity duty by States, results in considerable **cascading** (up to 10% of electricity cost and up to 2%-3% of turnover).

++ **Natural Gas**: A number of inputs/input services are used in the extraction of natural gas. In order to cut down cascading some rate concessions have been given. Being outside the GST, no IGST is imposed on its imports. Moreover, natural gas comprises an important input in a number of downstream sectors that suffer GST such as fertilizers. There are very few States in India which produce natural gas. Central Government is thus avoidably compensating such plants even though they were earlier entitled to get the gas on payment of CST @2%. Natural gas produced at offshore locations does not suffer either GST or VAT or CST being imports into India. Its inclusion in GST will set right all these aberrations. At the minimum CST sale should continue for use of non-GST inputs for GST outputs and the present law is not worded against this but the actual implementation is to the contrary.

++ ATF: It is a critical input for the aviation sector. High and varied State taxes on ATF result in **diversion of consumption to other countries (to the extent possible) and within India to low-tax States.** Its inclusion in GST will help in optimization of the tax structure to the overall benefit of the country besides opening the entire tax credit chain.

++ Crude petroleum, MS and HSD: Presently, there is a considerable embedding of taxes due to GST inputs going into their production. As a result crude extraction and **setting up of refineries in India is no more as competitive** as in the pre-GST

period. This is also a unique case where the crude produced in India, if exported, will allow refund of all GST embedded taxes and **when re-imported will not require payment of GST**. All the three products would need to be brought into GST in one go. This will provide a level-playing field to domestic extraction of crude oil as well as help establish new refineries.

++ New constructions: At present, Real Estate is liable to GST as long as it has not obtained completion certificate. This distinction is without economic rationale. The Constitution has defined Service as "anything other than goods". Accordingly, real estate of all kinds is covered by the definition of service and does not require a Constitutional amendment. Imposition of tax on construction is necessary to restore parity between two classes of properties i.e., before completion certificate and after. Consequentially, the entire real estate sector (except old properties and land) should be brought into GST. States can continue to levy their respective taxation on real estate over and above GST. Once distinction between under construction and completed properties is removed, they should be brought back into tax credit chain with a clear legal requirement that prices will be maintained for a **period of three months** after the change.

++ Alcohol: Unlike previously discussed items, inclusion of Alcohol in GST will require a Constitutional amendment. There is considerable scope to raise overall revenues (including State Excise) from alcohol by subjecting it to the inherent checks of GST (like E-way bill) besides removing the aberration of its exclusion from GST. Here GST rate could in fact be raised so as to also encash the existing cascading.

Till the time, all these goods are brought under the ambit of GST, it is certainly not undesirable to make GST payment OPTIONAL at a nominal rate on these goods so that input tax credit chain is not broken. Such a system exists for the MSMEs whereby one can pay higher taxes and avail ITC even if there is an exemption. Recently, the Association of Restaurant Owners has also demanded a similar system where 12% GST can be levied with ITC or one may continue to pay 5% without ITC. Such a system is not unique as it prevails even in Europe.

It is high time that the GST Council comes up with a detailed roadmap for inclusion of these goods under the GST and also a complete overhauling of the present design of GST so that private investments and FDI could pour in for expansion of the existing production capacities. Secondly, till the time such a roadmap or white paper is ready for discussions, all ad hoc major changes ought to prevent further muddying of the GST waters!

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GST Council:
The 'Dynamic Multiplier' in Action!

Introduction

The GST is, conceptually speaking, a growth-pedalling pass-through tax. Being convinced of its intrinsic potential to promote growth and integrate 'barricaded' markets into a single market, the Prime Minister, Mr Narendra Modi, a reform-maverick, was truly restless to hug it tight as fast as it could be done! That is how the GST Council, headed by the late Arun Jaitley, felt a bit coercively elbowed to advance the timeline from the constitutionally-provided space till September 2017. Since the Prime Minister could not resist his temptation, it was hastily advanced to 1 July 2017. Except for the Prime Minister and the Lok Sabha Secretariat—which had to bedeck the history-soaked Central Hall draped in many items of antiquity and carpet the floors for the midnight tryst with the historic tax reform—all key actors, such as the taxpayers, the GST Network, and the tax administrations at the Centre and the State levels did not have any inkling about the unfolding script! Weirdly, all the stakeholders openly admitted that they were ready and the consequential chaos was largely and bravely dubbed as manageable! Such public posturing was hugely demonstrated despite the fact that neither the Council nor the GSTN had ever discussed Plan B if the courageous attempt to match input-output invoices came a cropper! Even the GSPs were not geared up as their API was not yet ready! Predictably, small businesses—like traders, proprietary firms, and MSMEs—were the worst sufferers! Our informal sector indeed retired fatally hurt!

Notwithstanding the kerfuffle and the technical glitches during the initial months, the GST buggy successfully managed to cross the Rubicon—the first anniversary! Mr Jaitley extolled the revenue potential of the new tax system which logged 1.22 per cent tax buoyancy—which was never recorded in the past. While praising its inherent feature of allowing the seamless flow of input tax credit (ITC), the then Finance Minister said that almost 15,00,000 Composition Scheme traders opted for normal registration so that they could avail ITC. The revenue collections registered a 12 per cent growth in the first year—close to the 14 per cent incremental growth promised to the States. The GST spin-off benefit was reaped as a rich harvest by the Income Tax Department, which reported 44 per cent growth in personal income tax return filers—the total number spiralled from 3.7 crores to 6.9 crores. The then Revenue Secretary talked at length about the salubrious impact of GST on the economy. And full credit was attributed to the timely, speedy, and efficient decision-making by the new dynamic growth multiplier—the GST Council!

Though the composition of GST Council mirrors the Parliament of India and may be monikered as 'Mini-Parliament', its efficacy and efficiency have been incomparably unmatched in the past five years! Albeit not without its share of *kuddle-muddle*, high-decibel howling and mauling, political contestations and drum-

beating, and allegations of muting megaphones! Despite being a newly-born constitutional body with no legacy, the political maturity of the Union Finance Ministers, and also the unadulterated spirit of cooperative federalism, the buggy of the Council chugged on! It took a string of pivotal decisions—astonishingly, with unanimity. About 8 per cent of decisions may be bracketed under this category. Except for a single aberration of voting over the issue of lottery, all the decisions were taken by consensus. Some of the notable decisions which were required for the quick roll-out of the new tax system were the approval of the CGST and IGST laws; the exemption thresholds for goods and services; Composition Scheme for goods; Composition Scheme for services; cross-empowerment; division of the tax base between the Centre and the States for tax administration purposes; audit; and assessment. Though naysayers may tend to pinpoint many demerits in its working but one yardstick which may have wider acceptance comes from the Supreme Court of India. In the *Mohit Mineral* case, the Bench, as part of its *obiter dicta*, observed that the GST Council fosters federalism and democracy and harmonised decisions thrive not only on cooperation but also in contestations!

Then came a phase when the average monthly revenue collections shrivelled! The flavour of debate within the Council turned vinegary! The GST was skewered for being a revenue laggard! True to the proverbial saying—while success has many fathers, failure is an orphan—the States who were party to all decisions, blamed the Chair for flawed legislation. Birth defects in plenty were publicly highlighted and debated. Even before the wrongs pointed out could be righted, thuddingly landed the humongous blow of COVID-19. A string of lockdowns further locked the revenue potential of the GST. What rubbed salt to its deepening bruises was the unravelling of a series of mega-fake ITC scams. Internal studies of the quantum of fraud trembled the confidence of the Council in the liberal measures put in place. However, the Chair held on to the fast-fading glimmer of hope and nudged the Council to approve multiple Groups of Ministers (GoMs) on several scorching issues, such as correction of inverted duty structure; revenue augmentation measures; IT and returns overhauling; review of slab rates and exemptions; and also the creation of the GST Appellate Tribunal.

This is not to say that the Council grappled with all these issues in right earnest! It did play possum over some of these but it was perhaps a part of its strategy to let the new tax system gain more stability and certainty before more changes could be initiated. Meanwhile, the Apex Court of India provided a strong bout of reassurance by upholding several decisions of the Council in the *Mohit Mineral* case. While quashing the application of the Aspect Theory of Taxation to the case of ocean freight, the Apex Court upheld some of the principles contoured by the Council, such as the principle of territorial nexus and the principle of deeming fiction. However, there would always be a segment of taxpayers who may like to seek solace in a popular statement of Emmeline Pankhurst of the U.K. Suffragette Movement fame: Justice and judgement lie often a world apart! Anyway, in a nutshell, I would like to

conclude that the Council has, thus far, played its catalytic and dynamic multiplier role to an enviable extent to inspire other federal bodies in India!

Chapter 1 provides details of how the GST Council took a series of decisions in its early meetings to implement GST from 1 July 2017; prescribed easy paperwork for availing transitional credit; a peep into how ill-prepared the GSTN was and how there was no Plan B in place if the GSTN were to go dud; how a large number of small businesses and MSMEs mortally suffered during the initial months; how the death of SMEs in the informal sector may shrink the size of the shadow economy but would also have serious socio-economic consequences; and how the late Arun Jaitley admitted the teething problems and also the instant job losses in some cases.

Chapter 2 dwells on events linked to the first anniversary of the GST and how the then Revenue Secretary, Mr Hashmukh Adhia, recalled his experiences about responding to the hardship issues of the taxpayers and the beneficial impact of GST on the economy at large; why the Delhi Finance Minister expressed lack of trust in the IGST model; how the Council decided to hold back more reforms till monthly revenue breached the ₹ 1,00,000 crore milestone despite tax buoyancy being recorded in the GST collections for the first time; and Mr Jaitley citing the example of how over 15,00,000 composition dealers were opting for normal registration so that they could avail ITC and also the spin-off effect of GST on widening the tax base of income tax from ₹ 3.7 crores to ₹ 6.9 crores.

In Chapter 3, I have touched on the issue of the unwarranted controversy over the CBIC Member (GST) writing a letter clarifying that if a case is booked on the basis of intelligence, whoever, Centre or State, books it, will complete the investigation and the principle of single departmental interface would not work in such cases; how the policymakers goofed up in fixing a common deadline for GSTR-9 and GSTR-9C as the auditors who work on GSTR-9, cannot do the audits as per the ICAI Guidelines; given the limited number of auditors and over 12,00,000 audit cases, more time needs to be given; and then comes the issue of audit by the Revenue—Audit Manual not yet ready and the State VAT is not familiar with audit and TIOL recommends that the audit threshold needs to be raised from ₹ 2 crores, which is not practical.

Chapter 4 elaborates on how the revival of the import sector is akin to the vanishing of the bad hangover of lethargy in the economy and robust economic growth promises matching GST collections; how the GST Council played squint-eyed over the issue of creating the GST Appellate Tribunal despite deadlines being set by the High Courts and the Apex Court for settling all contentious issues; how the Council played possum over correcting the inverted duty structure problem and also whether the Authority for Anti-Profiteering is to be put under the scalpel; and how the PM drops hints at bringing petroleum under GST but the FM says only the Council can take a call on this issue.

In Chapter 5, I have touched on the red-hot issue of GST being dubbed as a revenue laggard and this is after the Council lowered the tax rates on dozens of items below the RNR rate; how explosive became the issue of loan-taking to pay for

compensation as there was not enough cash in the pool to compensate the States; and with COVID walloping the revenue kitty, the Council felt coerced to set up a GoM with the mandate to play with the slab rates, exemption, and the IDS but it was wrong timing and an attempt to drop an axe on own feet!

Chapter 6 sneaks a peep into how COVID triggered fiscal dwarfism for the Revenue and how the GoM would have no choice but to give a bloody nose to the taxpayers; the limited wiggle room for the GoM to play with tax rates with 28 per cent and 18 per cent slabs accounting for over 80 per cent of tax revenue and the 12 per cent slab, which brackets largely mass consumption items like medicines, cell phones etc; how post-Covid global trend lurches more towards indirect taxes to mop up extra revenue as income tax collections have nosedived across the world; and how TIOL recommended that time was ripe for the Council to review the basket of exemption and widen the tax base which has now grown to 1,38,000 and how the time has come to withdraw exemption and make use of the Direct Benefit Transfer route to help the disadvantaged sections of the society.

In Chapter 7, the landmark Larger Bench decision of the Apex Court in the case of *Mohit Minerals* has been analysed at length—though the ruling went against the Revenue on the issue of ocean freight, several key principles decided by the GST Council were precociously upheld, such as the principle of territorial nexus and the principle of deeming fiction, and also did not find merit in excessive delegation charge; the levy on ocean freight was set aside as it was based on the Aspect Theory, which was different from the principle followed for the composite supply; how a wrong committed during the Service Tax regime was palanquined into the GST regime and our elite policymakers knew that such a levy would not survive judicial scrutiny; different types of federalism elaborated and how fiscal federalism qualifies as 'marble-cake' cooperative federalism—where not only cooperation but also political contestations promote the twin values of democracy and federalism; and finally, the different constitutional rankings of the expression 'recommendation' used in India's Constitution and to what extend the GST Council's decision is binding in effect!

Chapter 8 comments on the GST Council's 47th meeting's hits and misses—an opportunity lost to bigfoot on the issue of the GST Appellate Tribunal, perhaps, because the States continue to be uncomfortable with the Apex Court's formula of an equal number of Judicial Members like the Technical Members in a Bench; how parity in the number of JM and TM Members calls for a silver bullet and that is why the issue was referred to the GoM; how tweaking the law and roping in the Principal bench of CESTAT may speed up the formation of the GST Tribunal besides inheriting the rich legal legacy; how the Chair managed to parry the incendiary issue of compensation raised by some of the States; in-toto acceptance of the GoM's recommendations on correction of inverted duty structure and some of the misses like the levy on services provided by the local bodies; and a future roadmap for the next five years.

1

July v/s September: Does the Council Need to Avail Constitutional Space for Better Preparedness?*

While briefing the media immediately after the last GST Council meeting on 3 June, the Union Finance Minister, Mr Arun Jaitley, said that there has been a consensus among the States for the implementation of GST from 1 July. True, we also heard some feeble voices of protest from some States as regards certain unresolved issues. But, a flurry of administrative directions coming from the PMO and the Prime Minister—himself reviewing the preparations for the tryst with a new indirect tax regime—goes to indicate that all the stakeholders, except the taxpayers and the field formations of the GST Administration, are serious about the imminent deadline. The PMO has asked all the Ministries and Departments to set up GST Cells to monitor and help sector-specific queries. They have been asked to interact with the PSUs and enable them to get ready for the ride on the GST bandwagon.

To provide an extra cushion of comfort to the trade and industry while approving the Transitional Provisions, the GST Council has accepted the demand for allowing 60 per cent input tax credit in case no duty paid document accompanies the goods being supplied. The Council has allowed 60 per cent credit for goods attracting 18 per cent and above GST rates and 40 per cent for lower GST rates. Even in the case of IGST, the credit has been hiked to 30 per cent for goods attracting higher tax rates. Moreover, the time period for reconciling the credit ledger has been increased to ninety days. In addition, 90 more days can be granted by the GST authorities. The Government has also released the Draft Rule for Credit Transfer Document during the transition.

Notwithstanding all these measures, the moot questions are: Is our industry ready for the 1 July deadline? **What about the GST Network?** Are small traders and MSMEs prepared for this technology-riding tax system? Is it not the case of a very tight deadline? Are we heading towards a **'manageable' chaos?** What about the readiness of the CBEC field formations along with the State VAT administrations?

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* TIOL – COB (WEB) – 557, 8 June 2017.

There cannot be concrete answers to all these questions. Even an attempt to answer them is akin to speculation as a lot of facts appear to be missing to draw any irrefutable inference.

Anyway, I would prefer risking a 'speculative' attempt. The most vital question is: Is the GST Network really ready? If one recalls every time Mr Jaitley is asked this question, his answer is certainly **not confidence-earning.** The official stand is: the GST Network has informed the Council that they are on the right course. But, not putting detailed information about the outcome of the tests conducted by the GSTN is one strong indicator that their Beta version has probably not produced satisfactory results. What goes to confirm this fact is the recent clarification coming from the Revenue Secretary, Dr Hashmukh Adhia, at Bangalore, where it was his deliberate attempt to clarify or rebut some media reports about the half-baked preparations of the GST Network. The GSTN spokespersons have been making positive public statements but they fail to inspire confidence, particularly with respect to return filing and matching of input-output invoices numbering several billion. Although I wish them good luck for early success, my word of caution would be: It is better to delay the GST roll-out by a month or two rather than to usher it in definite chaos that may ensue. More than the laws and the Rules, the GST is a tech-driven tax system and a robust IT infrastructure is not negotiable for its successful implementation. The fact that neither the GST Council nor the GSTN has talked about '**PLAN B**' if their software fails them goes to indicate that the economy may be confronted with an unparalleled degree of chaos.

If the GSTN fails to meet the deadline even after one or two postponements, the only option left with the Council would be to roll out the new system by putting the Input-output invoice matching provisions in a state of suspension for a few months. In fact, similar treatment may be opted for if the return formats do not work well for millions or billions of returns to be filed. As long as the **payment is secure, the Council should not show aversion to such decisions** if the situation demands so. There is no harm in delaying the implementation of certain critical provisions which would ultimately help taxpayers in overcoming the initial chaos.

Let us now take a look at the other side of the fence. Are all taxpayers really ready for 1 July? Except for a minuscule percentage of large corporates which can afford leased lines of broadband, others would be struggling to upload data on the GSTN server. Given the state of telecom affairs, voice as well as broadband, populating data online before the same is uploaded is going to be a painstaking effort. A good example could be the recent incident of the Minister of State, Arjun Ram Meghwal, climbing a ladder resting on a tree to make a phone call to the officials from his constituency. This goes to prove the point that unless Facilitation Centres with leased lines are set up, this would not work.

Given the fact that even when a good number of *Suvidha* Providers are not yet ready nor their softwares have been **tested** by the GSTN, how can one believe that the GSTN is really ready? Some of the GSPs have come out in public with their

statements that there would be a time lag of two to three months in the roll-out of their services. If the GSPs are not that confident, how can the Government be so sure about the 1 July deadline?

Among the taxpayers, the worst sufferers are going to be small enterprises which are not tech-savvy. As per various surveys conducted by FISME and KPMG, as high as 70 per cent of small and medium-sized firms are not yet ready for the GST. Many experts believe that there would be disruption in the business cycle of small firms and this may result in job loss in the initial months. This is indeed bad news for a Government which is yet to do much for the informal sector. Unlike other economies, the informal sector creates more jobs in India than the organised sector, which is caught in a web of slowdown. Given the fact that the GST is a system which is designed to 'formalise' all informal sector firms, it may lead to the **'instant death'** of thousands of small firms and such deaths would be more than a price which Mr Jaitley described as some 'initial teething problems'. Once a business entity is dead, it cannot be revived in a system which does not favour small businesses. The Reverse Charge provision is a virtual death knell for them as large enterprises would think thrice before doing business with them.

The death of small businesses may perhaps be good news for Mr Modi as they generally deal in cash and if they are dead, the black economy would shrink but its socio-economic consequences may upset the delicate balance in the economy. Therefore, the GST Council may soon realise that it would be required to prescribe a different set of compliance provisions, at least for the initial two years. Just making them file too many returns and data choking the server may not help the cause of revenue. Secondly, the GST tax administration would also require some time to cope with the kind of pressure their officials are going to have to handle. With the GST laws treating branches and warehouses as distinct establishments, there are Commissionerates which have received more than 20,000 new registrations and the merged administrative Commissionerate is finding it difficult to cope with the workload.

Let us hope that the GST Council and the Prime Minister have taken into account all these factors which may create chaotic situations post 1 July before insisting on early implementation. The 101st Constitution Amendment Act does give two more months to the Council and it is better to avail the breathing space available rather than rush into it.

2

One Year of GST: It is High Time for the Council to Unfold Reforms for the 2nd Year*

1 July was a big day for the 'Made in India' brand of the GST. After all, it was its first anniversary. There were celebrations across the country if one goes by the tweets: one of the important and tangible 'Indi(a)cators' of ground-level involvement of officials as well as taxpayers with this mega indirect tax reform process. Although the federating States may be mistaken for their lukewarm celebrations as they have a very 'thin' presence on the social media space, a few phone calls to the officials in some of the States confirmed that they were no less excited than the CGST officials on this mega day; and it is so notwithstanding the fact that it was a Sunday.

For the noted mascots of the GST at the Union level, it was a perfect day not only to rebut the charges levelled by the Opposition leaders but also to extol the salubrious impact of the GST on the economy as a whole. Since Mr Arun Jaitley is still recouping at home albeit he did address the gathering through a video link, the entire onus to talk about the future reforms was put on the Revenue Secretary, Dr Hashmukh Adhia, who has successfully midwifed the entire roll-out process. His detractors may find many faults with the implementational steps taken by him but for me, he has been a **successful champion.** Notwithstanding his limitations to understand the technicalities of a tax statute, he has always been at the forefront of all technical debates either on the idiot-box or seminars organised by the chambers of businesses, and based on his 'near perfect' understanding of the macro-dimensions of the GST design, he has even been answering a volley of technical queries.

Going by Dr Adhia's statements on various TV screens and even Mr Jaitley's address on the GST Day, one may come across many facts about what happened in the past and how a wrong committed was rectified with alacrity, but not much could be inferred about the future roadmap of the GST Reform process. GST has stepped into the second year and has also been stabilising almost rapidly, Mr Jaitley and Mr Adhia had enough time to talk about the key milestones the GST Council would like to achieve in the next 365 days. Whatever has happened in the last 365 days is the past and the nation, and even the foreign investors, would be keen to know the future twists and turns which may be given to the GST. A palpable restlessness may be seen

* TIOL – COB (WEB) – 614, 5 July 2018.

among the industry speakers and also some economists, including Mr Arvind Subramaniam, about knowing a time frame for bringing the **excluded sectors** under its sweep. Though the Council may have its own legitimate reasons to procrastinate decisions on such issues, a **White Paper** approved by the Council, detailing the reform measures to be taken in the **next 365 days**, would be largely welcome. I am sure that roping in petroleum and the real estate sectors under the GST is not immediately feasible but some of the reforms, such as easing the blocked credit and removal of restrictions on the ITC, are very much doable and a statement in this regard would be hailed widely.

I recently heard the lone voice of the Delhi Finance Minister expressing no confidence in the IGST model, and the obvious reason for his irritation is the consistent piling up of the IGST revenue, which has come close to ₹ 2,00,000 crores in the past ten months. Though one may argue that a major part of such revenue is **only ledger entry** and no hard cash, for the States, such a huge pile-up of credit is within the control of the Union of India and they would like to have their own pound of flesh. Obviously, the farrago of IGST collections seems to be raising serious questions in the minds of several State Finance Ministers and the Council would do well for itself if it details the **future fine-tuning of the IGST model** in its White Paper. Such a document would serve not only the present Central Government but also act as a roadmap for the new Government, which would take charge in May 2019.

Such a document should also talk about a number of amendments required in the GST laws. Several internal and external committees have zeroed in on many sticky provisions which require steps like tweaking, rewording, rephrasing, and rewriting. This way the proposed amendments can undergo a second round of refining and chiselling and a healthy debate may contribute to further simplifying it. Of course, there is no such thing as a simple tax in the world of taxation but simplification as a milestone can be said to have been achieved if the compliance from an average taxpayer goes up by a few percentage points. Since **simplification of a tax law is never a one-time affair,** greater transparency in debating the proposed changes would serve it better besides cementing the faith of the taxpayers in the policy-making forum.

At present, what may appear to be a little obsessive for the policymakers is the revenue statistics. A surge in GST collections is again a process which can be realised over a period of time. Holding the process of reform back in the name of realising the milestone of a tax revenue of ₹ 1,00,000 crores is certainly not a wise decision. It is more so in the light of the fact that every reform measure has a gestation period and revenue is a by-product of it. Raising GST collections beyond the miracle figure of USD one trillion should be achieved only through a ‘default mode’! And what is this mode? In simple words, the GST Council should continue to take reform and simplification measures without waiting for the revenue to cross the canvas of ₹ 1,00,000 crores and all such measures would automatically bring in more

revenue. One good example is what Mr Jaitley quoted in his blog published on the GST Day. He said that as many as 15,00,000 taxpayers who would, based on their turnovers, fall in the category of composition dealers, opted for normal registration and they are happy availing ITC and paying taxes on each transaction. Such a reality could never have been seen by the GST tax base strategists prior to its implementation. For them, all such taxpayers were pure composition dealers and they would have been presumed to have paid taxes only on their turnovers. But it did not happen! This is a live indicator of what a good design of a tax system could do. So, the simple *mantra* should be to keep **simplifying cleverly** and not waiting for the revenue to first enrich the kitty before more reforms are undertaken.

In the first year itself, the GST, as a reliable tax system, has proven its worth. It has given a tax buoyancy of 1.22 to the indirect tax collections: an unheard-of phenomenon in India! On an annualised basis, the total collections have been worked out to be close to ₹ 11,00,000 crores: a neat growth of about 12 per cent—so close to the 'committed growth' of 14 per cent! Given the fact that such an impressive growth has been recorded, the onus shifts from the court of the taxpayers to the GST Council's forum which needs to continue with the reform of tax rates of certain services and at least a 28 per cent tax slab for certain goods. A beginning is required to be made to retain the confidence of the taxpayers who expect a logical reduction in the top tax slab category. Given the fact that more than ₹ 8,000 crores is being collected as Cess and what is presently needed to compensate the States is about ₹ 7,000 crores, there is certainly sufficient room to push down certain goods in the 18 per cent category at its 21 July meeting.

Secondly, the GST has done a great deal of good to the direct tax collections. Even the latest income tax figures indicate a 17 per cent growth in the corporate tax mop-up and a 44 per cent growth in the personal income tax collections. A slew of measures, including the GST, has ballooned the direct tax base from 3.7 crores to 6.9 crores and the Exchequer has been reaping the benefits in terms of much higher collections. Given the fact that indirect tax is a regressive tax, why not smoothen the impact of such a regressive system by rationalising the tax rates periodically? I sincerely hope that the GST Council would now be a little better organised in terms of detailing its future decisions based on the hardcore statistics and the process of reform should continue unhalted!

3

Audit under GST: The Council Needs to 'Audit' a Few Provisions and Decisions*

For the GST, the consensus view is that it would take more than five years to shed half of the controversies which surround it today. The latest row to emerge on the surface is about the cross-empowerment of the Central and the State tax authorities to initiate action based on tangible intelligence gathered in respect of the entire value chain and the origin of the controversy is a letter sent by the Member (GST), CBIC, to the field formations. In response to certain queries received by the Board, the Member has simply clarified that the officers of both Central Tax and State Tax are authorised to initiate intelligence-based enforcement action on the entire taxpayers' base, irrespective of the administrative assignment of the taxpayer to any authority. The authority which initiates such action is empowered to complete the entire process of investigation, issuance of SCN, adjudication, recovery, and filing of appeal. The same position will *mutatis mutandis* apply if an intelligence-based case is booked by the State Tax Authorities.

Logically speaking, there is nothing wrong with such an instruction. It is true that the taxpayers have been provided with a **single interface as** far as the assessment or audit is concerned. For carrying out procedural activities, what is required is an element of certainty and such certainty can come only if an assessee is allotted to one of the tax authorities. So far as any preventive action to curb abuse of the legal provisions is concerned, there cannot be any compartmentalisation and the understandable rationale under the GST system is that when the base for levying the CGST and the SGST is common, it cannot be split for taking preventive measures. It would be absurd to even think that the CGST officers cannot be empowered to take action against an assessee who might have been allotted to the SGST pool for various other purposes. It makes complete sense when the Member (GST) states that once a case is booked on the basis of intelligence (processed information), the same cannot be assigned to the State authorities. The basic rule of the game which is followed by all economic and even non-economic intelligence agencies world over is that the agency which filters information into actionable intelligence should execute the same for better and quicker results unless the law prohibits the same. This sort of

* TIOL – COB (WEB) – 628, 11 October 2018.

cross-empowerment can palpably be seen in the case of some of the laws like the **NDPS, Wildlife, IPRs**, and many others. Against this backdrop, I personally believe that there is indeed no room for any meaningful row unless generating legless rows is the road ahead for some 'experts'!

If someone is really too keen to kick a meaningful 'controversy', then the issue at hand is that of GSTR-9C (the tax audit report). Given the fact that the GST is so far a largely procedure-driven tax system, a taxpayer is required to maintain a huge amount of data and upload the same periodically through various types of forms. Apart from the monthly or quarterly returns, one is required to file an Annual Return in GSTR-9. Before I delve deeper into the kind of information being sought, let me first touch on the issue of due dates. 31 December is the due date for the GSTR-9. Even for the GSTR-9C the due date remains the same. But what is not yet clear is: Who would upload the Audit Report on the GSTN portal? In the case of the Income Tax Act, it is the **auditor who does it himself; and once it is done, the taxpayer validates the same and files one's return**. In the case of the GST, it is always the assessee who files the return. There is no parallel facility for the auditor to submit reports separately. If the taxpayer is the one who is going to upload the audit report, who is to blame **if certain audited data is tampered with?** If not, how is the system going to work? I guess this is the moot question which seems to be deterring the GSTN from handing over the software development work to its vendor!

Secondly, if we take a close look at the GSTR-9C, it is a Reconciliation Statement of turnover declared in the GSTR-9. The fact that the auditor who is going to finalise the Annual Return cannot be, as per the ICAI guidelines, the auditor for GSTR-9C, the work on the GSTR-9C would begin only after the GSTR-9 is finalised and filed. In this scenario, it becomes **a legal impossibility to file both by 31 December**. There has to be a gap between the due dates for GSTR-9 and GSTR-9C so that proper scrutiny of the final annual return could be done to figure out the additional liability, if any. Given the facts that the taxpayers' services have become central to modern tax administration in the past five years and the **CBDT seems to be consistently following it** (a good example is the two consecutive extensions of the due date for corporate return-filing with audit reports), the onus shifts to the GST Implementation Committee or the GST Council to extend the due date for filing GSTR-9 and also for GSTR-9C to at least March 2019. What further calls for such a decision is the fact that there are only about 20,000 CAs and 5000 Cost Accountants who are guesstimated to be in the indirect tax practice. However, the total number of taxpayers, going by ₹ 2,00,00,000 threshold, is likely to be 12,00,000. This makes it a Herculean task for the professionals' community to deliver what the GST authorities expect them to deliver: **finding out the additional tax liabilities for them!**

Let us now take a look at what all the GSTR-9C asks for: Reconciliation of Gross Turnover, Taxable Turnover, Net ITC, and the auditor's recommendation on additional liability due to non-reconciliation. Considering the fact that the auditor is

expected to certify and also work out additional liability, there cannot be two views on the fact that the **auditor will have to revisit several aspects such as classification, tax rates applied, ITC availed, exempted and non-GST supplies, etc.** It is undoubtedly going to be an exhaustive and marathon exercise. Here, two scenarios may arise: (1) the taxpayer may pay in cash if any additional liability is worked out; and (2) the taxpayer may only partly agree with the auditor and pay only partly. Once the data is uploaded on the GSTN, what happens next? How is the CBIC going to treat such cases? **Is the CBIC really ready for the audit battle?** What percentage of total annual returns is going to be selected for audit? **Such a decision is yet to be taken.** Even the **audit manual is not yet ready.** What about the manpower in the Audit Commissionerates? Have they got any sort of training in GST audit? A good number of Senior Superintendents have been posted to these Commissionerates but since they are close to their retirement in a couple of years, they have no keenness to learn GST audit. It is important for the CBIC to organise **regular written examinations for them and also reward them for doing well in terms of some sort of incentive plan or commendation certificate**. Giving them a crash course will not help as a crash course is generally suited for those who have strong elementary knowledge about the subject. This does not seem to be the case here.

If we look at the SGST tax administration, VAT audit was always done by professionals and the authorities used to rely on the same. VAT officials never did audits themselves. An audit is indeed alien to them and it would be too late to teach the same to them. In this background, the CGST Commissionerates would not get any meaningful help from SGST officials. So, the extant scenario calls for a wiser decision by the GST Council. The Council needs to debate: if there is already a GST Audit after the financial statements are audited from the Income Tax perspective, **what should be the frequency of Departmental Audit?** Whether such audits can be computer-aided exercises? What should be the **guidelines for Special Audits under Section 66** as this is also going **to cost the Exchequer unlike in the past**. Given that the GST law prescribes audit under three different sections such as 35(5), 65, and 66, it is important for the Council to curb the invasive nature of additional audits! It must also be kept in mind that too many audits would definitely **multiply the compliance costs of the taxpayers** and it would have an adverse bearing on the index for 'Ease of Doing Business': an annual exercise of the World Bank.

Before I conclude this column, I would like to urge the GST Council to revisit the abysmally low threshold infused in the law and **raise it from** ₹ 2,00,00,000 **to** ₹ 6,00,00,000**, at least!** Such a revision would not only reduce the compliance costs for a large number of taxpayers but also reduce the burden on the professionals who work on behalf of the taxpayers and do deserve some 'fruits' of taxpayers' services envisaged by the Government. Secondly, a lesser number of audit cases would become more manageable for the Department in the first two to three years until its

audit Commissionerates become fully equipped and trained to earn an extra 'bowl' of revenue, which is the ultimate goal of any audit exercise! Let us hope that the GST Council goes for a comprehensive audit of its own decisions on the issue of multiple audits and their frequency!

4

GST: The Council Playing Possum over Key Issues But 'cwm' of Pain Swelling![*]

After a bout of severe vertigo and intricate tapering tantrums in the last fiscal year, the Indian economy has recovered impressively if one goes by the loud-speaking statistics of the first quarter. Wow! Over 20 per cent growth rate! The IMF's succinct comment is: India will have the fastest economic growth rate in the current fiscal year. Such optimism is colossally mirrored by the robust growth rate in the GST collections. Apart from the domestic transactions, the import trend appears to be turbocharged—out of the ₹ 56,000 crore IGST collections, import accounts for close to ₹ 27,000 crores. Revival of the import sector is akin to the vanishing of the bad hangover of lethargy in the economy! If one asks statistical sleuths to interpret the current data, they would conclude that the disruption caused by buggy economic algorithms is now over for India! However, the searing growth may taper off if the looming third wave of COVID-19 makes 'landfall' during the festive season of October and November. Though it may not prove to be a gutsy hurricane, it may still puncture the emerging 'metaverse' of optimism and hugely upset the helmsmanship in the Ministry of Finance. However, we may leave behind the looming house of horrors and also the possible errors in our strategy to grasp the nettle and hope against hope that the present vaccination drive may prove to be a 'diluent' against the severity of the impending tide of infections!

Let me now swirl from the good news of robust GST collections in the month of August to some of the thorniest issues wobbling the GST cart in India. While addressing the media persons after the last GST Council meeting, the Union Finance Minister had loudly hinted at an exclusive meeting to discuss the future roadmap of the compensation to the States and extension of the levy of Compensation Cess as demanded by many State Finance Ministers at the last meeting. It was widely fathomed that such a compensation jaw-jaw may take place in the month of August. But, not even a whisper is heard about the next Council meeting, though many futuristic agenda items were bombastically talked about at the CII meeting.

Extension of compensation to States beyond the stipulated period of five years in July 2022 is a sensitive and heart-pounding issue not only for the States but also for a

* TIOL – COB (WEB) – 779, 2 September 2021.

large segment of taxpayers. However, painful canyons exist between the expectations of the States and the taxpayers—diametrically opposite and algebraically intriguing! States, walloped by COVID-19 and having suffered rude revenue deficits, are keen to see the extension of the Cess for a few more years or the Centre, in lieu of no fresh lease of life to Compensation Cess, may compensate them by plucking some revenue from the Helix Nebula—the source of the Solar System! In contrast, the taxpayers who have been whingeing and moaning about such a back-breaking tax right from day one have been pausing their breath to see it through its expiry date—July 2022! However, they know for sure against their flickering hope that the compensation is a minefield which is, in all likelihood, going to burst their bubble of optimism as fiscal 'jihadists' from States are not going to let the 'lollipop' jump out of the window and disappear from the tariff bucket so soon! Having assessed the potential of this issue to cause rumption and kerfuffle on the floor, the North Block appears to be preferring the allegation of dementia rather than an inspiring zeal to 'kill' the issue with an acceptable solution! Anyway, an eerie calm prevails behind the storm-in-the-making wall!

Another issue which has been hanging fire for a pretty long time and is now widely seen as an unresolvable riddle is that of the constitution of the GST Appellate Tribunal. What has compelled the Centre to put it on the back burner? Why has the Centre been playing 'squint-eyed' to the repeated *diktat* of the High Courts on this issue? Does it really believe that it is still not needed in the prevailing litigious GST eco-system? *Plus ca change*! Does the GST Council also believe that the Tribunal is an avoidable 'cannabis' for the taxpayers who can manage to do with the existing structure of Advance Ruling authorities? Why is that even time-bound orders of courts also fail to hustle the Council into taking a call? Going by the prevailing mood in the policy corridors, it appears that no de-escalation is on the cards even at the next GST Council meeting, which is perhaps in the offing! I sincerely hope that the Council would stop treating it as a cornucopia of sadistic pleasures and act as a warehouse of concerned policymakers towards the pain of the taxpayers and take a firm decision. With all the issues of appointment of Judicial and Technical members being settled by the Apex Court and certain miscellaneous petitions being tossed out, there is no legitimate reason to play possum over the constitution of the Tribunal. The time has come to erase the vestiges of 'fiscal apartheid' and to respond to the taxpayers' desperate call! Exhausted and without hope, the taxpayers perhaps need to gird for a long haul!

In a similar logical spirit, the Council is also warranted to decide the fate of the Authority for Anti-Profiteering. This forum was designed to serve certain specific purposes when the GST cart was put on the tarmac road, and it did serve the cause it was created for! Now, it has turned fiction-esque! It has outlived its utility and key decision-makers are acutely aware of it—then, why pretend for a rude awakening? It has no Members and just the Chairman who is struggling to keep the padlock on its shutters at an arm's length! If the Centre believes that there are fair cases pending,

then why not appoint Members to expedite the same? Ideally, rather than pumping a new life into it, a formal decision needs to be taken by the Council to put it under the scalpel so that further litigation and writ-chokehold could be bookended!

Another important issue which has emerged as a band of vast nebular clouds is that of an inverted duty structure. There are about thirteen items which continue to suffer such suffocating 'fiscal gas'! The Council has taken up four of them at its various meetings and suggested changes in the tax rates to cap the growing 'bottle' of fiscal pains for the two. Two more items may be taken up at the next meeting. The rest may do some star-gazing for a favourable constellation of stars to smile to get rid of such a 'bile'! Ideally, the inverted duty structure is a glaring and ugly distortion of the GST tax system. Such a devil has been incidentally deliberately palanquin-ed from the Central Excise regime. It is a killing fiscal yoke but was gleesomely funnelled by the policy-makers from the previous regime to roil the GST turf! Had the Council followed a clear-eyed policy, it would have been discarded long back but a dust-storm of political bloviating and filibustering always put a layer of the additional shutter on their eyes and the vexatious issue continued. Many goods, including fertilisers, suffer from such a 'coronical' malady!

This brings us to the most torrid and perhaps asteroidal issue of bringing petroleum products, ATF, and natural gas under the GST regime. Energy is a common input for the entire economy but no ITC is available and it has a deadly nexus with the inflationary pressure on the economy. However, for the States and also the Centre, they are milch cows to be milked liberally and thuggishly! However, seeds of radioactive hope flowered when the Prime Minister recently talked about backing a proposal to bring petroleum products under GST—an ordinately delayed piece of action! Having said that, conflicting signals surfaced as pillars of political geo-storms when the BJP leader, Sushil Modi, said that it is not possible for the next ten years as States mop up about ₹ 2,00,000 crore revenue from these lavishly consumed goods and they would call for compensation in lieu of their inclusion in the GST.

The same sentiment was orchestrated in the Parliament when the Union Finance Minister uttered that there is no talk of such a move and only the Council can take a call. True, the Council can but the Centre needs to shepherd the Council members to open at least the first chapter with ATF and natural gas before the GST produces enough 'gas' to placate any possible opposition to such a proposal. The Union of India needs to deploy a few tricks from the 'nudge theory' before the Council members chow down on the proposal. The alchemy has to change to realise the first milestone. Once ATF is in, natural gas may be the second milestone, followed by other petro-goods. The Council members need to gauge the contamination caused by the delay and find a solution to the swelling cwm of pain for the economy!

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5

GST Rate Revision: Kicking the Can Down the Road May Save GoM from Hoopla![*]

Success has many fathers, while failure is an orphan! This time-tested proverb aptly applies to the Goods and Services Tax (GST)—a baby groomed and also 'doomed' by dozens of 'fathers'! It has come to be seen as a revenue laggard for its sloth-like momentum in tax collections! Right from its inception, it always had a less-than-stellar record! The theatre of politics, backed by no methodical effort to do proper math, created an unsavoury spectacle of populist fiscal demagoguery! If thermometers could have measured ironies, the roiling mercury would have been seen to be rising on the GST tarmac!

GST was brought in to garner more revenue than what the States and the Centre were, put together, collecting by upsizing the economic growth and the tax base! But, the political masters turned oblivious to the conventional wisdom that there is always more than one way to skin a cat! If the goal was to appease voters, there was no compulsion to slash the tax rates below the Revenue Neutral Rate (RNR) of 15.4 per cent. The Chairperson at the last GST Council meeting said that the effective tax rate is, at present, down to 11.6 per cent—almost akin to how a popular saying goes: If you raise a snake, expect to get bitten!

Anyway, it would be foolery to form an opinion on the basis of the Revenue collected for the month of October—₹ 1,30,000 crores. *Sacré bleu*! What the Centre and the States, as per some internally-stitched estimates, require is in the range of over ₹ 2,00,000 crores! A mountain to climb! But what finally broke the camel's back was the humongous canyon in the Compensation Kitty. The prevailing collection is barely enough to meet 8 per cent of what has constitutionally been promised—14 per cent annualised growth in the revenue. This obviously 'gaslighted' a fracas, threatening a fork in the road ahead! Recriminations flew in all directions! It literally degenerated into a pitched battle—'carnivores' v/s 'herbivores'! The cooperative federalism was horrifyingly put to the acid test against its inherent strength of supineness! The multilateral relations between the Union of India and the States went through many bouts of churns and tumults! Ouch! Thanks to the PMO's last-gasp intervention, the harrowing challenge was somehow overcome by resorting

* TIOL – COB (WEB) – 790, 18 November 2021.

to borrowings from the RBI— and the same is to be paid by collecting Compensation Cess till 31 March 2026.

But what finally hammered the last nail in the 'kitty' was the pandemic. The revenue '*gulak*', much to the chagrin of all the stakeholders, hit its nadir! The Centre somehow managed by riding a petro-cart and the States proved to be quick learners by piggybacking on 'fuels' for revenue. In fact, their learning has become such a stick-in-the-mud that despite the Centre slashing Central Excise duty on petrol and diesel, some States are yet to do so! A few States managed by spiking duty on liquor. Those who were not inclined to be 'intoxicated' are now keen to be 'intaxicated' if the GST Council provides them with an opportunity—and this is what happened at the Council's last meeting in Lucknow. Exasperated by the sorely nagging revenue shortfall, the Council decided to eschew the traditional wisdom-laced path of 'penny penny makes many' and go for an option which may raise many more devils than the Council may manage to lay down!

With the Council running out of road, it constituted a Group of Ministers (GoM) by virtually handing it over a clean slate to script a new tariff chart and, if its sagacity demands so, the tax slabs may be rubbed on the sand and new deep buckets may be recommended! No matter how many times one may read the terms of reference (ToR), the only connotation which can be discerned is—just recommend tax rates which are 'robust' enough to upsize GST collections! Nerdily obsessed, indeed! The Council has tasked the six members of the GoM with a dinosaurian assignment—a merger of tax slabs if needed; withdrawal of exemptions; and parachuting one item from one slab to another with no wrinkles on the forehead—a historic opportunity for the GoM to indulge in a shade of major fiscal policy silhouette which may also result in fiscal brinkmanship! Even if a particular change in the tax rate may be viewed as fiscal banditry by the industry and trade, the Council may treat the same as a fiscal salve! All such recommendations which would lengthen the distance between the tax cemetery and the GST collections are going to be treated as avuncular and may be lapped up with both hands!

Acutely, in the know of the frothy expectations from it, the GoM has held two meetings so far and the third one is lined up coming Saturday. I am pretty sure that the TRU, which is providing the secretarial cushion along with the inputs from the Fitment Committee, would be avoiding the perilous pathway to a 'taxodemic' and would harmonise the tax rates panoply to the extent that they do not hurt the economy! At this juncture, let me float not just one thesis but two, for elaborate comprehension of the boggy issues involved in the large canvas of deep drilling! One thesis can be purely political in hue and character and the other, a complete 'tax-vax'!

Let me first begin with the political premise which works on the principle 'One kind word can warm three winter months'! Let me make it clearer before TIOL netizens begin cudgelling their brains. The Convenor of the GoM was strategically, if not diplomatically, chosen to be a BJP juggernaut. There are four members, including the Convenor, out of seven in the GoM, from the BJP-ruled States. The rest

carry multiple political stripes but the common thread running among them is the expression 'Opposition'! Irrespective of the colours in the rainbow, the Opposition would inevitably think alike and also shout in unison—and the converse is also awfully true! The four BJP pharaohs would shout what their 'unified *aka*' would 'coo' *sotto voce*!

Let us now do some crystal ball-gazing! First, the timing of setting up of the GoM is certainly not auspicious! It was announced in Lucknow and the same would necessarily see the recommendations of the GoM prior to the State polls as antithetical! Undoubtedly, a treacherous policy trek for the 'debonair' of the Council! Any spike in the tax rate, that too for a large canvas of commodities, would frighteningly harm the political interests of the BJP not only in U.P. but also in Punjab. Since the mandate of the GoM is to submit its report within two months, which is, in any case, comfortably missed, the submission of its report for the Council meeting to be held next month would trigger large-scale ructions among the industry, the trade, and the Opposition—at least in Uttar Pradesh and Punjab! Further, it may not seem foolhardy for the anti-Yogi forces to weaponise, leave aside the hikes, even the mere announcement of such hikes to be effective from April 2022! It would indeed be akin to dropping an axe on one's own feet! In this background, if the U.P. Minister, who is the voice of Mr Yogi in the GoM, seeks more studies to be done before any decision is taken, it would tellingly be logical and politically expedient. Let us not forget the old saying: The squeaky wheel gets the grease! The GST Council's top leadership would have to redress the grievance of the political folks sharing the same feathers!

Even the Convenor of the GoM and other two Members—Bihar and Goa—would, at first blush, espouse such a concern originating from Lucknow! Kerala is already toeing its legacy political stand of more studies before any rationalisation recommendations are made. West Bengal is caught in a state of doldrums as Dr Mitra's 'political health' does not permit him to turn radioactive on disputatious issues and the representative attending the GoM is barely and merely serious about parroting the political line 'droned' out of the *Didi*'s windows! Rajasthan, being a Congress-ruled State, has to pathologically oppose many of the ideas being debated in the GoM! A political hoopla would necessarily raise its head!

Secondly, looking at the gigantic canvas on which the GoM is mandated to 'paint' fresh tax rates, perhaps with a new brush, it needs toasty time to do justice to various groups of commodities and services rather than hurriedly going for a tax hike with skimpy research! By all standards, such an exercise is no less than a 1000-piece jigsaw! No point tinkering with the hiked tax rates again to ease the fiscal chokehold after a hue and cry! It would be in the interest of the GST Council to extend the time frame of the GoM by at least four months—enough time to undertake a flurry of mathematical activities and also to catch a breeze if the neurons threaten to spiral out of control! The ideal time for coming up with across-the-board tax-rate revision would be April 2022 as the next set of state polls would be at least six months

distant! My calculated expectation is that an extension of GoM timeline would serve the twin interests of the GST as well as the electoral politics, which cloaks itself at the root of all such fiscal decisions!

P.S. In the next week's column, I will attempt to define the size of the wiggle room the GoM has—either for a merger of the slabs or for upsizing the tax rates across the board.

6

GST: The GoM Is Trying Hard for Tax-Vax, But Do 'Leopards' Really Change Spots?*

The 'frolicking' time for playing Russian roulette over GST rates is over! With the fiscal dwarfism induced by the pandemic roiling the GST collections, the GoM's *leitmotif* is undebatably clear-eyed—to max out its potential with a carefully laid down transformative medium and long-term roadmaps! For GST-slayers, the need for more revenue may sound like a weary cliché but the GoM's sole mandate is to bolster the Revenue's arsenal by crafting and scripting shrouded 'arrows' in its quiver! That is another issue that shrouds generally have no pockets! If a need is felt, the GoM is empowered to disdain the path blazed by others in the past! Its hands are unfettered to ship goods and services from one bucket to another if it tangibly bungs up leaky fiscal 'casks' and does no injustice!

Undoubtedly, the challenge is asteroid-sized. And the tribe of GST policy eagles working overtime with their tool-kits does need a fresh breath of hot ideas! They are, much to their credit, acutely sensitive about eschewing the pathway which may lead to fiscal bloating! Keeping tedious sparring in the GST Council in its rear-view, the GoM is leerily cataloguing a new tariff chart so that the swelling 'balloon' of economic recovery is not pricked! Keeping a zippy approach at an arm's length, it has thus far avoided missteps which may achingly decouple the emerging reality of economic growth and the new GST tariff! It certainly does not intend to give a bloody nose to the taxpayers but the taxpayers do need to recall a time-tested maxim: Leopards do not change their spots! Empirically speaking, the wheels of wisdom and folly truly run parallel in real life and the changes being thrashed out are not going to be akin to 'putting lipstick on pigs'! The GoM which met in Bangalore last Saturday may meet again this Saturday in Delhi and may submit its Interim Report to the Council, extensively correcting the vexatious issue of inverted duty structure!

Undoubtedly, one may tend to laud the holistic approach of the GoM moving very cautiously but all fiscal experts would agree that there is no silver bullet to the

* TIOL – COB (WEB) – 791, 25 November 2021.

complex challenge which may pleasantly surprise all segments of the industry and trade! Rudeness and shock are the embedded elements in this assignment, and no matter how much circumspection may be deployed, a large segment may find it a buccaneering, wrong-footed, and fiscal empire-building gambit! It may even spark 'Modiflation' in the economy! The businesses may be lulled into a bruising sense of insecurity! Keeping in mind the myriad inherent risks, what should the GoM do to recoup the revenue which has taken a debilitating toll and the recalcitrant pandemic that is refusing to go? Let me swirl back to the last week's column where I had made a passing reference to the second thesis of 'tax-vax'! The first one was all about political expediency and buying more time to wall off possible adverse electoral fall-outs!

The GoM's race against the clock is to find an effective and least gruelling 'vaccine' which may protect revenue and 'gaslight' buoyancy in the monthly collections. Without being too pernickety about certain goods, let us steal a sneaky glance at how much revenue comes from different tax slabs. But, before we do that, let us spare a glance at the total number of goods under the GST basket—1211. About 7 per cent of items have been exempted; 14 per cent are in the 5 per cent basket; 17 per cent in the 12 per cent slab; 43 per cent in the 18 per cent kitty; and 19 per cent in the 28 per cent pot. The GST Council has cut tax rates on as high as almost one-third of total items. As per sources, payments through cash ledger accounts are about 10 per cent from the 5 per cent slab; 8 per cent from the 12 per cent slab; 65 per cent from the per cent slab; and 17 per cent from the 28 per cent slab rates. These are the vital pieces of the jigsaw puzzle the GoM has been mandated to grapple with and may split its 'hair for growth' in revenue!

Now, the GoM has to believe that when it has been given lemons, it can make 'lemonade'! For the GoM, the winner slabs are obviously 18 per cent and 28 per cent. Tweaking these two buckets would make the wateriness of the challenge muddier and scarier too! So, the only two slabs which are genetically available for fiscal-reengineering are 5 per cent and 12 per cent. The fact that correction of the inverted duty structure is one of the prime tasks, many items would be zipping into the 12 per cent pot from the 5 per cent pot, exactly like the textiles and footwear items. Extreme caution is required to be taken so that any rate revision does not create a new set of goods which may confront the virus of inverted duty structure (IDS)! Aha! A word of persuasion for the GoM! There are certain agri-items under IDS which also warrant correction and the same should not be subjected to dilly-dallying on the ground of political implications and optics in the public!

Secondly, the 12 per cent tax slab has many items which are of mass consumption nature. For instance, most pharma goods come under this tax head and they cannot be moved to the 18 per cent slab as it would gigantically harm the interests of the common man. Similarly, cell phones cannot be parachuted into the 18 per cent slab as many mega missions like Digital India, Startup India, and Standup India largely hinge on the hand-held devices for their successes. In a nutshell, a large swathe of

goods under this bucket cannot be subjected to higher rates nor be lowered to merge with a new slab which may be created by pushing the 5 per cent items to a new 8 per cent slab. This would not help the Revenue's interests. Ideally, the short-term strategy should be to script a new tax slab of 7 per cent and dismantle the 5 per cent edifice forever.

Post COVID, the global trend is to rely more on indirect taxes to meet the forced spike in government spendings, including public debts, as the personal income tax collections have suffered predictable bouts of jerky 'palpitations' worldwide! Even a low-tax jurisdiction—or call it a 'tax haven'—like Singapore, has gone for a hike in the GST rate from 7 per cent to 9 per cent after its last hike from 5 per cent to 7 per cent in 2007. Let us examine the impact of the pandemic on haemorrhaging revenue in Australia where GST has turned twenty and is yet to stabilise! It collects around 13 per cent of their total revenue. Since consumers spend more on education, health, and real estate, a debate is raging to bring all such services under GST which account for major shares of household income. India also needs to buckle down to make a modest beginning rather than keeping health and education completely outside the tax ambit. I strongly believe that any head which remains beyond the shadow of fiscal panoply later turns into a funnel for money laundering!

In other words, a studious relook at all the items under the 5 per cent head may produce insights into certain items which may probably dovetail into the 12 per cent bucket. Secondly, a hike of 2 per cent may enhance its contribution from 10 per cent to 14 per cent. What may further augment the cash contribution is the reversal of the tax regime which has broken the ITC chain for certain sectors, like real estate and restaurants. Ideally, ITC optical fibre should not be fractured to plug revenue evasion. Preventive outfits should be deployed for such work and they may be moved into the 12 per cent and 18 per cent slabs, respectively. These sectors may be watched closely to pass on the benefits of ITC to the consumers rather than shamelessly deep-pocketing them. Thirdly, in the interest of tax efficiency, the large basket of exemptions needs to be reviewed and slashed. An exemption may be withdrawn on many government services which go tax-free today. A large number of services which are exempted today in relation to education and health may be placed under the new slab of 7 per cent so that the GST Council does not feel compelled to hike the tax rates on other goods of mass consumption for higher tax mop-up. Presently, the taxed goods and services are subsidising the exempted goods and services and this triggers an imbalance in the overall tax architecture of GST design!

Although time and tide wait for none, for the record's sake, as part of its long-term recommendations, the GoM may work on creating a new slab of 14 per cent and all the items under 12 per cent may be zipped under this category. Whenever the Council takes such a decision, the 7 per cent slab may be moved to 8 per cent in the second tranche so that lesser strain is put on other slabs for generating revenue. Here may come the time for a twist in the tale! Once contributions from these two new slabs of 8 per cent and 14 per cent spike up to reasonably good health, the much-

talked-about debate of merger of slabs may be turned into a reality by bringing down the 18 per cent slab to 16 per cent and merging the 14 per cent slab into the same to keep only three slab rates of 8 per cent, 16 per cent, and 28 per cent. The largest chunk of revenue to the extent of 75 per cent should come from the 16 per cent slab in the future. This would provide relief to a large number of services too! Secondly, the TDS provisions may increasingly be expanded to rope in many private sector payments to mobilise extra revenue. A calibrated approach with exhaustive education and close monitoring may enable the Revenue to gather a good chunk of tax through the TDS route. If it avoids the mistakes historically made by the Income Tax Department in the case of TDS, such a change may gradually ensure a smooth and consistent flow of taxes into its monthly kitty!

Now, it is time to get whirring! This brings me to the most sensitive issue of lessening the tax burden on the poor! It is indeed high time that the GST Council 'gropes' the option of Direct Benefit Transfer (DBT) or GST Voucher for transferring tax subsidy. If a scenario emerges whereby the GST burden or even the direct tax burden is assessed to be disproportionate for the poor and the lower-middle-income class, the DBT route may be explored in lieu of outright exemption for all! India has tasted the success of the DBT platform and the same may be replicated for the tax subsidy if any, to be approved. This would enable the Government to expand the tax base much faster and also channelise all vims and vigours to plug the revenue leakage from the existing tax base. Of course, this idea needs more homework and elaboration which I would attempt in the future. I sincerely hope that the GST policy buffs would make realistic and not very upsetting recommendations although I am aware that what is learnt in the cradle generally lasts to the tomb! Godspeed!

7

GST: Composite Supply Trumps the Aspect Theory! 'Marble-Cake Federalism' Blossoming in India![*]

A good time certainly lies ahead for 'fiscal balloonists' in the Ministry of Finance and the occasion to cachinnate will be the landmark milestone of five years of GST on 1 July! What may dock with the GST Council is the ratio of the recent decision of the Apex Court in the case of *M/S Mohit Minerals*![1] In the true sense, this is the first elaborate and also Larger Bench judgement (running into 153 pages) of the Supreme Court on the various principles embedded in the GST laws and also the 101st Constitution Amendment Act—strenuously delved deeper into the depth of our Constitution. Except for one point where the decision has gone in favour of the assessee, this judgement lends greater confidence, wisdom, and legal creativity to the esoteric club of officers who constitute the GST Law Committee and also the members of the GST Council who may be humbled by the extensive delineation of their great responsibilities within the framework of 'Marble-Cake Federalism' or Cooperative Federalism.

Before I dwell on the number of GST principles being upheld by the Apex Court, let me go straight to the central theme of dispute which the Revenue lost before the Gujarat High Court and then at the supreme interpreter of laws in India. The issue of taxability of 'ocean freight' was decided in the context of 'composite supply' and the Revenue lost it! But, why? The principles defining 'composite supply' are nicely ingrained under Section 2(3) read with Section 8 of the CGST Act and are thuddingly admitted by the Bench! The key limb of these principles is: A composite supply may include supply of one or two goods or even services and its taxability is determined on the basis of principal supply or either goods or service. However, it has to be construed as a single supply under the GST laws. Whatever it is going to be, it cannot be artificially vivisected for the purpose of levy of GST. That is how a single tax rate applies. That is one plank on which rests the rationale of the Revenue when it comes to taxing coaching institutes along with books! Other examples can be a mobile

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* TIOL – COB (WEB) – 817, 26 May 2022.

1. 2022-TIOL-49-SC-GST-LB.

handset with a battery and a charger! There are numerous cases which the Revenue has booked following this simple principle enshrined in the provisions and normally, the Revenue should learn to live with these realities of legislated tax laws. However, it also predictably does not happen! How?

When it came to taxing ocean freight, the GST law draftsmen weirdly changed the rule of the game and took shelter under the concept of 'Aspect Theory'! A poisoned chalice! A carnival of fiscal activism! Although they knew that it would stain the principle enshrined in the law, they decided to tax the service aspect of import which represented a 'composite supply' under the CIF contract. But why? It is true that the expressions like equity, justice, and fairness are strangers to the multiverse of taxation as per various decisions of the Apex Court but, even then, it is universally known that distortions or inconsistencies in principles applied are indisputably without legs—and legless principles cannot escape the eye-sockets of the judiciary! Against such facts, why did the Law Committee and also the GST Council give their approval for this levy?

Let us explore a raft of possible reasons! Ocean freight, under the CIF contract, was in the Negative List when it was first notified on 1 July 2012. After a few years, the Indian Shipping Lines represented because it was losing credit! Then came a phase of a cascading set of woes because of stiff competition from foreign shipping lines. A string of thoughts bubbled into the idea jacuzzi and they mounted pressure on the Ministry of Shipping, which in turn pleaded before the Ministry of Finance to tax foreign shipping lines in order to provide a level-playing field to the home-tethered shippers. It was in 2016 that the Ministry of Finance, probably under the swollen nationalistic sentiments, decided to give a go-by to its own principle and took the sharp edges off of the industry. The fiscal tools were weaponised and the service tax under the RCM was notified on ocean freight. Of course, many foreign shipping liners wrote to the Ministry of Shipping but their kerfuffle did not earn a noteworthy grimace score, and the levy continued. Later, it also smoothly wheeled into the GST laws! Holy fisk! The GST Council also did not protest! However, the GST laws' draftsmen knew for sure that this levy would not survive once the issue knocks at the door of the Apex Court. So, the Apex Court's decision has got no 'shock value' for the Revenue, which would perhaps not even disallow the ITC or refund claims which are going to be filed as a consequence of this judgement! *Voila*, no brow-furrowing stuff at all!

Let me now visit some of the key principles which have been settled against the laborious arguments put forth by the seasoned counsel! One of the planks harangued before the Bench was excessive delegation contextualised against Notification 8/2017 which prescribes 10 per cent of the CIF value as the mechanism for imposing the levy under the RCM. The Bench, while analysing the various provisions and the rationale of the levy, did not find grist in the argument that it was a case of excessive delegation as the legislation itself has mandated so! There are many paragraphs devoted to settling this question of law. The second principle which has been upheld is the territorial nexus. The counsel had vehemently argued that the pertinent transaction of ocean freight had no

territorial nexus and the same does not constitute 'supply'. While pointing out the destination of the goods being in India, the Bench noted that it clearly establishes a territorial nexus with the event occurring outside the territory, and secondly, the services are rendered for the benefit of the Indian importer. Responding to the point that extra-territoriality ought to be provided by the Parliament through statute and not by the Union of India through delegated legislation, the Bench underlined that the provisions of Section 13(9) of the IGST Act recognised the place of supply of services as the destination of goods when the supplier is located outside India. The Bench further noted that the statute itself is broad enough to cover a taxable event that has extra-territorial aspects which bear nexus to India.

Though the Bench admitted the relevance of the Aspect Theory for taxing different aspects of a transaction and cited the example of the *BSNL* case but the Aspect Theory does not permit the value of goods to be included in the services and vice versa. However, the aspect theory does not hold water in the case of 'composite supply' under the GST laws. The idea of composite supply was to ensure that various elements of a transaction are not dissected and the tax is levied on a bundle of supplies altogether. The Bench has also acknowledged that in the digital age, the concepts of supplier and recipient of service have undergone major alterations and are not necessarily understood as two parties with a direct chain of supply. The Bench made a distinction between what is understood in the commercial sense and what is to be construed in the legal sense. It cited the example of Section 5(5) of the IGST Act which taxes an e-Commerce operator as the supplier of service, though it is merely a conduit. Such deeming fictions are to be honoured for the purpose of the GST laws as long as they have the legislative sanction.

On the issue of the binding nature of the GST Council recommendations, going by the quantum of content devoted and the strenuous efforts made to dive deeper into the Constitution, it appears that what the Bench wanted to say has probably not come out clearly or was largely misconstrued. It is true that Article 279A itself makes it a recommendatory body and the Central and State legislatures act on its recommendations to ensure harmonised implementation of the GST, enacted to achieve the objective of 'One Nation One Tax'. While distinguishing the nature of its recommendations, the Bench took the pain of listing out five different shades of recommendations being referred to in our Constitution and each expression carries a different connotation, depending on the context and the end goal of the constitutional provisions. While talking about the GST Council, the Bench clearly emphasises the obligatory nature of its recommendations and when it is obligatory for the smooth working of the indirect tax system, even if it is not constitutionally binding on the parties, it is almost equal to the same in effect!

At many places in the judgement, the Bench has underlined that some of the recommendations of the Council are binding and some are not but what has come out more vehemently towards the end of the order is that its recommendations are not binding and the same is being interpreted as 'constitutional space' for the States to go

their own ways, ignoring the recommendations! A close analysis of the decisions of the Council in the last almost-five years reveals that it has set a glorious example for the smooth functioning of a federal body to be followed not only by other bodies in India but also outside India for a federal system. Notwithstanding different political hues and squawking differences among the State Finance Ministers, the Council has taken more than 90 per cent of decisions by consensus; about 9 per cent by unanimity; and 1 per cent by voting in case of a lottery. Much to its credit and the respect for its stature, even after losing the motion on lottery, Kerala did not decide to go its own way and impose 18 per cent duty on its own State lottery! It respected the Council's view of having just one tax rate of 28 per cent.

While talking about the Council, the Bench rightly noted that it is not merely a constitutional body restricted to the indirect tax system but is also an important focal point to foster federalism and democracy. It further underlines that harmonised decision thrives not just on cooperation but also on contestation. Indian federalism is a dialogue in which the States and the Centre constantly engage in conversations. Such dialogues can be placed on two ends of the spectrum—collaborative discussions that cooperative federalism fosters at one end of the spectrum and interstitial contestation at the other end. One of the important features of Indian federalism is 'fiscal federalism'. The expression 'federalism' is globally pigeon-holed under various heads such as 'Marble-Cake federalism'; 'Layer-Cake federalism'; Dual or cooperative or competitive or cooperative federalism; and coercive federalism. Each type has been distinguished by taking into consideration various factors such as objectives, people, place, legislative autonomy, and fiscal powers. The GST Council indeed stands tall and exemplary when we talk about cooperative or competitive or dual federalism where dual forms of government work together for a common objective to implement 'One Nation One Tax'!

The level and quantum of trust and harmony can be gauged from the fact that the State of Maharashtra went to the extent of issuing a circular, deeming the CBIC circulars as being issued under the SGST Act. It was later withdrawn only when some legal eagles pointed fingers that it goes against the mandate of the State Legislature which has separately legislated the State GST law and retains its sovereignty notwithstanding the fact that it is in utter harmony with the Central legislation. Ergo, it would be wrong to make an inference that merely because some constitutional observations have been made by the Bench in this judgement, it tends to lend divisive ideas to States to arrogate their sovereignty by ignoring the recommendations of the Council! Ultra-loose prognosis! A case of arrant gaslighting! If the balloon goes up, it would go against the grundnorm of Article 246A and would certainly put the Council's nose out of joint! The 'Grand Canyon' would grow in size and would leave a sour taste for the entire economy! Let such ideas head for the door! I certainly do not scent a 'hound' at this stage! Not a sausage! Not a mutter! Long live the Council and let it function within the paradigm of 'constitutional ambiguity' if any!

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GST Law and Procedures: Scaling the Fiscal Cliff!

Introduction

Right from the word go, business processes proved to be the vulnerable belly of the GST. There was no mischief in the law or procedure which insisted on filing of GSTR-1, GSTR-2, and GSTR-3 so that invoices for inward and outward supplies could be matched! From the design perspective, it was the linchpin of the new tax system to plug the 'rabbit hole' for abuse of ITC. But since the GSTN was not properly undergirded, the notified business processes let down the taxpayers in a derisive way! Lakhs of return-filers switched from the GSTN portal to Twitter for sustained bellyaching so that their groans could be heard but administrative obduracy prevailed and a period of stalemate continued for several weeks. This was despite the settled legal dictum that ITC cannot be denied to a purchaser if a registered seller or supplier fails to deposit tax for certain reasons. Denial of ITC would amount to a double whammy for a compliant taxpayer who pays taxes on supplies and is denied credit for fault of others.

However, it was an equally intriguing challenge for the policymakers, desperate to ensure that the ITC facility is not abused. At the same time, suspecting ITC misuse, it was empirically not feasible for the Revenue to knock at every door! Since the answer to exit such a quicksand situation did not lie in the administrative domain, a lasting solution was found in the amendment of the law and putting the onus on the purchasers to ensure that their vendors file GSTR-1 and reconcile ITC after the same is reflected in the GSTR-2B. So, what began as chaos finally got settled as a law and the onus was put on the head of the taxpayers on the principle that there is no equity in the world of taxation and the institution of State does no wrong! Or, the might of the State, at least in the domain of taxation, prevails under all circumstances, including retrospectively!

In the past five years, the GST laws and rules have been amended not only to tighten the screw on the scofflaws but also to give certain benefits to the taxpayers. One of the constructive amendments was the facility of revision of returns, like in the Income Tax Act. The GST rule, initially, did not provide such a facility for GSTR-9. This naturally sparked widespread din and the Council finally relented. To curb growing instances of fake invoices, the facility of e-Way Bill was introduced and it immediately yielded tangible fruits. The collections showed signs of improvement. It started with the generation of about 16,00,000 e-Way bills daily and then peaked at 34,00,000. Though some instances of high-handedness were also reported, with a little tweaking in the law and the procedures, it has almost settled down as a reliable tool for the Revenue. What further helped eliminate room for misuse of ITC through fake invoices was the facility of e-invoicing. It began with large taxpayers, which were ERP-based and chances of evasion were slimmer but the threshold was

gradually lowered to rope in more taxpayers—down to ₹ 10 crores, and a time would soon come when it would be made mandatory for all taxpayers.

This brings me to the avoidable row over Section 50 of the CGST Act, 2017. This provision is all about the automatic and mandatory computation of interest @ 18 per cent on delayed filing of returns. Since the entire process of return-filing and tax payment was GSTN-driven, it was bafflingly or vaingloriously overlooked and none of the stakeholders—the GST Law Committee, the GSTN, and the taxpayers—came out squeaky-clean on this issue! Logically and also predictably, it should have been in place right from day one! It should have been built into the tax payment system. It should have been auto-computed and added to the tax liability in GSTR-3B as soon as a taxpayer filled in the tax period. But what buffaloes even boffins is that such a mandatory provision was not given effect until it piled up to as enormous a sum as ₹48,000 crores! What an explosion! It left the taxpayers sourpuss for long and this 'time bomb' exploded when the Member (GST) asked the officers to recover interest u/s 50(1) in cases of delayed payments since 1 July 2017. While climbing the computational ladder to ₹48,000 crores, the Revenue erred in factoring in gross tax liability, which also included the sum owed to the States as per the SGST Acts and all this was done when an amendment to Section 50(1) was passed by inserting a proviso to grant relief to the taxpayers. Since the amendment does not expressly state whether it is prospective, it automatically becomes clarificatory as per the settled laws and thus, retrospective in nature! Ergo, no demand! The huge mountain of demand was chimeric and not a cornucopia for large revenue. Thankfully, it was later settled in favour of the taxpayers.

Time to limber up for an insightful peep into a dummy quasi-judicial forum—the Authority for Advance Rulings. Such a forum was conceived so that the taxpayers may dummy up until the Appellate Tribunal was created. But soon, it turned out to be a chastening experience—two different rulings in two different States but the taxpayer remains the same! Where is the window, now? For the taxpayer, the issue remains as unresolved as it was at the time of moving the application. If the taxpayer knocks at the door of High Courts, it defeats the rationale embedded in the creation of this forum—to stymie a fresh bout of litigation! After years of bellyaching, the GST Council approved the proposal to set up a National Authority of Advance Rulings which continues to be still-born to date! A typical case of farrago! Aha!

Chapter 1 lucidly illustrates the rabbit-hole of frustration arising from the poorly-designed business processes and the dogma being displayed not to alter the faultline-igniting processes; how the GST Council remained committed to the invoice-matching matrix and stood four-square behind the GSTR-2; though there is nothing wrong in having conviction in the design, the consequential chaos minimised the allure of the GST system as a good and simple tax; though the settled laws in case of VAT did not favour the Revenue determined to deny ITC if suppliers fail to file their returns, the practice continued abated and unaltered and such an approach is nudging taxpayers to move the courts; how the issue of Section 9(4) surfaced as double

taxation if tax is to be paid again on goods bought on MRP-basis; how the controversy envelopes the budgetary support scheme of DIPP, which was floated in lieu of the central excise exemption granted to certain States; and how the taxpayers vowed to invoke the doctrine of promissory estoppel!

In Chapter 2, I have dwelled on how the slow pace of changes approved by the GST Council helped the economy stabilise and the taxpayers overcome the pangs of transformative reform, which was also eloquently acknowledged by the World bank; how the implementation of e-Way Bill legged up the revenue collections; the CBIC launched a special drive to clear mounting refund arrears and how the levy on lottery turned out to be a lottery for Revenue which collected a huge sum; and how divergent rulings by the Authority for Advance Rulings in various states generated protest and a demand for a national forum to settle legal disputes.

Chapter 3 provides a glimpse of the unwarranted controversy over the issue of GST levy on sanitary napkins, which led to allegations like the Council being insensitive to the health of the womenfolk; how the Council could have motivated the taxpayers by polishing the amendment in Section 17(5)(b) which eased blocked ITC on food beverages, health services, and travel but unfortunately, allowed only if it was obligatory for the employer—a welfarist State missed the opportunity to encourage corporate citizens to turn welfarist; the grant of the facility of one-time revision of return like the income tax; and how the GST Law Committee ignored the Gautam Ray Committee's recommendation on slump sale.

Chapter 4 deals with a low-intensity controversy about Mr Piyush Goyal's breakfast diplomacy with the like-minded State Finance Ministers; demand by the cement industry to shift it from the 28 per cent slab to the 18 per cent slab; incentive package for digital payment; demand for making returns and tax payments quarterly for small businesses; Composition Scheme for service providers up to ₹50,00,000; and the Union Cabinet not agreeing to the amendment proposal for the reversal of ITC without payment of interest.

Chapter 5 delves deeper into the controversy surrounding Section 50(1), which was a non-automated time bomb; though interest on delayed payment of tax was automatic and mandatory in law, all the stakeholders missed it—the GSTN did not provide any facility; taxpayers, knowing that they cannot escape it, overlooked it and the GST policymakers played squint-eyed; how the bomb exploded after the Member (GST) asked the field formations to recover arrears amounting to over ₹46,000 crores but the CBIC goofed up by factoring in even the arrears under the SGST Acts; all this was done when the relevant provision was amended but since the amendment did not make it clear whether it would be prospective, it was largely construed as clarificatory and thus, retrospective.

Chapter 6 deals with the proposal to amend the law to eject the provisions relating to tax audit—a welcome move to decarbonise GST laws but a segment of professionals felt adversely impacted and thus, rolled out a frenzied drive to jockey

support for unravelling the amendment; how the applecart of the Revenue was upset by the latest decision of the Apex Court with respect to the levy on opulent clubs governed by the Doctrine of Mutuality; how a drive by the Revenue detected over 3,000 cases where over 9,000 fake GSTINs were used; how the Revenue ensured that the provisions of Section 149 remain buried in the cemetery; a timely delinking of the nexus between Sections 129 and 130; and a radioactive amendment in the e-Way Bill, which was widely protested against.

1

GST Heading for an Avalanche of Litigation!*

For the historic GST, it is the return-filing season; and, going by a large, unbroken chain of technical glitches, not only preventing taxpayers from filing their returns but also demotivating and convincing them about the poor design of the business processes, it may also be called a still-born or a premature baby. The two facts which emerge from the prevailing hopeless situation, are: one, the taxpayers' community is getting frustrated with the mechanism prescribed to file returns; and two, the lawmakers are certainly not coy about demonstrating a shade of dogma in favour of the faultline-triggering business processes. 31 October was the original deadline for filing GSTR-2. As against ₹ 48,00,000 filed as GSTR-1 for the month of July, only about ₹ 20,00,000 GSTR-2 could be filed by 31 October, including a good number of erroneous returns as taxpayers and half-educated professionals did not know what to do. More than 45 crore sales invoices have been uploaded and they are to be matched with the purchase invoices to allow credit. The GSTN software did work but only to frustrate the return filers! The GSTR-2 is indeed a very complicated return demanding multiple hours to fill one return with multiple mistakes as clarity eludes most taxpayers. Secondly, it threw too many errors and the Government has simply extended the due date to 30 November 2017. The GIC and the GST Council continue to put their faith in the GSTR-2 and invoice-matching matrix to plug the possible misuse of the ITC.

There is nothing wrong with the **intent** of the lawmakers but what is wrong is that their obduracy to do invoice-matching right at the beginning of a new tax reform is evidently killing the attractiveness or the veneer of the GST being a simple tax system. At this stage, when the economy has decelerated and the size of the industry's working capital has shrunk, doing anything which may result in an artificial or wrongful blockage of input credit may trigger another round of hullabaloo in the economy. And each round of such commotion may have an adverse impact on foreign investment for which the Prime Minister has indeed worked hard by selling India as the most attractive destination. Even a quantum jump in the Ease of Doing Business Index may not attract many investors on this count alone.

Secondly, what may trigger a spurt in litigation against GST is the implication of the recent Delhi High Court decision in the case of DVAT. In the case of *In Quest*

* TIOL – COB (WEB) – 578, 2 November 2017.

Merchandising India Pvt. Ltd.,[1] the Delhi VAT authorities had denied ITC to purchasers for the failure of the registered sellers of goods to deposit the tax for certain reasons. While deciding this case, the Delhi HC has ruled that the remedy for the Department would be to proceed against the defaulting selling dealer to recover the tax and not to deny the ITC to the purchasing dealer. Relying on the Apex Court's decision in the case of *Corporation Bank*,[2] the HC further noted that the selling dealer collects tax as an agent of the Government. Therefore, the *bona fide* buyer cannot be put in jeopardy when he has done all that the law requires him to do. The purchasing dealer **has no means to ascertain and secure compliance by the selling dealer.**

The ratio of this decision clearly applies to the scenarios emerging in the case of GSTR-2 where a good number of taxpayers have found that although they have paid tax to the suppliers, the suppliers have not deposited the same. But this is what the GSTR-2 intends to achieve—a successful matching of purchasers' input credit invoices with the suppliers' sale invoices before the ITC is allowed. The fact that the purchasers cannot exercise any shade of control over the behaviour of the suppliers, who may decide to upload certain invoices in subsequent months for reasons best known to them or one may not even deposit tax and upload invoices, in such a scenario, for no fault of the purchaser, the **ITC is going to be blocked**. This does not happen anywhere in the world. Conceptually, such an idea to safeguard the interest of the Exchequer is fine but certainly not at the cost of those who have paid taxes and complied with the procedures. Punishing them by blocking their ITC may not go long way in earning trust for the GST laws. The new tax reform must flourish on the foundation of justice and fairness. Denying credit for no fault of the purchasers is certainly not going to be taken kindly, even by the Judiciary. My live fear is that once the Judiciary is activated on this issue, it may strike it down as there cannot be a procedure or law which may force one to do something which is impossible to do. Yes, such a process may be made legally sustainable only if some method is found to enable purchasers to exercise control over the suppliers. As rightly held by the various courts, when a purchaser pays taxes to the supplier, the latter collects the same on behalf of the Government and it then becomes the responsibility of the Government to ensure that the persons collecting such taxes deposit the same in the Government account; and if the supplier fails to do so, the purchaser can simply not be punished for other's offences.

This brings us to another issue which may trigger an avalanche of tax litigation, and it is the lack of coordination between the CGST and SGST officials across the country. Based on the GST Council's recommendations, the Union of India issues amending Notifications and clarifications on a particular date but the SGST officials tend to be tardy and issue the same on a date which creates a baffling gap between the two dates. Now the issue is—when every intra-state transaction is subjected to CGST and SGST levies, how is such an aberration to be interpreted if a taxpayer

1. 2017-TIOL-2251-HC-DEL-VAT.
2. 2008-TIOL-258-SC-CT.

decides to challenge the 'lazy notifications' issued by the States? This is more serious, particularly in the case of tariff notifications. Any time gap means a serious hiatus in the taxing laws which means no tax can be collected without the authority of law for the period of time gap. My fear is that the day some taxpayers find time away from the regular return-filing, a few writ petitions are going to be filed before different High Courts on this issue. One latest example is that the RCM postponement notification was issued on 13 October by the CGST authorities, after the GST Council recommended it on 6 October, but some States did it on 14 October. Some States are yet to formally issue it. The only easy solution for the States would be to notify the CGST Notifications as **deemed to apply to SGST as well**. By legal fiction, it can be done and it would make the life of taxpayers much easier rather than having to constantly follow up with each SGST authority.

The RCM example raises yet another issue—shouldn't tax authorities take into consideration the convenience costs of the taxpayers? Had they planned it a bit better the notification should have come into effect from 1 October 2017, so that taxpayers were not required to keep two different accounts: **one with RCM invoices and another without them**. Come November and all taxpayers who have issued RCM invoices would have to again struggle with the GSTN and I am sure the GSTN has not taken into account such a battle gathering incremental storm in the weeks ahead.

When we talk about the RCM under Section 9(4), the issue of double taxation has also cropped up. Given the fact that a good number of industries have been including the GST in their MRP tags; and if tax is to be paid again under Section 9(4) when they are purchased from unregistered suppliers, it amounts to **double taxation**. It leads to cascading of taxes. It appears that such cascading of taxes was perhaps not the intent of the lawmakers but it seems to have escaped the 'eyeballs' of their thinking minds. They indeed need to find a solution to this issue which may haunt taxpayers in the coming months.

Let us now visit yet another burning issue which is likely to see serious litigation—the Budgetary Support Scheme of the DIPP, which has been issued as a '**measure of goodwill**' in lieu of the Central Excise Exemption granted to certain States. Though the State of Jammu and Kashmir has decided to notify the remaining 42 per cent refund benefit as against the 58 per cent promised by the Centre, it is obvious that all the States may not come forward so soon. The legal issue that has come up in this background is the invocation of the **Doctrine of Promissory Estoppel.** Many legal pundits believe that what has been announced by the Centre is evidently unfair and not a shade of what was promised and announced when the industry was encouraged to set up plants in the exempted hilly States. Refund of tax paid in cash is not being seen as an incentive or commensurate subsidy for what the industry was getting earlier. A good number of taxpayers are contemplating filing writ petitions before the High Court and it does not bode well for a baby tax which is unfortunately already caught in the eye of a technical hurricane which threatens to puncture the trust of the taxpayers in the collective ability of the Central and State

Finance Ministers to roll out a simple and good tax! Let us hope the GST Council, at its next meeting, would do something more to earn back the trust of the taxpayers and the GSTN's vendor, Infosys, would match the Council's trust in its IT prowess to bring the IT-enabled business process back on the rail!

2

GST: Once Bitten, Twice Shy![*]

Once bitten, twice shy! That is how one may describe the slow pace of pending GST-related reforms such as the e-Wallet Refund Scheme, the new GSTR format, the tweaking of the GSTN's critical software, and even GST rates or laws. Moreover, it may appear that tardiness also pays! But how? It has indeed softened the painful impact of disruptions caused by the implementation of the imperfect GST-IT platform. The slow pace of changes approved by the GST Council has helped the economy to overcome the pangs of transformation which was eloquently acknowledged by the World Bank recently when the Q4 results were made public. Manufacturing, industrial production, and capital formation have noticeably taken a leap and that is how the economy growth swirled out of the less than 7 per cent quagmire to log a 7.3 per cent growth rate. It is indeed good news for India and it is expected that the policymakers would prefer going slow on all mega GST-related initiatives even if they are decided by the GST Council.

Secondly, it would be too optimistic for any GST protagonists to expect the Council to bring any of the petroleum products under the GST scanner. The Council would prefer to cool its heels for some more months and watch two mega events—a sustainable growth rate in the GST collections and the political headwinds in the country. Given that the general elections are now almost on the cards, no political party would like to devour tangible reform risks. Secondly, the GST collections are yet to yield a comforting trend which may provide a cushion to the risk-taking behaviour of the Council. Though number-crunchers vouch that the April collection figure of ₹ 94,000 crores is a healthy sign of improvement as compared to the July–December average of about ₹ 89,900 crores, the Council would prefer more data under its microscope before it breathes easy about the annual projections. Like in the previous years, the March collection was exceptionally high and the April collection was predictably down. Though it was down, it was certainly not out of the projected range of slump!

The e-Way Bill, which now stands implemented across the country, has done its tangible bit—a marginal push in the collections. In the coming months, it would show more substantive results by contributing to the Revenue Kitty. Going by an average of 16,00,000 e-Way bills being generated daily and this number being

* TIOL – COB (WEB) – 610, 7 June 2018.

expected to go up to 20,00,000 per day, things would be falling in place for the worried tax administration. In the months to come, other anti-evasion measures such as the TDS may come into force, sooner than one may expect, if the revenue collections do not pick up as per the expectations of the revenue monitors in the North Block.

One recent analysis which the North Block had gotten done by the GSTN has prompted the Revenue Secretary to pinpoint serious slackness in the performance of the CGST Commissionerates. Though out of nicety, the CBIC honchos have probably not reacted (in fact, there is a history to support their stoic silence whenever an accusing finger is pointed at them), the field officials are a bit agitated; and they do have valid reasons for such reactions. The study done by the GSTN has taken into account merely four or five parameters and left out those where the CGST arms have done exceptionally well such as policy, refund, and anti-evasion. So far, for whatever stories that have been reported about the arrest of GST abusers, the source has only been the CGST Commissionerates. The SGST administration across the country is yet to make its first case of misuse of provisions or outright attempt of tax evasion. Probably, they continue to rest on their 'glorious' laurels of turning a Nelson's eye to ...!

Secondly, GST refund has so far been a unidirectional effort! Thanks to the CBIC special drives, more than ₹ 30,000 crores of refunds have been sanctioned and, as per the latest data, what is pending is about ₹ 14,000 crores. However, exporters are of the opinion that if the GSTN provides the facility, more exporters would like to lengthen the queue and the total sum could be more than ₹ 20,000 crores. Whatever the figures are going to be, what is important is that the States are equal partners in the GST collections and their efforts are not yet noticeably visible. It is true that the e-Wallet Scheme, which was announced to be put to test by 1 April, has been delayed, but the general philosophy after the GSTN episodes appears to be: Once bitten, twice shy! The security aspects of such e-wallets are yet to be finalised and the technology for the same is yet to be chosen.

Even as certain decisions may appear to be languishing for implementation, a good number of States have reported that the GST has turned out to be a true 'lottery' for them as they have mopped up as much as ₹ 4,000 crores from the levy of GST on lotteries sold by nine States. The Kerala Finance Minister is of the view that this sector has the potential to generate as much as ₹ 35,000 crores to ₹ 40,000 crores annually if this sector is nourished and allowed to grow by a favourable policy framework. On the revenue mop-up front, as many as half of the States have reported close to a 48 per cent growth rate in GST revenue collections. This means lesser funds outgo from the Compensation Cess Fund and in months to come, the GST Council may prepare a blueprint to pare down tax rates on some of the goods, which number about fifty and continue to be in the 28 per cent tax bracket.

On the GST law front, the Council had approved as many as fifty-four amendments but a review was also suggested. Thus, a Review Committee of CGST

and SGST officials was set up and it was given the mandate to interact with the Law Committee (the original framers). Unfortunately, even after three meetings, nothing appears to have been finalised and the fourth meeting is slated to kick off **today** for three days in the National Capital. If an Amendment Bill is to be tabled during the Monsoon Session of Parliament, it has very little time to discuss it threadbare and then rewording of the key expressions overcoming the 'mischiefs'. Though the GST laws provide for a State-level forum of officials to pass advance rulings, what happens when there is a case of **divergent rulings** passed in the case of the same assessee by two different State ARAs? This has happened in the case of *Giriraj Renewables Pvt. Ltd.*[3] and the North Block needs to quickly settle such aberrations before they snowball into full-fledged litigation.

Since the objective of the Union of India is to minimise even the pending litigation and prevent a fresh bout of litigation, it should take a call on either creating a national body to sort out such discrepancies or legally empowering the **existing ARA** headed by a retired Supreme Court judge. Like the Customs, this forum may be vested with the powers to deal with all such GST-related issues and it can have regional benches at least in the four metros. Some CESTAT or retiring CBIC Members may be appointed as its Members. It would be much easier than creating a whole new body with regional Benches. It is more so because this forum has, in the past, dealt with even CST issues besides other indirect taxes. Let us hope tardiness does not really become a *mantra* to solve all problems irrespective of the elements of urgency!

3. 2018-TIOL-12-AAR-GST + 2018-TIOL-43-AAR-GST.

3

GST Law Amendments: Will the Council Make it More Taxpayer-Friendly?*

The Saturday meeting is going to be the GST Council's first gathering without Mr Arun Jaitley, who is known in the inner circle of the BJP as a 'rapprochement juggernaut'. It is also going to be the first meeting of the GST Council in the Second Year of the GST, but without its original pilot. I am not sure whether the GST Council's Secretariat would be making an arrangement to connect with him through video link during the meeting if any exigency may entail the presence of 'Mr Pacifist'. Undoubtedly, for the stand-in Finance Minister, Mr Piyush Goyal, it may largely be seen as big shoes to fill but in terms of achievements, he is perhaps the best the BJP party has among its young leaders. Mr Goyal will be chairing the proceedings of the Council which may witness some acrimonious noises from some of the State Finance Ministers who may try to make best of Mr Jaitley's forced absence. A little bit of patience coupled with the vast experience of officials of the Union of India in the past one year may enable Mr Goyal to sail through his large agenda for the day.

One of the agenda items is to rationalise tax rates on many goods which have been grabbing headlines in the media for the past three months. Apart from certain items necessary for the construction industry, the Council may lower the rate for the handloom and handicraft sectors. With the polls coming closer in some of the States, it would make more sense for the Council to lower the tax rate on sanitary napkins. Though the taxman may have some valid points not to do it, we need to collectively realise as a sensitive society that it is a necessity for 50 per cent of our total population and they must not be disappointed for some revenue. Exemption would certainly not be a good idea as it would hurt more as inputs are also taxable. I believe the Fitment Committee, which normally meets before the Council's every meeting, has made a recommendation for rationalising tax rates on more than a dozen items. Let us see how the Council Members react to the tariff change, particularly when the tax collections have not yet buoyed to the threshold of ₹ 1,00,000 crore a month.

Apart from the tax rates, the Council is expected to take a formal decision on setting up a National Authority of Advance Rulings with some regional benches so

* TIOL – COB (WEB) – 616, 19 July 2018.

that the machinery of the advance ruling could serve some tangible purpose at the ground level. It would also entail certain changes in the laws. What would be more desirable for the Council is also to take a call on one of the latest petitions filed in the High Court on the issue of '**separation of powers**' in the case of the constitution of the GST Tribunal. As per the petitioner, the Technical Members of such a forum would be **dominating the judicial members** and such a design would be robbing the forum of its 'judicial character'. Such allegation needs to be quickly examined by the Law Committee Members and the Council should be briefed about it. Once the Council decides, the necessary changes must be made to the laws along with the forty-six proposed amendments.

Given the fact that the Council's Secretariat has received tonnes of feedback by the 15 July deadline, I sincerely hope that the lawmakers would be polishing the amendments proposed in Section 17(5)(b). Though it is a taxpayer-friendly amendment which eases the restriction on the ITC to be availed on food and beverages, health services, and travel benefits to employees, its condition is found to be repugnant to the industry's interests. As per the amendment, such benefits will be available only where it is obligatory for the employer to provide so. The contra-argument is that if any enterprise is providing such benefits to its employees even if it is not obligatory, it is indeed a welfare measure and such welfarist corporate behaviour must be encouraged by a welfarist, State which has the expression 'welfare' running through the Constitution as the essence of its letter and spirit. When a Government does it, it is generally welcomed and appreciated. The same logic applies *mutatis mutandis* to a corporate entity which must be encouraged for undertaking such employee-friendly measures.

Let's now study the amendments more deeply. Some of the proposed amendments are only to rectify the inadvertent typographical errors. If that is so, they should logically be **made retrospective** if one goes by the well-articulated principles of interpretation of laws. Secondly, there are many amendments which are proposed as taxpayer-friendly changes. Once again, going by the same logic, if these changes are to aid taxpayers, they should be made effective retrospectively. Thirdly, the proposal is to omit reverse charge under Section 9(4) although it is to be rephrased to retain its teeth to bite certain classes of taxpayers in future. Since the intent is to omit, such omission should also be retrospective from 1 July 2017.

One of the key taxpayer-friendly amendments is going to be the facility of revising returns. Since such an option is being gifted to the taxpayers, it is equally important that the Government should make it clear that no penalty would be levied if revision is done on account of any errors being pointed out during the assessment or audit. For the Composition Scheme, which has indeed not taken off, the general suggestion of experts is to allow a certain percentage of one's total turnover as inter-state trade. As soon as such a facility is inbuilt, this Scheme would be a runaway success as most traders have been losing market because of the restriction in the Scheme.

Besides the proposed amendments, it appears that the Law Review Committee has made a serious error by ignoring genuine and legitimate recommendations of the Gautam Ray Committee (I talked about it in the last week's column). One of the recommendations is about not levying GST on slump sale, and the logic is—if the transfer on a 'going concern basis' takes place, the transferee of goods will have to be compulsorily a registered taxpayer and there will not be any leakage of revenue. Another good suggestion which may militate against litigation is that any supply between an employer and an employee without any consideration or with limited consideration is not to be treated as supply. Let us hope that the Council demonstrates its magnanimity and boldness to approve these changes which would go a long way in improving the compliance percentage in the months to come!

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4

GST: Proposed Amendments—The Union Cabinet 'Mends' to Aid MSMEs*

The gap between the 28th and the 29th GST Council meetings was less than fifteen days, and the same produced widespread perception that the Interim Finance Minister, Mr Piyush Goyal, had efficiently managed to push the GST Council into the top gear for rates' rationalisation and procedural simplification. Such a perception was seemingly not based on conjectures and surmises. Mr Goyal had indeed produced tangible results at the 28th meeting. But it seems his quick-success appetite was not well-appreciated by many State Finance Ministers of different political hues. What was also perhaps detested was Mr Goyal's non-conventional mannerism to build consensus among some of the like-minded State Finance Ministers at a breakfast meeting. Although there was nothing wrong with such an informal *tete-a-tete* for some concrete results (that is another issue that one of the States asked for tariff reduction for breakfast cereal but it has not yet been granted), some of the States-in-minority eyed it as a 'bulldozing tactic' to push through proposals at the Council.

So, when the Council meeting took off on a good note to design a special push for the MSME sector, particularly the small and micro components, which are reported to have suffered serious setbacks in terms of growth, some of the suggestions coming from all those Finance Ministers who had cereals for breakfast in the morning prior to the Council's meeting, were 'studied' with a pinch of salt. Even before a debate could ensue, one of the suspicion-gripped Finance Ministers intelligently unfolded his demand, and that was tax relief for the cement sector! Such a demand was no less than a 'bomb'! It stunned all present in the meeting, for the obvious reasons that cement hugely contributes to the revenue kitty and no Government can afford to extend any tax relief at the stage where revenue shortfall has been showing tell-tale signs of stubbornness! Whether it was indeed a serious demand or just a ploy to silence other minor demands coming up from the various quarters is not known but it did turn the course of the debate.

Whatever it was, it changed the currents of the discussion and the Council could develop consensus only for setting up a fresh Group of Ministers (GoM) to study and

* TIOL – COB (WEB) – 619, 9 August 2018.

then recommend sensible measures to perk up growth in the MSME sector. The only notable exception was the incentive package for digital payments. Though it is likely to cost a little over ₹ 900 crores during the current fiscal year, the general view was that a pilot should first be run, and based on the ease of the implementation of the platform, it may be offered to the States to voluntarily join such a scheme.

No doubt, a no-decision meeting came as a dampener for most of the MSME units, but it was not so. The Union of India had culled out huge data and demands from such units and associations across the country. All the States had also sent their own inputs. Though the data was available, there was not enough time to structure the data under concrete heads and study all possible measures with the resultant revenue implications and that is why it was sensible for the Council to refer the issue to a GoM which has the representation of all political hues and whose members are very down-to-earth politicians. The GoM will have adequate time to examine all possible recommendations before it tables its report before the next Council's meeting in Goa.

Some of the suggestions which were received are: returns and payments may be made quarterly for small units; the Composition Scheme may accommodate all service providers **up to ₹ 50,00,000**; audit under the Income Tax Act may be deemed acceptable under the GST; the inverted duty structure may be streamlined; refund week for MSMEs; refund within thirty days; budgetary support may be extended to units up to a certain turnover; uniform regime for job workers; exemption to job workers from e-Way Bills; onus on suppliers to fill up Parts A and B of the e-Way Bill; one-time waiver from late fee and penalty in case of late return-filing; one-time settlement of legacy cases; payment option through all banks; further simplification of the compliance matrix; and duty relief on unbranded and branded items of mass consumption. These are only indicative demands as the list runs into three digits.

Now, the GoM is expected to draw the boundary lines on the GST canvas as many experts believe that the extraordinary step to aid the MSME sector need not be in the form of only cash or refund. It can even be in the form of credit so that the ITC chain is not broken. Secondly, any package, finally designed, would claim its own pound of flesh and the larger question would be whether the Centre alone would bear it or the States would also be joining it. Whether such a scheme would be optional for the States or the Council would make it a collective one. It is now to be seen what would be the size of such a package in the background of grim fiscal conditions.

Meanwhile, the Centre yesterday tabled the Bills proposing amendments to the GST laws. They were last week approved by the Union Cabinet. In principle, once the Council has approved certain amendments, finalised hurriedly or otherwise, the Union Cabinet was expected to put its procedural stamp and send the same to the Parliament in the form of bills. But going by the content of the CGST Bill tabled, it appears that the Union Cabinet **exercised its own discretion and struck down one of the amendments proposed**, relating to the reversal of credit without payment of

interest. Netizens may visit Sr. No. 15 of the proposed amendments, which intended to insert the second proviso in Section 16(2):

> *It is proposed to remove the liability to pay interest in case where the recipient has been made liable to pay an amount equal to the ITC availed in case he fails to pay to the supplier of goods or services or both the amount towards the value of supply along with tax payable thereon within a period of 180 days from the date of issue of invoice by the supplier. Since upon payment of the due amount to the supplier, the recipient shall be eligible to avail ITC of the said amount, it is believed that liability to pay interest is too onerous and should be removed.*

It is learnt that it was vetoed by the Union Cabinet with a rationale and the Council later accepted the Cabinet's view and approved the deletion of the proposed amendment at the last meeting. That is why the presentation of the Bill was delayed. Although it was listed for Tuesday in the Lok Sabha, it was finally tabled yesterday.

But why did the Union Cabinet do so? My take is that the Centre later changed its mind or was sensitised by some experts that the reversal of credit with interest may be onerous but it would be an efficacious, compelling reason for large corporates **to clear pending payments of small or medium units.** Once the interest part is omitted, a major chunk of payments which is presently made within 180 days may further be delayed. If so noble is the intent, it is equally important for the Union of India to insert a Column in GSTR-2A for making a simple declaration relating to all such payments cleared beyond 180 days with interest. Such data may be useful for analysing the effectiveness of this provision and may also act as a 'greasing force' to speed up pending payments before the six months' period lapses.

I am sure there are many more innovative ways to do something more concrete for the small and micro units which do make a substantial contribution to the GDP, the Exports Kitty, and job creation for the growing army of job-seekers. MSMEs do deserve special treatment to further reinforce the equity elements in the new GST regime!

Hopefully, the next GST Council meeting, scheduled towards the end of September, will come up with some concrete positives for the MSMEs before they gear themselves up for the festive season ahead.

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GST: The Section 50 Imbroglio—CBIC, GSTN, and Taxpayers…all Three to be Blamed![*]

Mess, mess, and mess! Mess is the new name for the Indian GST! Section 50 of the CGST Act was a fast-ticking, '**non-automated**' time bomb which was destined to explode but its timing was well within the regulatory powers of the GST lawmakers! I am pretty sure that had the CBIC bosses got the freedom to defer its explosion for some more months, they would have definitely done it! So, what triggered it? An easy guess is the maximation of revenue collections which pushed the CBIC Member (GST) to explode it 'hurriedly'! On 10 February, the GST Member directed the field formations to recover interest u/s 50(1) on total tax liability in case of delayed filing of GSTR-3B since July 2017, and the total sum he has referred to for recovery is about ₹ 46,000 crores!

Let me now elaborate on the expression 'hurriedly' used in the above paragraph. First, the CBIC seems to have goofed up in terms of asking its field formations to recover interest on gross tax liability, which also includes the interest amount pending with the taxpayers under State control. For recovery of any interest from taxpayers under State control, State authorities have the necessary powers to do so. The State component should have been excluded from the total sum quantified in his communication.

Secondly, when the CBIC was a party to the law amendment proposal presented in the 31st meeting of the GST Council and the Council gave its nod and the Union of India got the same amended vide Finance Act 2019, why is the Proviso to Section 50(1) not yet made operative? The CBIC, as a forward-looking implementing agency, should have given due weightage to the **spirit and the intent behind the amendment** and called for the recovery of interest only on the cash component in the case of delayed filing of GSTR-3B rather than the gross tax liability. Obviously, when an amendment has been approved in the relevant Section 50(1) by inserting a

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* TIOL – COB (WEB) – 699, 20 February 2020.

Proviso, and when the same does not explicitly state whether it is prospective, a court of law would necessarily interpret it as **clarificatory and thus, retrospective in its operation** as it evidently corrects an anomaly in the law! This is more so when the Proviso has become a part of the statute and what is pending is only its notification, and such a view was rightly taken by the Madras High Court in the case of *M/S Refex Technologies Ltd.*,[4] a few days prior to the issuance of the CBIC instruction.

Let me now come to the real issue. Unfortunately, **all three parties—the GST Law Committee, the GSTN, and the taxpayers—are responsible for the present mess** worth ₹ 46,000 crores! Following the principle of attribution, blame is to be apportioned and attributed to each of the three stakeholders! Why and how? Let me explain the role of each party and how they goofed up and are now trying to take advantage, inevitably resulting in this mess!

First, albeit a pain was taken to define what is 'valid return' u/s 2(117) of the CGST Act, the GST lawmakers goofed up in not making a provision in GSTN for filing return with 'payable' amount. In the law, it is permitted to file GSTR with 'payable' amount and it is called 'invalid return'. Then why did the GSTN not make provision for the same? Leave aside GSTR-3B, are they making such a provision in the new GST Return effective from 1 April 2020? As per my information, there is no such provision proposed in the new return too!

Secondly, when the CBIC knew that interest is automatic in case of delayed filing, they should have directed the GSTN right in the beginning to in-build it in the GSTR-3B as a mandatory condition for filing a late return. But they strangely left it to the whims of GSTN and allowed the taxpayers to file late returns without payment of interest!

Thirdly, what are the reasons for not making the amendment effective to date? The official reason shared by the CBIC on Twitter is that the State Governments of West Bengal and Telangana are yet to amend their respective SGST Acts. But the real reason could be that the Proviso has a few defects and cannot be implemented as such! When they conceded the points raised in various representations that no interest should be charged on the ITC available in the electronic credit ledger, they should have thoughtfully worded the new Proviso rather than realising later that there are serious flaws and it cannot be notified!

So, what is the solution? Let the GST Council first take a call as to whether the amendment is prospective or retrospective. All the taxpayers across India obviously want the Council to make it retrospective. Against this backdrop, obviously, the CBIC cannot notify the relevant Proviso in its current form and it has to go through another round of agenda, discussion, and meeting with the GST Council and if required, along with comprehensive amendments. In this scenario, it would have

4. 2020-TIOL-382-HC-MAD-GST.

been in the CBIC's interests to avoid litigation or not to force assessees to file writs across the country and obtain a stay on recovery proceedings.

Let me now explain the role of GSTN, whose contribution to the present mess is no less tangible! When the law mandates automatic and mandatory computation of interest @ 18 per cent in the case of delayed filing of returns, such a functionality should have been in-built in the return rather than leaving it to the choice of a taxpayer. It does not happen in the case of Customs. Once the assessment is done and duty payment is delayed, the EDI will not allow duty payment without mandatory interest. Even in the case of Central Excise and Service Tax, a similar mechanism was in place. In fact, in Income Tax, out of the sum paid by a taxpayer, first the interest is adjusted and then the principal amount. The GSTN *babus* clearly overlooked it and later found an excuse in the expression 'manner' to be prescribed u/s 50(2). The CBIC again defaulted as when the GSTN brought it to its notice that a particular manner for computation of interest was to be prescribed, it should have been done.

The Second cardinal error the GSTN made was that even after several reminders by the taxpayers to make provision to file **invalid** returns by making part payment of cash and credit available in the ledger, it did not allow it. Although its domain was not to interpret the legal provisions, it did at its own cost and did not allow millions of taxpayers who were **willing to make part payment** of their total tax liabilities, which would have not only enhanced the much-needed revenue collections during the initial months but also saved the taxpayers and the GST field formations from the present ₹ 46,000 crore crisis! On several occasions, the taxpayers asked the GSTN to allow them to discharge tax liability partially but perhaps, administrative arrogance, coupled with poor supervisory by the North Block, provided a comfort cushion to the GSTN to not pay any heed to their reminders!

Let me now come to the third stakeholder who conveniently appears to be playing the victim card—the taxpayers! When it is settled law by the Apex Court (*CIT v. Anjum M.S. Ghaswala*)[5] that the interest on delayed payment of tax is **compensatory in nature and thus, mandatory**, all assessees who filed their GSTR-3B belatedly knew for sure that interest was going to be recovered at some stage. The only valid question of doubt they may have entertained was whether any interest liability will also arise on the ITC available in the electronic ledger account. Here, I would prefer to disagree with the Telangana HC decision in the case of *Megha Engineering*, where the HC stated that:[6]

> *Until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place ... if no payment is made, the mere availability of the same will not tantamount to actual payment ... only when the payment is made, the Government gets a right over the money available in the ledger.*

5. 002-TIOL-73-SC-IT-CB.
6. 2019-TIOL-893-HC-TELANGANA-GST.

Credit is the sum already paid to the Government by the suppliers in the supply chain and at the time of filing returns, the assessee (buyer) only reconciles such payments in the electronic credit ledger account. In this context, the Madras HC's observation in Paragraph 12 of the order in the case of M*/S Refex Industries Ltd*. is self-explanatory. The Bench has taken a view that '*the availability of ITC in the electronic credit ledger connotes enrichment of the State*'. Besides the Court's observation, even the GST Council decided to amend the Section only because it understood that charging interest on the ITC, which is a credit against tax paid in the value chain, would be an unfair practice!

So, what should be done to get out of the present *impasse*? The Union of India should quickly take the issue before the GST Council at its next meeting in March and take its approval for clearly mentioning the retrospective operation of the new Proviso in Section 50(1). In fact, the approval should be taken for comprehensive amendments to address all sorts of situations and the Union of India may introduce the same in Phase II of the Budget Session and notify the same. Secondly, a fresh instruction may be approved by the GST Council to recover interest only on the cash component of the gross tax liability and also the facility to file 'invalid return' to be provided by the GSTN. Such a facility would do a world of good to deficit-marred GST collections! Let us hope that good sense prevails and the Executive rescues GST from being operated only through the writ courts!

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GST Amendments: A Bid to 'Decarbonise' Toxic Practices![*]

For cold-eyed doomsayers, the GST has already turned into an ageing pillar of India's fiscal experiment! A good proportion of the taxpayers, the higher Judiciary, and even the otherwise-wholesomely-paid professionals have become allergic to frequent changes in a thicket of rules, regulations and top-down administrative diktat! Though a sizeable chunk of the indirect tax community may not agree with such an awfully intense and wonkish assessment of the prevailing state of affairs, it has indeed become hard to sugar-coat even positive amendments for them. If the GST is to win, *voilà*, such 'super-spreaders' of gloomy mood do need to be brought to heel! One of the sixteen proposed amendments in the Finance Bill, 2021 is to guillotine tax audit—i.e., a timely burial of a compliance provision which was fast turning into a museum piece! It is certainly not a case of taxpayer empowerment at the cost of the Exchequer's interests. There are other provisions in the law to protect the turf of the Revenue.

However, what knocks my socks off is the emergence of a lightning rod of 'pot-and-pan-banging' protests from some quarters, which has created a combustible atmosphere surrounding the North Block! Although the mascots of these associations and even the affected institutes need not be blamed for displaying steadfast loyalty to their own forums and their member, what is spawning misgivings is whether the Union Finance Minister would be able to demonstrate the same degree of fealty to her own larger constituency of faceless taxpayers. Are the mandarins in the Ministry of Finance invulnerable to the swelling balloon of political pressure? Is this amendment a well-thought-out decision to overcome widely-experienced legislative throes? Would frenetic jockeying by influence-peddlers succeed in nudging the Government to pour cold waters on this supposedly 'torrid' amendment?

I personally believe that the pertinent amendment is to 'decarbonise' the GST compliance eco-system. That is beside the point that it would certainly hurt the interests of much-pampered professionals who had become accustomed to trousering 'high-octane' professional fees! They are also not at fault as the onus to protect the interests of taxpayers rests with the Sovereign and not the professionals. In today's cut-throat competition where rivals are quick to snitch clients, jockeying for the reversal of the omission by well-heeled and richly-networked professionals is a

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* TIOL – COB (WEB) – 751, 18 February 2021.

natural event and it is now left to the BJP's political leadership to positively respond to the aggressive 'cavalry' of professionals or 'calvary' of taxpayers' interests!

Let me now swirl to one of the widely-analysed amendments in Section 7 of the CGST Act, 2017. It is retrospective in nature. This is to tax rich clubs in the country. In fact, taxing clubs is an 'intaxicating' international practice. After GST was notified, most clubs got themselves registered and continue to pay taxes. Everything was moving spectacularly fine for the Revenue but for the Apex Court decision in the month of October 2019 in case of *Calcutta Club Ltd.*[7]—and the verdict governed by the judicially-deep-seated doctrine of mutuality, went against the Revenue in the case of service tax and VAT. This is where a technical chink surfaced at one of the meetings of the GST Council. A view got cemented that for once, the Revenue should steal the thunder by muscling in the pertinent provisions even before some professionals or assessees get a wacky idea to challenge the same . That is how this amendment was approved by the GST Council.

Though it is a well-settled law that even fetters of iron cannot 'tax' the Sovereign from taxing a particular income or supply, a serious problem lies here! There is a striking mismatch in phrasing the amendment in the Finance Bill and the text approved by the GST Council to tax contribution in place of consideration. Secondly, the legal drafting of this amendment appears to be 'oumuamuaing' for precise legal lingo ('oumuamua' means 'scout' in the Hawaiian language)! Many legal savants have already pointed out the 'mutating virus of error' in its drafting! Thirdly, it appears that its over-arching shadow on many other taxpayers, such as RWAs and Trade Unions, had perhaps escaped the range of eyecups used while discussing the amendment. From the minutes of the GST Council, however, it does not mirror so!

Let me now comb through the amendment which promises to slow down the pulse rate of the 'heart' of GST—the Input Tax Credit (ITC)! What really invited this wrath vide amendment to Section 16 of the CGST Act, 2017? A thicket of reasons! First, the Revenue always had a non-negotiable dream of achieving matching invoices between the supplier and the recipient. But it did not crystallise. Secondly, the volume of eyebrow-raising gigabytes of data revealed a rising incidence of propensity to not file GSTR-1 whilst continuing with the filing of GSTR-3B, thereby utilising the ITC. Thirdly, a teeth-chattering trend of barrelling ITC into the system through fake invoices was closely analysed. The CBIC Chairman recently highlighted that after a drive was launched in November, over 3,000 cases were booked, detecting over 9,000 fake GSTINs in mere three months! **Oof! What a 'stunner' rather than an ITC-gunner!** Even after a one-time amnesty for filing GSTR-1, obduracy towards poor compliance was diagnosed! All these factors proved irresistible propellers for the GST Council to amend Section 16 and make the filing of GSTR-1 by the supplier mandatory for the recipient to avail the ITC.

7. 2019-TIOL-449-SC-ST-LB.

Let me now discuss the flip side. Since the GST Council was acutely aware of the pain such a mandatory provision may cause to the taxpayers, it was also decided to flesh out the provision of Section 149—the compliance rating of suppliers. I just heard that the Revenue is fully armed with detailed preparedness to activate this provision; of course, only in the GSTN portal. Such a list of 'black sheep' is not going to be made public as it would have many other legal spin-off effects. So, a registered taxpayer will have access to the compliance rating of their suppliers, prepared on the basis of their last forty months' return-filing fiscal behaviour. Such a facility would enable recipients to spot the 'fiscal poltroons' in a taxpayer's list of suppliers. It may also be acknowledged that the GSTN has already activated its assiduously prepared 'Know Your Supplier' (KYS) facility. It is a twin tool—**pre-login and post-login** with more details. The pre-login showcases limited information to any visitor looking for clues about one's supplier. A good number of recipients have vouched to me that KYS is a good tool!

The next meaty amendments are relating to Sections 129 and 130. A delinking of the nexus between these Sections has been proposed on the basis of several adverse writ courts' decisions. The provisions of Section 129 have now been corralled only for issues relating to detention, seizure, and release of goods and conveyances in transit whereas Section 130 is now confined to adjudication. In cases of detention, tax cannot be demanded now. **Only the penalty provision survives.** Such an amendment is indeed taxpayer-friendly as the intertwined provisions had ignited a period of utter chaos. However, what may cause angst among transporters is the rigid provision of neither less nor more but a 200 per cent penalty! This is again a chilling example of poor drafting! It should have been an 'up to 200 per cent' penalty rather than 200 per cent of the tax payable! Such an amendment may sound like a sweepstake for the Revenue but it has the potential to put transporters to a 'cloudburst' experience like the recent one in the Chamoli district of Uttarakhand!

Given the change in the e-Way Bill rules—100 km. being substituted by 200 km. in 24 hours—a blistering application of the penalty provision is likely to be the order of the day. This is more so when there are no exceptions for the hilly States or the weather conditions' nexus (thanks to an undeniably frigging change in our local climate) and even for the part-load consignment transport. Apparently, such a change in the distance to be covered within 24 hours was done to stymie any attempt by transport to undertake multiple trips on the basis of the same e-Way Bill! It is beyond the pale of doubt that it is a frigging possibility but corralling all the cases under the same bracket across India sounds like a blighted and weirdly exotic proposition! Unless these provisions are steamrolled into a more compliance-friendly format, it may prove to be a recipe for GST sclerosis! I sincerely hope that wisdom may occupy a chunky part of the Revenue Department in the North Block, particularly after the ardent votary of iron-fisted legal and administrative provisions in the GST—the Revenue Secretary says Sayonara to his all-powerful musical chair!

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IGST:
The 'Little Boat' Sailing without Tailwinds!

Introduction

Once all the stakeholders found themselves parked on the same page, India embraced the Dual-GST System in the form of the CGST law by the Centre and the SGST law by the States. This way, the sovereignty and autonomy of both the Parliament and the States were duly honoured. Then surfaced on the horizon the question of taxing inter-state commerce, which used to attract Central Sales Tax (CST) prior to 1 July 2017. Article 269 of the Constitution had vested powers in the Union of India to notify the levy but there was an administrative arrangement with the States to collect and keep the tax revenue in their own coffers. It was an intriguingly Byzantine foundation to float a new system which does not suffer a hammering from the mauling States. In view of the labyrinthine fiscal history, the CST precedent had emboldened the States to lay their hands on the revenue generated out of inter-state trade. Had the Centre conceded such a demand, it would have resulted in an atrocious inequity for certain States. Had India gone for the models followed by either Brazil or Australia or the EU, it may have proved to be a booby-trap which roils all these tax jurisdictions as they sputteringly continue to douse sporadic blazes! Like a thunderclap, then surfaced a new idea whose time had come and, as per Victor Hugo, such ideas cannot be resisted or stymied! A live case of a serendipitous discovery!

Let us clap for the CBIC officials who thrashed out a state-of-the-art and improvised system which is splendidly unique to India and has, of late, pulled many foreign visitors to New Delhi to hear the curiosity-propitiating story from the horse's mouth! It is now popularly known as Inter-State GST (IGST). Building on the globally-acknowledged foundation of the fiscal economist Ricardo Varsano's 'Little Boat Model', India created a bespoke tax sub-system which eliminated the need for zero-rating inter-state supplies. While straight jacketing it to the local needs, the architect of IGST kept in mind the cash flow strains of the businesses and also the administrative wrangle of regular refunds! It was customised to such an extent that it now operates as a highly efficient intermediate tax used for chauffeur credits (ITC) across the States. Burnishing it further, a ladder of credit flow was also designed—CGST, SGST, and then, IGST. The fundamentals of the design of this ladder made it virtually non-negotiable and had to be 'owned' or operated by none but the Union of India, which acts as a 'boat' to help ITC swim across the river (i.e., the States) and perform the role of a clearing house! The differences were thus reduced to ashes! Unanimity was attained and the GST Council approved the precocious tax system which would soon be replicated world over in many tax jurisdictions—export of a polished and time-tested tax system, for the first time ever in the fiscal history of India!

Then sprang a new issue before the GST Council—the coastal States sought jurisdiction over the territorial waters in which many transactions took place and the States collected local taxes. Andhra Pradesh claimed that it had been collecting taxes to the tune of ₹600 crores annually from supplies of bunker fuels to foreign vessels and also gas exploration but was never questioned by the Union of India! The States demanded a CST-like arrangement even under Article 269A! The second red-hot issue which cropped up was the cross-empowerment under the IGST Act. The late Mr Jaitley found himself perched on the edge of a new cliff! Though the master navigator in Mr Jaitley nudged him to sail close to the wind to overcome these challenges, it was a pyrrhic rapprochement! How? As per Article 245 of the Constitution, extra-territorial jurisdiction rests with the Union of India and territorial waters legally constitute Union Territories which fall under the jurisdiction of the Central Government. A conjoint reading of Articles 297 and 366(30) makes it crystal-clear that the constitutional power is vested in the Centre to make regulations for territorial waters. However, the need of the hour was to deal with it with a bout of pacifism and to mollify the frayed tempers of the coastal States—which got support from virtually all non-coastal States as well—Mr Jaitley cool-headedly sliced away the jurisdiction of the Parliament by granting jurisdiction to coastal States by a deeming fiction up to 12 nautical miles. Thus, the latitude of the IGST law was put to knife and it now applies to all transactions like high sea sales, but beyond the 12 nautical miles. It was perhaps acceded to by Mr Jaitley only because one of the fundamentals of taxation is: it is to be administered by the one to whom it actually accrues. Since states had been collecting VAT for long and the CST revenue also used to enrich their kitties, it was a reconciliatory step in the direction of making GST a reality in India albeit at a pyrrhic cost!

Chapter 1 deals with the high-wire management by the late Mr Arun Jaitley, who was willing to pay any price to push through the IGST and compensation bills in the Parliament and how coastal states extracted a rich bout of concessions from him by agreeing to their demand for deemed jurisdiction up to 12 nautical miles even though the Constitution of India vests all powers in the Union of India with respect to territorial waters; and one of the States put forth the point that it had been gathering above ₹600 crores in revenue by levying VAT on bunker fuels required by foreign vessels and gas exploration and thus, the Council should agree to a similar arrangement under Article 269A.

Chapter 2 lets you sneak a peep into the fragmentation of taxing rights and how India built on the foundation stone of Varsano's globally-acknowledged 'Little Boat' Model of VAT Theory and how the bespoke Indian model of inter-State commerce does away with the need for zero-rating of inter-state supplies; takes care of the working capital requirement of the businesses and obviates the chaotic scenario arising at the time of grant of refund; how Indian IGST acts as an optical fibre for transfer of credit across sub-national (provincial state) authorities and how, in addition, an innovative architecture of credit ladder was designed for ensuring a

seamless flow of ITC; how the basic design makes it mandatory that the IGST, the 'Little Boat', has to be necessarily owned by the Union of India; and also touches on the issue of the States putting their foot down on the issue of owning taxing rights in the territorial waters, which constitutionally qualify as Union Territory and only the Parliament has the inherent legal right to regulate all activities in such territories but this issue emerged as a stiff cliff before late Arun Jaitley.

In Chapter 3 provides detailed gen about the demand of the States to be granted taxing rights over the territorial waters to levy, collect, and appropriate taxes; a peep into the pith and substance of the UN Convention on Law of the Sea or Treaty; how Mr Jaitley handled the demand for cross-empowerment of States officials in IGST cases and how they were excluded from the ambit of adjudicating authorities notwithstanding their argument that they used to perform all the powers under the CST Act, 1956; a studied look into the design of the constitution of India and the powers under Article 269 and the views of a globally-popular VAT expert on inter-state commerce.

Chapter 4 deals with the IGST Bill and how several levies under the Customs Act, 1962, such as CVD and SAD, were subsumed; the definition of imported goods under the IGST Law v/s the supply of goods and how a technical challenge may surface in case of import of goods without consideration whereas it has been made clear in the case of import of services; a legal jigsaw puzzle relating to if a particular supply does not qualify as taxable supply under the CGST law—how can it be liable to tax under the IGST and the Customs Tariff Act and how exports were left out of the definition of inter-state supply; and the Union of India may have to defend its exclusive power under Entry 83 of List 1 and it would be wrong to allow meddling into the affairs of the Centre by the States.

Chapter 5 talks about the piles of rich GSTN data—a mother lode of precious insights and a quick analysis reveals that about 69 per cent of total business transactions in the country are inter-state in nature; deeper AI-driven scrutiny popped up variance in IGST paid by importers and the ITC claimed in GSTR-3B, which also means that the importers are selling such goods at a premium but without invoices and the buyers are opting for cash transactions and voluntarily forfeiting ITC—a tell-tale sign of thriving shadow economy; and another clue which may be culled out from the gap between what is being uploaded in the GSTR-1 and GSTR-3B is the tangible and actionable evidence of revenue leakage and such a business practice poses a Gordian challenge for the Union of India, which palanquins the millstone to settle the IGST in favour of the consumption state and ensure smooth flow of credit across the system!

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Kudos to Mr Jaitley for Steadily Steering GST Council towards 'Destination' and Tax![*]

The two-day conclave of the GST Council concluded yesterday. Immediately after the early winding up of the meeting, the Union Finance Minister, Mr Arun Jaitley, invited a good number of the State Finance Ministers to interact with him as part of his pre-Budget consultations. The State Ministers were carefully selected, keeping in mind the plurality of India's polity and accordingly, invitations were extended. Some of the State Finance Ministers who had just exited from the GST Council's meeting after successfully demonstrating their frayed tempers over the issues of dual control and compensation for the projected revenue loss did not even wait for the same to fade away, and they continued with their fulminations to register their annoyance with the Union of India over some of its recent policy decisions. One such Minister, from the State of West Bengal, a politician by 'accident', in fact, saw an opportunity to please his *Aka* and strongly registered his protests against demonetisation, which has allegedly led to the erosion of tax collections by the States. He described the situation arising out of demonetisation as a state of 'financial emergency' in the country. After spitting out his grim criticism, he walked out of the meeting and briefed the media about his supposedly 'daredevil' act.

Since similar fulminations are a common sight at the GST Council meetings, they hardly unfazed Mr Jaitley, and the fact that Mr Jaitley does not lose his *sangfroid* and is not a miser with his diplomatic smile, which helps him in winning over frayed tempers, he managed to move a few more inches closer to his 'destination tax' goals. For a major swathe of the economy and a large number of experts, the latest Council meeting did not achieve anything tangible but the truth is—he managed what he wanted from this meeting. Mr Jaitley was not at all aiming at resolving the territorial waters and cross-empowerment issues. His sole goal was to grant a patient hearing to frayed tempers and get the Council to approve what he wanted, and the Council has officially approved the two critical documents—the IGST law and the Compensation Bill.

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* TIOL – COB (WEB) – 535, 5 January 2016.

Let us take a look at the major bone(s) of contention in the IGST. The first critical issue is the jurisdiction of the coastal States over the territorial waters, where many transactions take place and the States have been collecting State taxes. As per many State Finance Ministers, the coastal States have been levying VAT for several years and they were never stopped from doing so. For instance, the Andhra Pradesh Finance Minister said that they have been mopping up as much as ₹ 600 crores from the supply of bunker fuels to foreign vessels and also an exploration of gas. Going by such a practice, the Coastal States feel that it is now not correct to exclude territorial waters from the jurisdiction of the State. In response to such a plea, the Union Finance Minister commented that the SEZs have been deemed foreign territory within the geographical control of the States but they never objected to it. However, Mr Jaitley hinted that a solution can be found to this issue and the Parliament can be taken into confidence to allow the States to continue with the present practice.

The second critical issue is the dispute over cross-empowerment under the IGST law. The States have been arguing that although the Union of India had the powers to levy CST on inter-state trade, there was an administrative arrangement to allow the States to collect such taxes and also keep them, as per Article 269. A similar arrangement can be made even now under Article 269A. However, the Ministry of Finance is of the view that such powers cannot be vested in the States under the IGST.

Since Mr Jaitley has indicated that a solution can be worked out to address even this problem, the State Ministers agreed to officially approve the rest of the provisions of the IGST. In fact, many of the industries—such as telecom, banks, insurance, and IT—had pleaded for some sort of centralised registration like that in the case of Service Tax but no call was taken on this issue, and the IGST Model Law has been passed, leaving blank the definition of the jurisdiction of a State—which is going to be discussed and closed at the next meeting on 16 January. Technical brains associated with the exercise confided in TIOL the fact that it is now not a major bottleneck with the Centre showing unmistakable overtures to take a step backwards over the issues. In other words, before the IGST bill is tabled in the Parliament, the definition of a State can be fleshed out by including twelve nautical miles of the territorial waters for the coastal States. It also seems that although the landlocked States would lose revenue as they would not get any share in such collections, they seem to have agreed to support their cause so that an early breakthrough is achieved.

The second major success which has come out of this meeting is the ever-disputed subject of compensation. With demonetisation leading to a tangible contraction in the economic activities in the past two months, and the fact that its impact is likely to linger on in the coming months, the States have suffered a loss of revenue. Some States wanted the quantum of compensation to go up from ₹ 50,000 crores to ₹ 90,000 crores. In fact, with the GST likely to be implemented from September 2017, many States demanded that the five-year compensation clock should start ticking only from the date of implementation and not financial year-wise. A suitable

wording was demanded to be inserted in the Bill and the Council has agreed to calculate sixty months from the month of implementation.

The second point of dispute was the levy of Cess on demerit goods. A good number of States wanted that the Cess alone should not be the source of revenue for the exclusive Compensation Fund. They wanted that some funds should be committed from the Consolidated Fund of India. In this context, they insisted that the Compensation Bill should make it clear that it is not only Cess but also 'some other means' which are to be found and resorted to for raising more funds, if needed. The Centre accepted the amendment and the same is going to be inserted in the Bill which was approved by the Council.

With the Model Laws being approved by the Council, except for the legally-vetted versions which would once again come back to the Council for final stamping, the major milestones have been achieved. Given the fact that the Ministry of Law has been working overtime along with the CBEC team of officials, the legally-approved versions may be tabled before the Council at its next meeting.

Now, the only two issues that remain to be officially resolved are the issues of territorial waters and the cross-empowerment. The first issue is expected to be clinched at the next meeting but the issue of cross-empowerment may take at least two more sittings of the Council. Dual control is a little ticklish issue as some States are still of the view that even if there is a vertical split of the tax base, 60 per cent of the assessees should go to the States. A solution apparently lies between 50 per cent to 60 per cent, and the same is likely to be found at the next two meetings.

A minor issue where the Council is yet to officially take a view is the tax rate for the Composition Scheme. Earlier, it was said that it could be between 1 per cent and 2 per cent. The latest to be heard in the corridors of power is that a special rate of less than 1 per cent may be fixed for small traders—not for manufacturers and service providers. A new category is likely to be carved out where the tax rate could be 0.5 per cent or 0.8 per cent.

Against this backdrop, it would be wrong to say that the GST Council continues to be stuck in a quagmire and no headway has been made. The remaining two issues are certainly not without solutions if there is a political will and most State Finance Ministers told me that Mr Jaitley has the required federal spirit and the necessary ounce of courage to sort them out. Let us hope that Mr Jaitley lives up to the expectations of his State colleagues and speeds up the roll-out of the much-delayed indirect tax reform caravan!

2

IGST: The GST Council Rocks the 'Little Boat'![*]

For the Union Budgets in the past, the indirect tax proposals used to be much-awaited and the most sought after by the entire economy; and the sole reason was—the hikes in the rates or a new levy used to be triggered by the provisions of the Provisional Collection of Taxes Act enacted way back in the year 1931 and the amended tariff used to come into force from the midnight of the day the Budget used to be presented. As for Service Tax provisions, they are a different ball game altogether. In contrast, the direct tax proposals, even today, come into force only after the Finance Bill is enacted. In fact, some proposals have to be notified after the enactment of the Bill. So, unlike in the past, I did not get the subliminal happiness when the Union Finance Minister, Mr Arun Jaitley, presented his budget this year. It had everything but very little for indirect taxes, and the obvious reason was the tectonic shift in the tax jurisdiction from the domain of the Union to a pooled-sovereign body—namely, the GST Council.

The GST Council has taken a string of historic decisions which are going to lay down the foundation for a robust and hybrid VAT/GST system in the country. As against the global experience and experiment with innumerable types of value-added taxes, the Council deserves kudos for evolving a typical Indian variety of hybrid GST. No doubt, this mini-Parliament intelligently sorted out many ticklish technical knots by finding innovative solutions but it also seems to have erred in finding a way out of the problem of cross-empowerment at its ninth meeting. It probably happened because it was running out of political patience and also, the time zone frozen by the Constitutional amendment.

Let me examine where and how the GST Council has probably erred!! All noted tax commentators across the world–such as Richard Bird, Sijbern Cnossen, and Oliver Oldman—have observed that one of the key essentials of a successful VAT system in any economy is a strong tax administration, preferably a single agency. If that is not possible, against the matrix of dual agencies, a systemic bias should be inbuilt towards the federal tax administration, and such a bias is natural for any

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* TIOL – COB (WEB) – 540, 9 February 2017.

CVAT kind of system as it alone stitches together and holds tight the sub-national or State VAT systems. From the assessee's perspective, this is more important as the federal agency acts as a distributor of credit in the case of inter-state transactions.

What India has done is fragment the taxing rights of the federal government. GST in India has been designed on the foundation of what is globally known as Versano's 'Little Boat Model'. This model eliminates the need for zero-rating inter-state supplies; minimises the strain of cash flow requirements for the business; and obviates the need for refunds. The attractive features of this model were the persuading reasons for India to adopt the IGST model. In the Indian context, IGST acts as an intermediate tax for the transfer of credit across sub-national (state) authorities. This model was further refined by the CBEC officers, who designed a ladder for credit flow—i.e., the ranking of the CGST, SGST, and IGST credit—depending on the nature of transactions. The significant point which needs to be noted here is that the very design of the credit flow architecture requires the intermediate tax or the 'Little Boat' to be owned by the Union rather than the sub-national (the States).

What the GST Council has decided is to cross-empower the sub-national (state) VAT officials to collect IGST. While deciding so, the GST Council has ignored the legal opinion of the Law Ministry (the Attorney General was probably not contacted) which was available on record and its decision now entails the Parliament to do what the Constitution of India does not permit. Let us visit Article 245, which allows extra-territorial jurisdiction to the Union but certainly not the States. But what the GST Council has decided is to permit the States to have jurisdiction up to twelve nautical miles and also to tax any sort of transactions taking place in the territorial waters. This clearly means that the GST Council wants to 'gift' deemed jurisdiction to the coastal States, coming into conflict with the Union Territory jurisdiction.

As per the Constitution, territorial waters constitute UTs and only the Union of India can have jurisdiction over UTs. But the GST Council wants to amend the law to lend deemed jurisdiction to the States by perhaps overriding the spirit of the Constitution. Another important question is whether the implementation of such a decision of the GST Council by a deeming fiction would not alter the actual boundary of a State notified as per the law. When a coastal State acquires the taxing right over the territorial waters, does it not amount to extending the boundaries of these States without a separate Act being enacted by the Parliament? The subsequent question that crops up is—should the Parliament really allow the GST Council to play with the physical boundaries of the coastal States, extending them to territorial waters, to which the sovereignty of each federating State of India extends through the Union? Thus, does it mean that the GST Council exercises supremacy over the Parliament?

Let us examine this issue in the background of Articles 297 and 366(30). Even a cursory reading of these Articles makes it clear that all economic activities in the territorial waters around the coast are to be regulated by the Union Government.

Secondly, the issue of taxation in coastal waters falls in a grey area of tax litigation and at present, the matter is pending before the Supreme Court under the present laws. The Union Government has filed an affidavit in the matter to say that the taxing powers in territorial waters belong to the Central Government. But the fact remains that the Union Government has been flippant in taxing transactions in territorial waters in the past. I am sure the Ministry of Finance and the Ministry of Home must have valid reasons for not levying central levies in territorial waters and beyond. It is also true that since the nature of such a tax is of inter-state sale, it always remained beyond the purview of the CBEC. But the larger point to be noted is that two wrongs do not make a right.

In the proposed GST regime, a supply originating in a coastal State and reaching territorial waters is an inter-state supply. But what the GST Council seems to have recommended is to make such supplies intra-state supplies. Even the reverse will be inter-state supplies. What is worse is that some States have been demanding that supplies originating in territorial waters and being consumed there should be treated as intra-state supplies in the coastal States. What may trigger debate is whether Article 269(5) really vests such powers with the Parliament to convert intra-state supply in one State to an intra-sate supply in another State. Supplies originating and getting consumed in territorial waters, which are intra-state supplies within the Union Territories, can really, by legislation, be deemed intra-state supplies in the coastal States as no part of those sales take place in the coastal States.

In my little understanding of the Constitution, taxing rights form the most important bricks of the basic structure of our Constitution, and even by legislation, the Parliament may not convert intra-state supplies outside the coastal States into intra-state supplies within them. Therefore, the GST Council should review its IGST decision rather than rocking the 'Little Boat' that may amount to fatal blows to the proposed GST even before it is implemented.

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3

IGST Continues to be the 'Apple of Discord'*

For the latest meeting of the high-profile GST Council, the venue chosen was the City of Lakes—Udaipur, the historic capital of the Mewar Kingdom. A great history of artillery warfare shadows this city and since the 10th meeting of the Council was perhaps expected to be a witness to a different shade of modern 'warfare' within the four walls of participatory democracy, such a venue was chosen. But because the legally-vetted Model GST Laws were not available for the final stamp of approval by the Council, not much 'warfare' was seen at the meeting. The only draft which was available after legal vetting by the Ministry of Law was that of the Compensation Bill. Since most of the issues in this case were settled long back, it sailed through smoothly. It is to be now approved by the Union Cabinet before the same is tabled before the Parliament.

As the Ministry of Law could not make the Model Laws of CGST, SGST, and IGST available for final approval, the Council took up other remaining issues—such as anti-profiteering provisions; the formation of the Appellate Tribunal at the Centre and the State levels; exemption to certain items; and many others. Since the Committee which has been assigned the job of working out specific rates for goods and services has still not finished the job, this was not discussed at this meeting. However, the Chairman of the Council expressed his hope that the legally-vetted Model Laws would be available at the next meeting in New Delhi on 4 and 5 March. Once that is vetted by the Council, different Committees would initiate the rules-drafting work.

Interestingly, since Union Territories (UTs) stand apart as a different class of entities, it was decided that a separate Bill is to be drafted for the same. A committee is going to do so along the line of the SGST so that the seamless flow of credit is not disrupted. But what continues to be a million-dollar mystery is the status of the Jammu and Kashmir Law, which is not yet clear. Even the GST Council has not talked about it. When I had met the Jammu and Kashmir Finance Minister, Mr Haseeb Drabu, he had said that an expert panel was working on the same, and the Draft would be made available for discussion with the Centre. Since none in the know of things appears to be discussing it, one needs to wait and see how the businesses originating or terminating in the jurisdiction of Jammu and Kashmir are

* TIOL – COB (WEB) – 542, 23 February 2017.

going to be conducted under the proposed GST regime. It is more important from the perspective of the flow of credit. Any delay on part of Jammu and Kashmir to join the GST bandwagon would kill the business in its territory as the credit would not be available for inputs and supplies originating there would be treated as an import in the consuming destinations.

Let us now move towards the most controversial and torrid issue of the 90:10 ratio decided for division of the assessee-base below the ₹ 1.5 crore threshold. Although the IRS Association may feel grumpy, the Centre did make a serious attempt to draft the minutes of the ninth meeting of the Council in such a manner that different States may have different arrangements with the Centre for sharing the assessee-base below the ₹ 1.5 crore threshold. It is another issue that a good number of States did not agree to such a *modus operandi* as they perhaps feared that it may eat away the unity of the States, which is so vital for future negotiations with the Centre. Some of them perhaps felt that different arrangements may lend arm-twisting opportunities to the Centre in future negotiations. In the larger interest of cohesion and unanimity, the Centre also discarded the doctrine of arrangement with States and that permanently seals the much-debated issue. The final verdict is out—the Centre would retain 10 per cent of the assessee-base and the rest are to be divided among the States.

But does it mean that everything is lost for the CBEC officers? Perhaps, NO! And the answer lies in the not-yet-decided method of working out the threshold. The expression 'threshold' is yet to be defined. How is it going to be calculated is something of great significance. If a business has a permanent establishment (PE) in four different States, the threshold may be decided by clubbing their supplies in totality. Even related parties' transactions may be clubbed together, depending on the legal structure of a corporate. For instance, the threshold may be decided by clubbing the supplies of subsidiaries with those of the parents. If something like this is done, the tax base of the CBEC would soar up for above the ₹ 1.5 crore limit and the total number could be much higher than one may project today. So, one needs to wait for the final shape of the GST laws before one rushes into a cocoon of disappointment!

It is time now to discuss the most controversial issue of IGST. Although the Council, at its last meeting, had decided that the States would get powers to tax transactions in territorial waters as by deeming fiction, all such transactions would be treated as intra-state transactions; but many States objected to the Draft finalised by the Centre and the Draft proposes to treat territorial waters as the territory of the Union of India and the powers are to be delegated to the States to tax transactions as intra-state transactions. The demand of many coastal States is to treat territorial waters as the territory of the States and allocate powers to them—not to just collect but also to levy and appropriate the taxes.

Although the Chairman of the Council referred the issue to the Law Committee to examine, even if one goes by the international conventions, such a decision would not be valid. Let me draw attention to the UN Convention on Law of the Sea or Treaty. Such a Convention replaces the earlier concept of 'freedom of the seas'. As

per the UN Convention, the jurisdiction of only a sovereign entity and not sub-nationals (like States) has been recognised to exploit marine natural resources in territorial waters, continental shelves, and Exclusive Economic Zones. Territorial waters, even along the coastal zones, are international waters and are regulated by the UN Conventions. So, any demand to extend the boundaries of States up to twelve nautical miles would be violative of not only international treaties but also our Constitution, if we read Articles 297 and 366(30). However, it is also true that some of the States have enacted certain local laws which regulate certain economic activities in territorial waters. But it is only for the limited purpose of 'Fisheries' which happens to be Entry 21 to the State List of the Seventh Schedule of the Constitution.

Yet another issue which was raised by the States at the latest meeting was the cross-empowerment of State officials under the IGST Act. The decision to exclude State authorities from adjudicating cases, if any issue relates to the import or export of goods or services, was vociferously contested—and their argument is that the States have been administering the CST Act, 1956 and assessing the authenticity of exports as it involves a refund of taxes paid at the input stage.

Here, if we visit the Constitution of India, Articles 268 to 270 reveal a fundamental design feature of the Constitution, i.e., the taxes are administered by the Government to which the taxes accrue. Taxes like Stamp Duty and CST, albeit they are Central levies, accrue to the States. It is for this reason that the Central levies are administered by the States—but that is certainly not the case for the IGST. It is a Union levy as per Article 269A. There is no automatic credit of it to the States. It gets utilised through the cross-flow of credits and the rest is to be settled on a monthly basis by the Union Government. Against this background, the delegation of powers under the IGST Act may breach the basic design of the Constitution.

From the entire range of controversies, it may appear that the IGST is going to be the most challenging for both the Union and the States. While doing my research I also decided to interact with the globally known GST Economist, Dr Sijbren Cnossen who was kind enough to respond to my e-mail. His e-mail has been reproduced below:

> *... as you know, I've never favored the IGST since it will amount to taxation of inter-state export, while inter-state importers will have to file for refunds. It would have been much better if every inter-state exporter and importer would have had to deal only with his own instate GST administration, as is the case in the EU. The IGST may well turn out to be the Achilles heel of the dual GST. And now VAT officials of exporting states will be allowed to impose the VÄT on exports (and, of course, they won't pay this to the VAT of importing States although they should). The extension of the GST to territorial waters is an extra interesting complication, which you have nicely dug up.*

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Hasty Passage of GST Bills: Customs Loses Power to Levy IGST on Import of Goods![*]

On the GST legislation front, the Union Government has done pretty well so far. A part of the credit goes to the GST Council too. There is a deadline, and the Modi *Sarkar* does not want to be called a laggard. Thus, it lost no time in pushing the four Bills through the Lower House of the Parliament. I wish the Lok Sabha could have been given a little more time to debate and collect feedback from the industry experts about some of the amended provisions in the final Bills. It is true that the trade and industry were given adequate time to react or suggest but it should not be overlooked that those reactions were in relation to the provisions proposed. In the final Bills, many provisions have been amended to appease certain quarters which are parts of the decision-making apparatus.

There are many such amendments. One of the most controversial ones is the tinkering with the provisions of the Works Contract. Pained or perhaps 'insane-ed' by the growing graph of litigation, particularly after service tax was imposed on the service component of such a contract, there was the acute realisation, at least in the Central Government camp, that the Works Contract imbroglio must be sorted out. A sensible attempt was made to put it in the deeming category of Supply of Service. Now, as per the new provision, the dominant character of a transaction would decide its taxability. Similar tinkering has been done with the provision allowing provisional credit and also the Input Tax Credit rules.

There are many such changes but one oversight I would like to dwell upon in this column today can be found in the IGST Bill. One may recall that apart from many domestic indirect taxes, the GST is also going to subsume the Countervailing Duty and Special Additional Duty of Customs. What bears testimony to it is Section 5(1) of the IGST Bill which provides that*:*

> *integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of Customs are levied on the said goods under Section 12 of the Customs Act, 1962.*

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* TIOL – COB (WEB) – 548, 6 April 2017.

Import of goods into India in Customs Act, as well as GST Law, has been defined as bringing goods into India from a place outside India. It may be noted the scope of the words 'supply of goods' is much narrower than the phrase 'import of goods'. A transaction of goods in the course of import will qualify as a supply of goods only to the extent it is for a consideration and in the course or furtherance of business. Imports of goods without CONSIDERATION or NOT in furtherance of business have not been earmarked as a SUPPLY.

This is quite evident from the definition of the word 'supply' in Section 7 of the CGST Act, which has been reproduced below:

- *all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
- *import of services for a consideration whether or not in the course or furtherance of business;*

It is clear from the definition that it is not only the consideration but also 'in the course of or furtherance of business' that is central for a transaction to be treated as supply. Any transaction which falls short of the 'twin test' cannot be termed a supply except those specified in Schedule I of the respective CGST or SGST and UTGST Acts. Imports of goods without consideration or not in furtherance of business have interestingly not been specified in Schedule I.

As per Article 366 (12A) of the Constitution 'goods and services tax' means any tax on supply of goods, or services, or both except taxes on the supply of the alcoholic liquor for human consumption. Thus, it is clear that both CGST and IGST are taxes on 'supply'. The first one applies to intra-state supply and the latter to inter-state supply, including imports. There is no definition of the expression 'supply' in our Constitution.

Going by the settled legal jurisprudence and also the tools of legal interpretations, wherever the Legislature has an intention to treat any such transactions as supply, it specifically provides so. For example, in the case of import of services, even if the transaction is not in the course or furtherance of business, it has been treated as supply. But in respect of import of goods, there is no such provision. Thus, a transaction of import, either without consideration or not in the course or furtherance of business, e.g., personal imports or imports by defence establishments or NGOs, may not be chargeable to IGST.

Any attempt to now bring such excluded imports under Section 3 of the Customs Tariff Act, 1975 (CTA) will be beyond the scope of the IGST Act besides violating the specific mandate of the Constitution too, which has clearly specified in the Statement of Objects and Reasons that CVD and SAD are being subsumed in GST. Moreover, the CTA allows only levies of such taxes which can be imposed on like goods in India in accordance with the WTO's mandate of providing 'national treatment'. If a transaction does not qualify as a taxable supply under the domestic

GST laws, it cannot be liable to IGST under CTA. Any such levy directly under the CTA will amount to a protective tariff subject to bound rates under the WTO.

It appears that a specific provision under Section 5 of the IGST Act or Section 7 of the CGST Act is needed to include 'import of goods without consideration or not in the course or furtherance of business' as supply to avoid any legal challenge about the *vires* of integrated tax on such imports. It may further be viewed that even if the integrated tax on the import of goods is levied under the CTA, the legal provision in this regard may have to be recommended by the GST Council in accordance with the provisions of Article 279 of the Constitution.

As a passing reference, it may also be noted that Article 269A of the Constitution interprets inter-state supply to include imports but not exports. A number of provisions have been made in the IGST Bill relating to exports outside India. These may have to be defended under the Central Government's exclusive powers under Entry 83 of List I of the relevant Schedule. To that extent, it will be wrong to allow any meddling into the affairs of the Centre by the States.

In a nutshell, even if the Rajya Sabha does not get the privilege to discuss the provisions of the Money Bills at length, the growing feeling among the industries and trade is that the Union of India needs to go for at least one round of Amendments in the GST laws before they are brought to life either from 1 July 2017 or 1 September 2017. Let us hope the custodians of the GST laws do not turn a Nelson's eye to all such flaws in the laws!

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5

IGST's 'Little Boat' May Not Sail in Nilekani's Proposed GSTR Model*

This may sound strange but it is true! The tardy growth pickup in the GST collections has begun to trouble (a bit more than the GST Council!) even our stock markets, and their lurking fear is the slippage on the fiscal deficit front. What seems to have dented the sentiments in the markets is the *damp squib* outcome of the GST Council's 26th meeting. The trade and industry had very high but realistic expectations that the Council would be able to finalise the New GST Return Form containing the invoice-matching principles. Along with the procedural aspects, the Council had earlier vetted many changes in the GST laws and a ray of hope was that all such amendments may be moved during the Budget Session. But nothing of that sort happened. It was virtually a quick-fire meeting and it now transpires that it was held with the sole objective to further defer all such provisions which were deferred till 31 March 2018. Even the e-Way Bill was an old decision which was only to be granted a stamp of approval.

Although the GST mop-up for the month of January 2018 has been revised close to ₹ 90,000 crores as against ₹ 86,400 crores announced earlier, the wrinkles of worry can clearly be seen on the face of the Central Government officials. To begin with, the North Block has substantially reduced the Budget Estimates of indirect taxes in the revised Budget Estimates by about ₹ 52,000 crores. The income tax target has been marginally hiked to ₹ 10,00,000 crores. On the GST front, things do not appear to be looking up and what may further puncture the balloon of confidence of the NDA Government is the growing graph of adverse results coming out, one after another, of Bypoll results from various States, where it has its own Governments.

Against this backdrop, the only hope of shoring up tax collections is the e-Way Bill Scheme, which would come into force on 1 April 2018. Although the new scheme has hugely been liberalised and many irritants have been ironed out to reduce the prospects of harassment at the hands of tax officials (once checked, no consignment is to be verified twice), what could have been a better option to avoid any shade of disruption in the economy was to implement it only for inter-state trade for six months—and the simple rationale could have been the latest data coming out of the GSTN Server: about 69 per cent of total trade transactions are inter-state. Once such a large percentage of goods movement is brought under the sweep of

* TIOL – COB (WEB) – 598, 15 March 2018.

surveillance, it would automatically puncture the confidence of tax evaders to push goods without invoices or on fake invoices, like the ones recently caught in Mumbai. A decision to defer e-Way Bill for intra-state movement of goods would have gone a long way in comforting the ruffled feathers of the trade and industry, which has got many valid reasons to doubt the ability of the GSTN or any other agency to implement a new glitch-free Scheme!

What seems to have further added to the woes of the Union of India is apparently what was stated in one of the Four Press Releases issued on 10 March after the Council's meeting. It stated that the Council was briefed about some of the insightful findings of data analytics undertaken by the CBEC and the GSTN. The preliminary findings are the variance between the IGST paid by importers at Customs ports and the ITC of the same claimed in GSTR-3B. Another finding is the gap between the self-declared tax liability in Forms GSTR-1 and GSTR-3B. Though this Press Release stopped miles before the point at which could have revealed any clues, some sense may be inferred from the piling data of IGST Collections. As it is commonly known that the IGST is nothing but Input Tax Credit to be availed by the taxpayers and the Union of India is just a clearing house for this tax, but what the importers are paying at the Customs ports is not being claimed as ITC by the buyers of such goods in the consumption States. If such a phenomenon exists, it only means two things—the importers are selling their goods without invoices at lucrative prices and the buyers are also selling them in cash transactions and that is why they are not availing the ITC; and since the ITC is not being availed, there are gaps between what is being collected as IGST and Compensation Cess and what is being claimed as ITC in the GSTR-3B. Such a phenomenon is likely to result in a huge surplus in the hands of the Central Government and how this is to be treated is not known at this stage.

The second observation in the Press Release is about the gap between the tax liabilities arising out of invoices uploaded through GSTR-1 and what is being paid through GSTR-3B. If the gaps are huge, it indicates massive manipulation of data being uploaded. Unless quick analysis and follow-up actions are taken, the growing gaps between these two Forms would become a gigantic problem for the tax administration to act upon. Even if they come across serious tax evasion chances are that, they would be disadvantaged to take action against a large number of taxpayers as several elections are lined up in the coming months, including the speculative chances of early general elections. No Government going to the hustings would like to antagonise the voters a few months before the polls.

Unfortunately for the Council, it is not in a position to implement other substantive provisions such as the RCM and the TDS, which could have buoyed up its tax collections. Another Press Release clearly states that a Group of Ministers is still looking into the modalities of its implementation to ensure that no inconvenience is caused to the taxpayers. Even for the TDS and TCS, the GSTN is still working out the modalities to link the State and Central Governments' accounting systems so that seamless credit flows to the taxpayers whose tax is deducted or collected at the

source. Now that these two provisions stand deferred till June 2018, there is no hope of having better tools to shore up revenue in the next fiscal year except for anti-evasion measures.

This brings us to the long-persisting imbroglio over the new return format. The Council has extended the present GSTR-3B format for three more months and meanwhile, the GoM is going to apply its mind to some of the competitive proposals unfolded before the Council. One such popular proposal is now known as Nandan Nilekani Model, which has the backing of many States. But what is this model? In place of multiple GSTRs Mr Nilekani has suggested that the ITC should be allowed without matching the invoices of suppliers and buyers. Such matching can be left to be done by the supplier and the recipient on their own and the tax administration caravan can carry on without bothering much unless it comes across serious misuse. In other words, this model seeks to delink the tax payment by the supplier and the ITC availment by the recipient. So, where is the problem? The problem lies from the Central Government's perspective. As goes the fact, 70 per cent of all-India transactions are inter-state, attracting IGST, and the Union of India is the clearing house which has to 'settle' the revenue of the States. In this case, if a 'link' between the tax payment made by the supplier in State 'A' is broken with the ITC availed by the buyer in State 'B', it is bound to spell trouble for the Tax Kitty of the Central Government. The real challenge of this model is the IGST's unique settlement system where the onus lies with the Centre to ensure that the dues of each State are paid by it on a monthly basis. Secondly, it would also compromise with the system of transporting the credit to the consumption State to make it a seamless flow of credit.

Since the new GST Return format has not been finalised, the Council had no option but to extend the exemption granted to exporters. As regards the e-Wallet Scheme, the Council is very serious and also highly cautious as it is going to be a new system which may disrupt India's exports. That is the reason that it has given direction for testing and re-testing of the new system before the same is notified. The Council has gone for six months' deferment and hopes that the NIC would be able to run the pilots much before that. Going by the entire bunch of the Council's decisions at its last meeting, it may be said that the Council has adopted the once-bitten-twice-shy approach and it is indeed a welcome one!

Credit Conundrum: The 'Fiscal-Shrike' at Work!

Introduction

If GST is a better and refined variant of indirect taxes, it is overwhelming because of its intrinsic strength to pedal Input Tax Credit (ITC) seamlessly. Though many more tentacles of GST may be attributed to its forte, what sits in the nucleus of its strength is the ability to moat against cascading and faster facilitation of ITC to the taxpayers—and this is what makes it so popular a system that over 166 economies have embraced it as a preferred indirect tax system. However, what governs the rules and rationale for blocking ITC are socio-economic needs of a country. Such needs are more compelling and pushy if it is a democratic country like India where the political system is under greater strain to eradicate poverty, deliver services to others, and undertake socio-economic development. If the needs for resources are more acute and the direct taxes fail to suffice, the horse of indirect taxes is under obligation to palanquin a major part of the millstone!

This is what happened when India decided to be on board the GST-buggy! First, the architects of the GST were not sure of a steady flow of revenue as the initial phase kerfuffle was quite predictable and secondly, the quantum of monthly revenue was beyond the perimeter of realistic guesstimates. Since the shortfall in revenue collections would have had serious detrimental implications for a raft of centrally-sponsored and regional welfare schemes, the GST Council decided not to play with fire and a decision was taken to block ITC in certain cases. This goes behind the genesis of the drafting of Section 17 of the CGST Act, 2017, which applies a surgeon's scalpel to partly and fully block ITC for a sprawling basket of input goods and services. The fear deep-embedded in the mind of the decision-makers was that if the ITC is allowed to sprint on 'multiple legs', the tax payment through the cash ledger may fall short of the 'red line'—if I can use the words of Dr Hashmukh Adhia, the then Revenue Secretary.

The fear of the GST Council was indeed not legless! The first fatal blow came when the business processes governing the matching of input and output invoices, designed to allow only legitimately due ITC, proved dud! It did not work for the lack of adequate sandbox testing! This warranted a quick reversal and simple design of the tax payment return which was floated in the form of GSTR-3B. It took some time but the GSTR-3B demonstrated to be a reliable and loyal servant of the Exchequer and stabilised the pipeline for the incoming revenue! But then popped up several cases of abuse of ITC by certain sectors, which grumpily disoriented the Council and a decision was taken to float Composition Schemes for mega sectors like real estate, which contributes about 7 per cent of GDP, and the restaurant sector. A minimal tax rate of 5 per cent without ITC was notified. For tiny service providers struggling to find their feet in the recession-hit economy, yet another Composition Scheme of up

to ₹ 50,00,000 turnover was floated. All these decisions, aside the blocked credit, further removed the crucial discs from the vertebrate of the ITC spine! When many instances of rampant availment of Transitional Credit (TRAN-01) were brought to the notice, Newton's Law played out and the tax administration reacted in equal force, rather in unequal measure—and this, apparently, fanned the flames of litigation across the country.

What added more ammunition to the growing morass of discontent was the late onboarding of the State of Jammu and Kashmir. Since Jammu and Kashmir had its own Constitution and the approval of the SGST Act was delayed in the Assembly, this further led to the denial of credit on the supplies received from the State to other States. Incidentally, there was a special excise duty regime in the State where the refund module was in practice once the duty was paid. The same problem afflicted the receipt of services from Jammu and Kashmir besides the transit goods up to 30 June 2017. Anyway, all these issues were, over a period of time, sorted out. Then came a more palpitating period for the decision-makers, who found that the monthly mop-up of taxes was either stagnant or tepid because of the belligerent racket of fake invoices. Huge revenue was stolen by conspiracy-veterans of the economy! At one point in time, the Minister of State for Finance told the Parliament that the size of fake invoices rackets detected thus far was worth more than ₹ 48,000 crores! A fiscal robbery, indeed!

This precipitated a spasm of ornery reactions in Lutyens' Byzantine power corridors! The waspish reaction dried up the cornucopia of good and simple procedures. The outbursts of frenzy changed the predilection of the policymakers. The policy to run an errand of mercy underwent a mega change and the sledgehammer fell on the ITC in the form of two new Rules, Rule 86A and Rule 36(4). Rules relating to registration of new taxpayers were also tweaked to keep an eagle eye. Then came a drastic amendment in the GST Law after several constitutional courts ruled that availing credit is a substantive right of the taxpayers and the amendment was all about taking ITC only if the suppliers upload the invoices in GSTR-1. All these measures have, to a large extent, stabilised the average revenue collections at the peak of ₹ 1,50,000 crores. The Centre and the States are delighted but the taxpayers keep staring at a flicker of hope that the Council would one day guillotine the rules blocking their ITC.

Chapter 1 provides a peep into the story of the missing column in the GSTR-3B for availing ITC; concerted efforts of the GST Council to encourage regular return-filing; the avoidable column in the return seeking detailed information about exempt, NIL, and non-GST inward supplies; denial of ITC if tax is paid under the reverse charge mechanism u/s 9(4); and the Subramanian Panel corroborating my findings that the GST would do long-term benefits to the direct taxes collections and if electricity is brought under GST as zero-rated supply, it would enable power-generating companies to avail ITC.

Chapter 2 deals with the nice design of GSTR-1, GSTR-2, GSTR-3 to allow seamless flow of ITC but the IT-driven architecture proved elusive and ill-tested; the two options of return-filing—one is workflow-driven and the other is system-based invoice matching—in the first option, provisional ITC is to be allowed based on the supplier's data, which means that suppliers are to be coaxed to upload data and the second option is about the invoice-matching system, tried and tested in the erstwhile VAT regime; historical data reveals 70:30 ratio for tax payment by using credit and cash ledgers respectively; how the cash flow consideration was factored in by the Council while deciding the ITC system; and how the various courts' decisions—no machinery provision can override the substantive right to credit—were taken into account while taking the final decision.

Chapter 3 dwells on the irony of the late fee facility and how mega service taxpayers like banks and insurance companies are paying taxes late and filing returns after several months and how such late filing is depriving recipients of availing ITC; why the PMO retained the provision of interest on reversal of ITC after 180 days; how the taxpayers felt wronged when they discovered that there was no provision to avail credit if their old service tax or import of services cases are finalised today; similarly, no provision was inserted to allow ITC if EPCG cases, in which CVD or SAD was paid, are finalised today; the missing transitional credit provision for the goods covered under the State Excise Duty also came as a shock for the taxpayers; and how credit was also denied to capital goods received post-GST implementation but the tax was paid in the prior period.

Chapter 4 details the magnitude of the fake invoice rackets, over-invoicing of exports for claiming higher IGST refund, rampant utilisation of blocked credit, fraudulent refund of accumulated ITC and splitting of an invoice to reduce tax liability on outward supplies, albeit GST being collected on the gross amount; a shocking revelation about fly-by-night exporters trousering huge amount of exports refund being processed under pressure by the Customs and a sample study finding that only 55 per cent of exporters are filing claims, being regular by profile; another study ferreting out that against a rise of 8 per cent in the number of shipping bills, there was a 300 per cent spike in IGST refund claims and about 60 per cent of claimants were non-companies; and amendments in the provision of registration and blocking of ITC in case of new registrants if they raise invoices above a certain threshold.

Chapter 5 deals with excesses being committed by the revenue sleuths while verifying excessive utilisation of transitional credit; denial of TRAN-01 credit for the supplies received from Jammu and Kashmir to other States; denial of such credit on input services; denial of credit on goods in transit up to 30 June 2017; a penalty-raj being unleashed in case of a technical violation of e-Way Bill rules; and violation of the principle of natural justice resulting in madcap litigation.

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Paying GST without ITC? It's Unfair![*]

From the ramparts of the historic Red Fort, while addressing the Nation on many critical issues, the Prime Minister, Mr Narendra Modi, did not fail to talk about the 'Good and Simple Tax'. He said that the GST has given a major boost to competitive cooperative federalism. He also said that the technology has made it look like a miracle, and the global community is closely watching the success of its roll-out. I tend to agree with the Prime Minister but the Union Government needs to address too many ground-level as well as technology issues before it can be said that the GST roll-out has truly been successful due to wise and foresighted planning. The most widely-acknowledged merit of the GST is the unhindered flow of Input Tax Credit (ITC) which is undoubtedly the backbone of the new indirect tax regime. Though the GST laws do provide for it, on the ground, it is being denied to the taxpayers if the non-availability of column for availing ITC in the GSTR-3B is to be construed as denial!

To make the roll-out smooth and trouble-free, the GST Council had decided to grant two months' relief in return-filing and that is how a new Form 3B was put in place to gather only the summary of transactions. At this stage, while designing the new Form, our lawmakers seem to have overlooked the need to permit accumulated ITC. It is true that the transitional provisions provide 90 days' time to file TRANS-01 but if one is ready to file it now, no such facility is available on the GSTN portal. This clearly means that at the time of filing Form 3B, a taxpayer has no choice but to pay only in cash. Netizens may recall that the same thing happened in the month of March when a good number of large taxpayers were made to pay through PLA and carry forward their CENVAT Credit to the month of April and once again, history appears to be repeating itself in the month of August. It is an admitted fact that a large number of taxpayers opt for Project Imports in the months of April to June. That is how one can see a spurt in the growth of even the domestic market, which supplies capital goods in the first quarter of the new financial year. Thus, a good number of taxpayers have huge credits as opening entries in their books. There are even medium-sized enterprises which have ITC ranging from ₹ 5 crores to ₹ 10 crores. Now that there is no facility to avail carried-forward ITC, one is required to pay ONLY in cash. One such company from Gujarat informed us that they do not have the cash to pay more than ₹ 1 crore in tax and they have applied for a business loan for discharging their tax liability.

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* TIOL – COB (WEB) – 567, 17 August 2017.

Such a state of affairs is indeed going to damage the business cycle in the economy and I am sure it would take a serious toll on the GDP growth projections. It is high time the Central Government takes up the cudgel on behalf of the industry with the GST Council, and first, extend the date for filing the July return and then make available the facility of availing credit. I believe the decision taken by the Law Committee is to allow such a facility only if one pays the tax in cash. If one does so, what would be the fun of having the ITC facility during the extended time period? GST has been billed as a Good and Simple Tax by the Prime Minister, and its credibility should not be damaged by denying the substantive right of credit to businesses.

Yet another head in Form 3B which calls for clarification is the information being sought about the exempt, nil, and non-GST inward supplies. Having captured all the data relating to outward supplies, the RCM and also the ITC, leave aside the GSTR-1. Even Form 3B, which was designed to seek only a summary of transactions done in the months of July and August, seeks huge details of all such inward supplies which were either exempted or attracted a nil rate or fell in the category of non-GST supplies. Since these terms are all-inclusive and no FAQ has been provided on this issue, it is open to the taxpayers to disclose information only relating to electricity, water, and petroleum products or even interest earned or stamp duty paid in case of certain transactions. Such a grey space may trigger either too much of feeding of data or only part submission. One can certainly make out the keenness of the Govt to curb the age-old practice of businesses submitting one set of data with the CBEC and another set with the income tax. Once one is made to disclose all these details in Form 3B and GSTR-1, it would be difficult for any business to 'manage' or manipulate one's books at the end of the financial year when one starts dressing up one's books for filing an income tax return.

Another provision of GST law which entails a review is the denial of utilising ITC for paying tax under the Reverse Charge Mechanism (RCM). When the ITC is fundamentally nothing but 'cash' to the credit of an enterprise which is to be utilised for discharging tax liability under the forward charge matrix, why should it be denied under the RCM? What is the rationale? Why should the GST make a beginning with such artificial bumps to the ITC availment? My guess is that the only merit one may find in it is the collection of tax in cash so that the revenue mobilisation efforts of the Governments are not bruised.

Anyway, let me now turn to a new trend of tabling Economic Survey Volume II in Parliament. As we know, the Economic Survey is conventionally the baby of the Chief Economic Advisor, Mr Arvind Subramanian, who apparently looked very happy addressing the media about the future projections of the macro variables and the GST. In my last week’s column, I concluded that the Income Tax Department is going to be a key beneficiary of the RCM provisions in the GST. Mr Subramanian has corroborated my findings by saying that the GST would benefit the direct tax collections in a big way. His logic is that in the past, the Centre had little data on

small manufacturers and consumption (because the excise was imposed at the manufacturing stage), while States had little data on the activities of local firms outside their borders. Under the GST, there will be seamless flow and availability of a common set of data to both the Centre and States, making direct tax collections more effective. I tend to agree with him but he did not elaborate on how and which provisions of the GST would do a world of good to the direct tax collections.

In fact, one erudite Netizen commented as to how the RCM would help income tax when the recipients of goods or services are under no legal obligation to mention the details of the PAN and address of the unregistered suppliers in the invoices raised by them; and he is right but in weeks to come, when the GST laws stabilise, the Government is not going to overlook such an opportunity to gather details of unregistered suppliers who are also going to enrich the direct tax coffers.

While talking about the salubrious impact of GST on the growth of the tax base, Mr Subramanian has noted that there were early signs of tax-base expansion. Between the months of June and July, about 7,00,000 new taxpayers, who were earlier outside the tax net, have taken GST registration. As per the latest figures, more than 12,00,000 fresh registration applications have been reported. While discounting the compliance burden on small businesses, Mr Subramanian has rightly observed that the GST would help them build digital records of tax payments which would, in turn, enhance their credit rating and help them access loans from financial institutions in the organised sector. True, the financial inclusion campaign would certainly get a major leg up from the GST.

Some of the hidden benefits the Survey has rightly talked about are: the textile and clothing sector is now a part of the value chain. Fabrics were particularly a major source of tax evasion; and the works contracts, a major segment of the real estate sector, are under the tax net and one would be able to avail credit and help formalisation of cement, steel, and other supplies. Documentation would help record input purchases

Like all his previous Surveys, the Chief Economic Advisor has also called for an immediate extension of the GST to some of the excluded sectors like electricity, land and real estate, petroleum, alcohol, health, and education. Electricity is a part of the infrastructure sector and it accounts for a sizeable cost of any business. If we take energy as the cost of doing business, it would also include the consumption of petroleum products and account for a significant share of the total costs of any business. Once electricity is brought under the GST, it may be either put in the zero-rated slab or the bare minimum slab of either 3 per cent or 5 per cent and the power companies can be allowed to avail input tax credit. Such a step would certainly help reduce the cost of electricity to consumers and the Union of India may also realise its goal of electrifying all villages by 2022. Such a decision would also give a boost to the power generation and distribution sector which does need, if not tax sops, at least a fair fiscal treatment for its key activities.

Education and health are two sensitive services which have become unaffordable for the poor and are disproportionately consumed by the rich population. Since the conditions of both the services are abysmally low, if one goes not only by recent hospital tragedies (like the Gorakhpur one) but also the budget allocations as a percentage of the GDP and the fact that States have failed to honour their commitment emanating from the Directive Principles of the Constitution, it is certainly desirable to tax at least the luxury segment of the health and education services, and there is tangible merit in the recommendation of Mr Subramanian which should be looked at by rising above vote politics. Let us hope the GST Council comes up with a progressive roadmap with a clear-cut time framework to bring all these excluded sectors under the ambit of GST.

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Designing a New GSTR, but Certainly not at the Expense of ITC![*]

For a business entity, what is so attractive in the GST vis-a-vis the earlier indirect tax regime? Perhaps nothing, but the Input Tax Credit (ITC). True, in pith and substance, the story of GST is a tale of a historic struggle by tax jurisdictions and their fiscal experts across the globe to demolish all possible impediments coming in the way of a seamless flow of credit; and the nature and character of impediments generally have a direct correlation with the socio-economic ground realities which, in turn, determine the dynamics of polity in a tax jurisdiction. That is one of the eminent reasons that the GST implemented by Country 'X' does not mirror the GST implemented by Country 'Y'. All economies which have adopted GST so far have opted for a customised and hybrid version suited to their own socio-politico conditions.

The story of the Indian GST is no different. Its struggle started twelve years back and it has painfully accelerated post-implementation. All the stakeholders including the techies, albeit late entrants to the GST ring, have been struggling, and, one of the pragmatic goals of this struggle is to find the right shade of compliance architecture. It is more so because the unhindered flow of ITC depends on its design. India hurriedly adopted one, theoretically-elegant-looking apparatus, in which the GSTR-1, the GSTR-2, and the GSTR-3 nicely merged into each other and what popped up on the screen for the taxpayers was their final duty liabilities. But it did not work for a variety of reasons except for any flaw in its theoretical design. It was probably before time for most of the taxpayers in India!

Now, the biggest goal for the Indian GST juggernauts is to 'discover' that elusive design that may fit into the bill; and one person, who last week put on the hats of Vasco Da Gama and Columbuses of the Tech World, was Mr Nandan Nilekani, the Chief of the Indian IT major, Infosys. He made an exhaustive presentation on two possible options and what is there in the nucleus of both the options is the ITC. The puzzling question before the GST Council was - since both the Options are about invoice matching before the ITC is allowed to be utilised towards the payment of tax liability, which one of them may be more acceptable or easy to comply with for the taxpayers?

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* TIOL – COB (WEB) – 591, 25 January 2018.

The options for return filing are work-flow-driven and system-based invoice matching through sale and purchase data. In the first option, the provisional credit is to be allowed to the purchaser based on the suppliers' data. In this workflow model, the purchaser's credit is dependent on the upload of data by the suppliers. In other words, the purchaser is required to coax, persuade, and even threaten suppliers if they delay in uploading their data as the ITC availment totally depends on the supplier's integrity and efficiency. The credit is to be allowed after the purchaser himself matches the invoices with the supplier's data. The second option, which seems to have found favour from the majority, is very similar to the one seen in the VAT regime. In this case, the invoice matching is again at the core of the activity but the quantum of ITC not available for availment would depend only on the volume of mismatch. In other words, the GSTN software is going to do the matching and the ITC is to be disallowed based only on the discrepancies.

Whatever Option the GST Council may finally accept, would be decided at the next meeting immediately after the Union Budget. But a TIOL word of caution for the Council would be that the final rules relating to disallowance of ITC based on such mismatches must stand the twin tests of law—the Doctrine of Reasonableness and the Principle of Natural Justice. Before I delve deeper into these two aspects let me first explain the economics of ITC.

Historically, the payment of indirect tax liability is split in the ratio of 70:30 in the Indian economy. If the total tax liability was ₹ 100, ITC of a business entity would generally take care of 65 per cent to 70 per cent of it and the remaining 30 per cent to 35 per cent was paid in cash or through PLA in the earlier regime (largely in the cases of manufacturers). If we go by this formula and the present average tax collection figure of about ₹ 90,000 crores, the total tax liability for the Indian taxpayers combined works out to be about a little over ₹ 3,00,000 crores per month. This clearly means that the total ITC for the economy as a whole is about ₹ 2,20,000 crores to ₹ 2,30,000 crores a month. This figure also represents a major safeguard for the working capital of the businesses. Any system which may finally be adopted by the GST Council must ensure that the monthly credit figure of ₹ 2,30,000 crores must not be upset by a huge margin. Any mismatch or discrepancies in the invoice matching must not be more than 5 per cent, which means deferment of ITC or locking of hard cash for the industry to the tune of ₹ 12,000 crores. If this figure goes up to 20 per cent, which is a possibility attributable to various possible errors in feeding the data, it would mean a 'freeze' on availment of ITC to the tune of ₹ 50,000 crores. Locking such a huge amount of working capital (allowing less ITC means greater payment in cash) would result in sustained hue and cry in the economy. We have witnessed it in the case of exporters, albeit their refund is not that gigantic.

Let me now discuss some of the pearls of judicial wisdom on the issue of Input Tax Credit; and this is very important as any disallowance of credit would be judged or scrutinised by the judiciary against the *ratio decidendi* of some of the key

decisions. Way back in 1999, in the case of *Collector of Central Excise v. Dai Ichi Karkaria*,[1] the Apex Court held that:

> *17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.*

Let me now take a long stride in the time zone. Last year, in October, in the case of *On Quest Merchandising India Pvt. Ltd.*,[2] the Delhi High Court gave a detailed order on the issue of denial of credit and the same was upheld by the Apex Court in the case of *M/S Arise India Ltd*[3]. In this case, the High Court held that when the legal obligation to deposit taxes collected from the purchasers was on the supplier, it would amount to gross injustice if the purchaser is denied credit. If the purchaser is buying goods from registered suppliers having TIN, denying credit for the failure of the supplier to deposit tax in the Government treasury was also held as violative of Articles 14 and 19 of the Constitution of India.

Let me now quickly navigate to the latest decision of the Karnataka High Court in the case of *Kirloskar Electric Co. Ltd. V. State of Karnataka.* In this case, the HC held that the claim of credit of input tax was indefeasible as was the case of CENVAT under Excise law and such credit of ITC under VAT law, which is equivalent to tax paid in the chain of sales of the same goods, and the same cannot be denied on the anvil of machinery provisions or even provisions relating to time frame, which is law of limitation and it only bars the remedy rather than negating the substantive claims under the taxing statutes.

Let us see the harsh observations of the High Court emanating from consistent and deliberate disregard for judicial discipline. The HC emphasised that such a tendency of the VAT authorities may invite contempt action and unless corrective steps are

1. 2002-TIOL-79-SC-CX-LB, Para 17.
2. 2017-TIOL-2251-HC-DEL-VAT.
3. 2018-TIOL-11-SC-VAT.

taken by the Department, the Court would initiate *suo motu* contempt proceedings against the Commissioner of the Commercial Taxes Department.

Such exasperated observations only tend to prove the point that under the GST laws, the tax authorities (VAT officials appear to be influencing the course of decisions by the Law Committee) must not incorporate such provisions which disregard the due process of law for denial of ITC. Whatever invoice-matching option may be finalised, such a system-driven exercise must avoid the temptation of auto-reversal of credit in case of discrepancies arising from the matching activity as ITC is a substantive right and no machinery provision can override it. Secondly, the larger purpose of such matching should be well recorded and debated rather than only verbally articulating that it would put curbs on a generation of black money. Last but not the least, a word of caution for the Council is that if the new return also does not work because of its inherent complexities, a decentralisation of the return filing option may be explored. It can also be manual filing at VAT or CGST Commissionerates across the country.

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GST: Credit Conundrums—Overlooking Them is No Solution![*]

The wheels of the GST '*karwaan*' continue to rotate at a decent pace! On the last day of the Parliament (10 August) the *Rajya Sabha* put its stamp of approval on all four GST Amendment Bills. Since there are many beneficial provisions in this Bill which is yet to be assented by the President of India, the parliamentary nod has certainly sustained the pace of positive change in the GST regime post its first anniversary. What seems to be lending momentum to such a pace is the quick follow-up by the Union of India on the decisions taken by the GST Council. On Tuesday evening, the Ministry of Finance notified the constitution of the Group of Ministers for suggesting measures, especially for the MSMEs. The GoM has got two months to submit its report along with the revenue implication of its recommendations. If the measures stitched together are going to cause a bigger hole in the Revenue Kitty, substantive recommendations may not have too many takers within the Council.

On the revenue front, what may help iron out some of the wrinkles of worries of the revenue monitors is a quick analysis of all those large government-owned companies or CPSEs or State-owned enterprises which find even a thirteen months' period not enough to become regular in filing returns. Since they have the option to pay taxes and file returns with late fees, in some cases, the delay may range between three to six months. Such delayed return-filing not only defers the deposit of taxes by a few months but also causes consternation for a large number of private entities which fail to avail ITC against their supplies of services in particular. A close scrutiny of insurance companies may reveal many such defaulters. The banking sector could be another potential area for scrutiny. Thanks to the deferment of the invoice matching event, the number of aggrieved buyers of such services could have been much larger.

Let me now go back to the amendments passed by the Parliament. Though the Union Cabinet decided to retain the interest clause for the reversal of ITC after 180 days in order to protect the interests of MSMEs, it seems a new way out needs to be explored as the large industries are unhappy about it. But why? Their submission is that in the case of large EPC projects, retention money is a part of the contract. Since

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* TIOL – COB (WEB) – 620, 16 August 2018.

the gestation period of such projects is long, the reversal of credit with interest is an unwarranted cost for them. In fact, it is learnt that even the Law Review Committee Report, which is yet to be examined by the Council, has also proposed that the interest clause may be omitted. Now that the first round of amendments is over, any further change will have to wait for the second round but only post-general election, or if the Council decides to expedite them, the Winter Session could be the last chance to do so and it would be more desirable if the solution is found within the ambit of the MSME Act if the intent of the Cabinet is to protect smaller units. Since retention money is an age-old practice for long-gestation period projects, it must be given due recognition in the space of law making.

When I spoke to some of the industry captains and asked them to point out just ONE pressing change they might be looking for, a major chunk referred to the unfair transitional provisions. Leaving aside the accumulated Cesses being denied, the industry feels more wronged about the fact that there is no provision for availing credit if a provisional assessment of service tax or an import of services case is decided today and tax is paid in this regard. Similarly, in the case of unfulfilled export obligation under EPCG, if CVD or SAD is paid, there is no provision in the GST regime to allow ITC or permit a refund of such taxes paid. Since credit for such taxes to be paid was available under the erstwhile tax regime, the GST Council should do justice to such cases.

A similar wrong has been done in the case of goods covered under the Medicinal and Toilet Preparations Act, 1995, lying in stock on 30 June 2017. A good number of products—such as shampoos, after shave lotions, deodorants, and perfume sprays—were liable to State Excise Duty, which now stands subsumed in the GST, but the transitional provisions in Section 140(10) do not extend credit benefits to such duty as 'eligible duty'. I believe the LRC Report has favoured an amendment in the relevant Section to extend the credit benefit under the GST. Textile traders also constitute a major section of such victims who could not take registration because of their strike in July last year and could not file GSTR. So, they could not pass on the ITC. Since a major chunk of their trade was B2B, it has impacted their working capital.

The situation is no different in the case of capital goods as well. There are thousands of cases where the capital goods were received post the appointed day of GST last year but the tax was paid prior to the implementation date. Since the law does not provide for any credit on such goods which involve huge amounts of tax payments, the industry is aggrieved about it as the lawmakers should have provided leeway to avail credit for the taxes paid. A feeling of victimisation may be measured even in the case of undistributed ISD by the head office. Since the balance of CENVAT Credit was not distributed by 30 June 2017, there is no provision in the GST to allow the same. Similarly, credit on inputs embedded in under-construction or work-in-progress premises is another live issue.

No doubt, the law or the policymakers may feel that the transitional window should not remain open for too long as this would delay the quick settling of the new tax regime but settling down the new regime on the foundation of bitter memories of the taxpayers or pillars of gross injustice is certainly not advisable. There is no straight-jacketed formula which may prescribe that the transition phase should be as short as possible. Given the complexities of the previous tax regimes and the number of taxes being subsumed in the GST and also the vastness of the country along with the multiple strata of the taxpayers, if the GST Council decides to make the transition a two-year window, it would help reduce GST-related litigation. Since there are palpable efforts by the Central Government to reduce litigation and that is why it has hiked the monetary limits (for income tax as well as indirect tax legacy cases) to withdraw even pending cases before the courts, it would not be wiser to allow GST taxpayers to toll the bells in the High Courts to claim their legitimate credit. I sincerely hope that the GST Council would take a fair view and would not mind paying some price in terms of allowing legitimate credit for keeping litigation to the minimum!

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GST: Fake Invoices—A Mega Hole in Treasury, Time for Punitive Legislative Measures![*]

When the much-touted GST was introduced in July 2017, the Revenue knew that like all other taxes, a time would come when there would be GST-related frauds. But none in the corridors of power had any premonition that such a time would come so fast, and so early! It has indeed become a common headline in daily newspapers. Let us take a look at some of the sample headlines: '*GST Fraud Alert - With fake companies, fraudsters steal Rs 800 Cr ...*' *and 'Delhi Govt cancels GST registration of 1282 traders for fraud ...*'. Such headlines in hundreds have become so ubiquitous that the size of the tax evasion has assumed the proportion of a mega scam. As per official estimates, the ITC availment on fake invoices, IGST refund frauds, and other types of evasion are speculated to have cost the Exchequer to the tune of ₹ 48,000 crores. This is much more than the sum of the total NPAs of ₹ 40,000 crores reported by the RBI for the last fiscal year! Such a scale of abuse of the ITC facility, which is further going to be liberalised vide Section 43A, is certainly scary for any Government! At the going pace, it would be clocking close to ₹ 1,00,000 crore by the end of the third year of GST.

Tax evasion has evidently acquired multiple dimensions—or call them *modus operandi*—availment of ITC based on fake invoices; invoices being issued to X but goods being supplied to Y; over-invoicing of exports for claiming higher IGST refunds; availment of blocked credit, fraudulent refund of accumulated ITC; and splitting of a supply to reduce tax liability. A good example is the one where Casinos were found to be splitting the transaction value to minimise the GST outgo albeit they were found to be collecting full GST from their customers, and the magnitude of this case is, based on initial estimates, about ₹ 6,500 crores!

Let us examine the magnitude and the *modus operandi* of IGST refund frauds. As per sources, between July 2017 and March 2019, over 31,000 exporters have claimed refunds of ₹ 77,000 crores. With exporters mounting pressure on the Government,

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* TIOL – COB (WEB) – 668, 18 July 2019.

the Revenue launched a special drive and special windows to process such claims. But scrutiny of their profiles reveals that only about 55 per cent of the claimants were regular exporters in the past three fiscals. The remaining 45 per cent were found to be irregular in terms of having no export records at all in one or two financial years. This clearly indicates that there was a concomitant growth in the number of fly-by-night operators with the increasing ease of claiming refunds sanctioned by the GST Council. A good number of exporters did inflate the value of their exports consignments for claiming higher refunds and the Customs made the cardinal error of not examining the consignments nor developing any risk parameters. It can also be speculated on this premise that some of the Revenue officials might have 'washed' their hands in the favourable flow of refund currents! Refunds were liberally sanctioned!

A detailed presentation on this issue was made before the Committee of Officers prior to the last GST Council meeting and as per some SGST sources, the key finding was that as against a rise of 8 per cent in the number of shipping bills, there has been over a 300 per cent increase in IGST refund claims. A quick analysis of claimants' profiles further indicated that about 60 per cent were non-companies, such as firms and proprietorship entities. A quick dive into the data further stunned the analysts—a good swathe of refunds were claimed by such proprietorship exporters who largely filed barely two shipping bills in a month. More interestingly, Delhi topped the tally of States which sanctioned the maximum refunds. Unlike Maharashtra and Gujarat, which ranked second and third, Delhi recorded 56 per cent of the total IGST refunds sanctioned.

Against this backdrop of a grim scenario, the larger question is—what should be done to stop such abuse which has the potential to derail the evolution of GST? Obviously, administrative measures like raids, recovery, and arrests alone would not be able to plug this leakage. It has to be a mixed basket of policy and legislative measures. The first step which should be taken is to tighten the process of scrutiny at the stage of registration itself. Thankfully, Aadhaar is going to be made mandatory. Aadhaar, with PAN, would enable the GSTN or CGST or SGST officials, who approve such registration within forty-eight hours, to quickly verify their income tax track records of the last few years. Such verification would also indicate the kind of funds available in one's bank accounts. If somebody has no verifiable track record of income tax or business or assets either in the name of a new company or its Managing Director or Partners, the Revenue should fix a threshold for the ITC for certain periods. If somebody furnishes a purchase order, advance payment details, and some other documents, one may apply for raising the cap on one's invoice, which is the mother of rising ITC frauds. In such cases, Revenue may even seek a minimum bank guarantee (BG) to protect its revenue! Such a Rule should be applied very selectively—only in the case of taxpayers showing no track records. Secondly, the threshold may vary for a new company, an LLP, and a proprietorship firm. Thirdly, banks should be integrated into the monitoring mechanism so that payment received

against invoices raised is not withdrawn in one go or in a systematic manner to defraud the Exchequer. Such registrants should also not be allowed the benefit of ITC on a provisional basis. For this purpose, an Explanation in the proposed insertion of Section 43A may be added prior to the passage of the Finance Bill, 2019.

Let us now move to some possible punitive measures. Going by the organised nature of ITC Fraud Syndicates, the possibility of making such an offence a predicate offence under the PMLA may be explored so that the properties or other assets created by utilising such funds are attached. More onus should be put on assessees in case of a fraud—suspension of registration and a higher rate of interest on reversal of ITC or recovery of tax stolen. Similarly, a greater onus should be put on Revenue officials who should do physical verification or risk assessment for all such claims which are above certain sum, like ₹ 10,00,000. The rationale is to keep a close watch on each claim filed. Depending on the risk scores, Special Audit under Section 66 should come in handy. A well-oiled verification unit should be kept ready in the field formations. A systemic alert should be generated if inward supplies are less and outward supplies are for exorbitant amounts. Chief Commissioners should be sensitised to keep a watch on high-value invoices raised by suppliers in their jurisdictions whose recipients are outside their jurisdictions. The possibility of fraud is more in such cases.

In a nutshell, if the bleeding of the Exchequer is to be stopped, it has become inevitable to initiate a series of policy and legislative measures to make registration a carefully-verified activity. If need be, even physical verification of addresses may be resorted to but before it is done, a detailed SOP should be put in place to minimise the pain such an exercise necessarily causes to an assessee. All such measures would be efficacious and effective if they ensure that no honest or genuine assessee is troubled in the name of verification or it does not degenerate into a money-making machine! Let us hope that only the genuine interests of the Exchequer are protected and it is not seen as sunshine for making hay!

(PS: To be concluded in the next column.)

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GST 'Galloping' on the Highway of Litigation!*

It was certainly not a mundane extension of the current session of the Parliament which came to an end yesterday. Though several economic and non-economic bills were also passed during the extended period, the entire session would go down in history for the surgical pruning of Article 370 of the Constitution. No doubt, it was an earth-shaking move in the political space but its reverberations can be seen even in the fiscal space. The notable fiscal effects are going to be on the computation done by the 15th Finance Commission, the applicability of the equalisation levy, and the Goods and Services Tax (GST). Given the fact that the terms of reference of the Finance Commission have been enlarged with more time at its disposal, any change in its mathematics can be taken care of during the extended period. It appears that the Google tax (Equalisation Levy) would also get attracted as soon as the new political structure is notified. So far as GST goes, a few Notifications and Removal of Difficulty Orders would perhaps suffice to meet the challenges arising from the New J&K Reorganisation Bill passed by the Parliament.

Though the attention of the Union of India would continue to be on the territories of J&K and Ladakh, the changing GST landscape also needs close monitoring before it gets awfully off track! Thanks to the litigious approach to the policy-making in the past, the High Courts are literally overflowing with writ petitions and most of the orders being passed have begun to go against the Revenue. In hindsight, this clearly transports us back to the erstwhile regime of VAT, Central Excise, and Service Tax, where litigation was the most prolific output of our tax system. To liquidate immitigable pile-ups of cases, the Union Budget has proposed the *Sabka Vishwas* Scheme but it appears that the GST Council would have to soon propose a similar scheme for GST as well. My simple guess is that by 2020, the Council would do good for its own interest by approving another round of *Sabka Vishwas* Scheme to liquidate GST-related cases.

TIOL has received several e-mails from assessees pointing out the excesses being done during Audit and how the assessees are gearing up for litigation. It is true that ITC facility has been misused by some assessees who have utilised the prohibited credit in TRAN 1 and TRAN 2, but the Departmental instruction to verify them has resulted in excesses in a large number of cases. Armed with the Board's Instructions,

* TIOL – COB (WEB) – 671, 8 August 2019.

CERA audit teams have begun the process of verification but even in such cases where proper documentation is available, assessees have been directed to reverse the credit with interest. Some taxpayers' e-mails have explained specific examples such as:

> *1) Denial of TRAN 1 Credit for the supplies received from Jammu & Kashmir to the State of Maharashtra: The said goods which were procured by the own Central Warehouse from the unit located in Jammu & Kashmir has suffered excise duty as the final products were dutiable as per Central Excise Tariff Act, 1985. The said goods were not unconditionally exempt from excise duty and therefore, the duty was paid on such goods. Even if the J&K unit has been claiming the benefit of the refund as per Notification 56/2002-CE dated 14.11.2002, the refund was granted on the total duty paid in Cash with a cap of 56%. In short, the dutiable products suffered with full duty and then became eligible to claim refund of certain percentage to the eligible units after fulfilment of criteria as specified in the Notification. The assessee notes that it does not mean that the goods were fully exempt and no amount was paid to the Government.*
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> *2) Denial of Transitional Credit for Input Services - GST TRAN-1: The Assessee had Centralized Service Tax registration and has multiple locations manufacturing units within the State of Maharashtra. As per internal standard procedure, the service receiver manufacturing unit used to receive services from the service provider. Upon completion of services, the service provider used to issue Invoice with Service tax levy to concerned user department. Upon verification and satisfaction of the services the invoice used to be approved by the user which was then sent to the Bill Booking department at Head Office. As per the agreed terms and conditions the bill used to be processed for payment.*
>
> *3) Denial of TRAN 1 Credit for the supplies received from Jammu & Kashmir (in transit goods upto 30th June 17).*

Since the GSTR-9 and 9C deadlines are close and the returns are being filed in thousands every day, the Revenue and Audit Commissionerates would also begin their assessment and scrutiny exercise in right earnest, some assessees are of the opinion that only when some evasion is detected on the basis of GSTN data, a premise-based audit should be undertaken. Their logic is that since all the data is available with the GSTN in electronic format, the first round of audit should be done at the backend and books scrutiny exercise should be undertaken only in such cases where evasion is 'diagnosed'! Their rationale is that assessee's premise-based audit should be avoided in the present-day IT-based tax system. Though one may see some merit in such an argument, audit is an unavoidable tool to verify the correct payment of tax or any leakage of tax payment. Since India follows the Canadian model of audit, and the Government has created too many Audit Commissionerates for the same purpose, minimising the audit exercise would be difficult. However, all efforts should be made to make such an exercise more business intelligence-based and transparent. Minimum trouble should be caused to the assessees and advisory in this

regard has been issued by the DG Audit. Ideally, a post-audit survey should be conducted by the CBIC to receive the feedback of the assessees and a follow-up action report should be presented before the GST Council. A close monitoring mechanism is the need of the hour to minimise harassment of taxpayers.

Another potential area of litigation is the e-Way Bill. It is believed that cases involving over ₹ 2,500 crores of tax have been booked last fiscal. One assessee writes to us that the State GST authorities have particularly gone out of the way to harass the industry and the transporters. Cases have been booked even in the cases of minor discrepancies in papers, and it is going to be a major head of litigation under the GST system. Some of the examples of discrepancies pointed out by the assessees are:

> *1) The amount shown in the bill and e-way bill differed slightly; 2) The address shown in the bill and e-way bill differed slightly due to space constraint or other technical issues of GSTN; 3) In Bill to ship to model, the address of the ship to was replaced by address of bill to in the e-way bill; 4) The bill and e-way bill was of, say 1000 cartons, but on physical verification 1020 cartons were found; 5) On physical verification, the officers took the view that the value of the goods was not correct; 6) container moving to the purchaser importer under Customs seal from port but e-Way bill albeit exempted but being demanded; 7) quality of goods is of higher value but the value shown in e-Way Bill is lower etc.*

In such cases, even though the supplier pays GST twice, a 100 per cent penalty is to be paid if the confiscated goods and the trucks are to be released. In many cases, the total tax payment exceeds even the value of the goods. Let us now see the travesty of legal provisions. Once the supplier pays the tax and penalty, the proceedings get deemed to be concluded u/s 129(5). This may mean that no appeal can be filed! If it is so, it does violate the Principles of Natural Justice and everything gets settled on highways! Incidentally, a batch of writ petitions with regard to the interpretation of Sections 129 and 130 of the CGST Act, 2017 are pending before the Gujarat HC and were to be finally heard yesterday.[4]

In a nutshell, the GST evidently appears to be moving on the highway of litigation unless urgent measures are taken to stop it from getting derailed! Since none but the Ministry of Finance knows it well that litigation only leads to pile-ups of arrears and does not serve the interest of the exchequers, the field officials need to be sensitised and restrained from richly contributing to this bottomless pit called litigation!

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4. See 2019-TIOL-1623-HC-AHM-GST.

GST:
A Close Shave from 'Cases' of Cesses

Introduction

The history of cess has been a messy story in India! In fact, it would be closer to the truth if I say that more than any other tax, cesses rested in the nucleus of fiscal policies pursued by the Centre as well as the States. Cesses always popped up as 'rescue workers' for the Governments whenever the wallets went through a phase of famine or drought of much-needed resources. It brazenly represented the ad hoc face of our fiscal policies. It all began with a specific purpose tax but later degenerated into merely a tax revenue, albeit accounted for in the notified *gulak* (kitty)! Depending on the exigency confronted by the Governments, the expression 'specific purpose', like education or health, often lost its meaning and the funds did slither out of one account to another if one goes by the CAG reports. At one point in time, more than forty different types of Cesses used to be imposed by the Centre. Similarly, the States also used to resort to such an easy method of mobilising resources.

Cesses always remained a close pal and a blue-eyed instrument for the Union of India because of certain constitutional *carte blanche*! Unlike other direct and indirect taxes, which are to be constitutionally pipelined into a divisible pool and the final receipts are to be shared with the States as per the calculus recommended by the Finance Commission, cesses are non-sharable revenue. As a result, whenever the Central Government needed extra resources, the natural predilection was always to go for cesses. Secondly, cesses are, by letter and spirit, non-CENVATable. In other words, no credit was available to the industry against such a payment. Over a time spectrum of seven decades, cesses constituted a tangled container of revenue. How much they added to the compliance costs of the businesses was neither cared for nor ever extensively studied at length! Though bellyaching from economists and also the taxpayers was occasionally heard, it was never deafening enough to arrest the attention of the political masters!

India then witnessed a new dawn at midnight in the form of GST on 1 July 2017. Dozens of Central and provincial cesses were subsumed with a shade of quietism! Though the focus of the world remained on mega heads like VAT, entertainment tax, luxury tax, service tax, and central excise duty, several cesses collected by both the institutions of the State were given a silent burial and it was welcome by the Indian Inc. with audible thunder of clapping! Against such an impolite background, the Union of India eerily made an attempt to exhume the skeletons of the quietly-buried embodiment of cess at the 27th GST Council meeting! The cause apparent was to help sugarcane growers caught in market-driven distress. There was indeed a genuine resource gap and the Central Government tried to test the 'excessive waters' of cooperative federalism by proposing to levy sugar cess. Though the sugar cess always qualified as a 'scary ghost' for the industry for more than 60 years as it was

not withdrawn despite recommendations by the Second Finance Commission in 1957 and then, the Twelfth Finance Commission in 2004, but none had imagined that the 'scarecrow' may stage a comeback even under the GST regime!. On 1 February 2016, it was hiked from ₹24 per quintal to ₹124 per quintal. Some States did opt to levy VAT on sugar but a large number did not, as it was considered a mass consumption commodity.

Though the Centre had a kosher reason to propose such a levy, it erred in misconstruing the GST form of taxation, which should not be used for a welfarist measure of the State by distorting its basic design; and the non-negotiable reasons are—it is a levy on value-addition and it works against cascading of taxes. Any levy like cess is intrinsically not designed to exist in harmony with the GST. Thankfully, the matter was referred to a Group of Ministers and the issue was finally settled against on the ground that a large swathe of States did not favour such a levy to palliate the pain of a particular segment of society. The Kerala Finance Minister argued that can a cess be levied to aid rubber growers tomorrow? It was indeed a close shave for the GST. But certainly not for too long!

Nature is indeed supreme! When Nature gets angry, ambers of its fiery mood rain down in the form of natural calamities—and one such natural disaster struck Kerala when devastating floods washed away the comforts of the State Government as roads were upended; houses collapsed; people lost precious lives; wildlife in the forests got inundated; and business premises were marooned! It was apocalyptic in all respects and the Kerala Finance Minister came up with a proposal to levy Flood Cess for extra resources! Having pooled its fiscal sovereignty in favour of the Council, Kerala had no means nor any other choice. After extensive deliberation, the Council knowingly decided to err on the side of distortions in the GST design but the economy was saved as the mandate was sanctioned only to levy such a cess on intra-state transactions and for a limited period. Though the Kerala government knew dollars to a doughnut that it would not fetch more than ₹600 crores, history was made by 'infecting' the GST design with the virus called 'Flood Cess'! The idea behind such an exception was perhaps to experiment with it and get to know the Mother lode of intricacies on the ground and also to gauge the mood of the victims of the hydrological disaster so that whenever a national-level disaster strikes India, the Council will have a precedent to lean upon! By the way, India is ranked third on the global disaster charts by the UN after the U.S. and China!

Chapter 1 touches on the issue of resuscitation of the much-maligned sugar cess, which took decades to skid into the kirkyard but rising like a phoenix from the ashes, it sprang into the GST Council's agenda and the key backer was the Union of India, which wanted to palliate the pain of sugarcane farmers by offering a package; strangely, ignoring the rationale of the GST, which is known for its virtue to neutralise cascading, the Central Government risked serious distortions in the GST design; and what may amount to double whammy is the gift of such a loose idea to the States, who may begin clamouring tomorrow for more such cesses.

Chapter 2 illustrates the tricky backdrop of the proposal of sugar cess; how most States agree to the need for a pain-reliever but owing to their ideological schism, were not keen to support the proposal and the issue was finally referred to a Group of Ministers; an insight into the constitutional powers of the Council to approve such a levy in the name of a disaster bruising the farmers but the question of morality—whether a distortionary precedent should be created for a piddly sum of ₹7,000 crores estimated for the relief package; the pros and cons of such a proposal; the timing of injecting such an exception into the GST design; the merit in much-feared cracks in the GST system; and why the GoM should not furnish its report in an unholy haste!

In Chapter 3, I have elaborated how the GoM, headed by the Finance Minister of Assam, sought views of the Ministry of Food and also the Ministry of Law about the constitutional aspect of sugar cess —whether Article 279A(4) vests such powers in the Council to approve such cesses and whether the expression 'disaster' used in the clause would take under its sweep even market-driven disasters; whether the residuary powers of the Council are equal in measure to Entry 97 in the Union List of the 7th Schedule to the Constitution; and whether the reasons are indeed so coercive in nature that the ghost of sugar cess, which was exorcised after concerted efforts, has to be brought out of the mausoleum?

Chapter 4 talks about yet another disaster which proved to be a watery grave for hundreds of Keralites and how incessant rains and floods punctured the balloon of courage of the State machinery and how the Kerala Finance Minister came up with a proposal to levy Flood Cess under the SGST Act—only on the intra-state transactions, to mobilise extra resources for immediate help and repair of public assets; though GST is not a system to gather extra resources to meet exigencies, the Council had a heftier issue to decide—whether such a case would create a precedent for most of the coastal States which are disaster-prone and even the North Indian States which often pay through the nose to deal with ruthless floods every year; and finally, how the issue became a litmus test for the spirit of cooperative federalism!

In Chapter 5, I have dwelled on the issue of Flood Cess, which was referred to a larger Group of Ministers representing the coastal and the hilly States, including the North-Eastern States, which often fall victim to natural calamities, for exploring the wiggle room for setting up a perpetual fund to deal with such calamities; whether there are any caveats prescribed under Article 279(A)(f) of the 101st Constitution Amendment Act, 2016; and the GoM being mandated to explore whether such a levy can be imposed only for natural calamity and not industrial disasters or man-made calamities!

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GST: Sugar Cess, a Pause before a Decision May Serve Better![*]

Patience pays, and gutsy patience pays more! Such a *mantra* is well-reflected by the latest GST collections for the month of March. The total GST mop-up breached the milestone figure of ₹ 1,00,000 crores and it was described by the Union Finance Minister, Mr Arun Jaitley, as a 'landmark achievement'. Though some industry experts may believe that there are many 'invisible' elements in the March month's collection (20 April was the due date for payment) such as stock clearances, arrear collections, and late payments of past months with interest, it is equally true that the compliance curve has begun to show an uptick. With the GST's complex architecture increasingly settling down and the fear of anti-evasion measures like e-Way Bills coming into force, a large number of fence-sitters have woken out of their slumber to comply with the return-filing regime. That is how one may notice a marginal 0.5 per cent increase in the compliance percentage to 69.5 per cent in March as against 69 per cent for the previous months. My guesstimate is that this percentage should be hovering around 72 to 73 per cent in the next two to three months and one good reason for such a high hope is not only the e-Way Bill but also the familiarity with the new regime, trickling down to small assessees.

Going by the statistics, the data analysts in the GST Council may make some fury-stoking inferences about the recalcitrant response shown by the community of Composition Dealers but this is where more courageous patience is required. Out of a little over 19,00,000 such dealers, only about 11,50,000 have filed their quarterly returns and paid less than ₹ 600 crores to the GST Kitty. Given the fact that most of such dealers are traders and they have natural political patronage of the ruling parties in the States, their compliance would always remain a spot of concern for the Council. It was a deliberate decision of the Council to leave assessees up to the benchmark of ₹ 1.5 crore-annual-turnover under the jurisdiction of the States, and low compliance behaviour was quite predictable, right from the inception of the GST roll-out. The fact that a large number of service providers, such as restaurant owners, constitute an 'unknown territory' for the State GST officials, it requires a longer duration of patience before they start contributing to the revenue basket. In my view,

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* TIOL - COB (WEB) – 605, 3 May 2018.

the month of April (20 May is the due date for return-filing) may turn out to be a bit more realistic 'barometer' for projecting the revenue trend in the current fiscal and the budget estimates are not too optimistic if one takes the fast-changing macro variables (industrial production in April has picked up) of the economy in the final reckoning.

I am sure the GST Council is going to briefly discuss the revenue trend at its meeting tomorrow. But, besides such issues, the Council is expected to give its approval to solutions worked out against many weightier and ticklish problems. One of them is of course the much-talked-about 'Fusion' Model of the new GST Return. With the GSTR-2 and GSTR-3 inevitably guillotined, the Council is likely to give its nod to a set of basic principles on which the Fusion Model of the GSTR may be developed in close association with the software vendor. A lot would depend on the inputs and understanding of the coding team of Infosys, which would require a few months to develop a simple, single-page format but the same must incorporate the basic principles to be approved on Friday; and one of the principles is going to be a clear-cut linkage of tax payment with the Input Tax Credit. Whatever shape or configuration may be outlined for the new return format, the Revenue is unlikely to sacrifice the 'umbilical cord' which would contain the 'real intelligence' to prevent undue availment of ITC. Let us wait for the curtain-raising event for more details.

The second major agenda item is going to be the ownership issue of the GST network. If one goes through the tale of its birth pangs and the controversial file notings by the then CBEC Members, it is a classic case of lobbying and counter-lobbying in the Ministry of Finance. But what prevailed finally was the 'Ministerial' view which saw many virtues in the private ownership of such an entity, and one of such virtues which was recently reiterated by its CEO, Prakash Kumar, was the handy hiring and firing policy (Rule 56[j] exists even in the Government). Quick came the question—how many personnel have been fired by the GSTN so far? FOUR was the answer. At what level? Neither known nor disclosed! Another virtue which was vehemently hammered in the beginning was the salary package required to hire good talent from the market. But what one may see now is that it is full of talented and 'coded' government employees who do understand both, the intricacies of the internal working of the Governments and the technology. Secondly, when the entire coding is to be developed by a third party, such an argument, empirically speaking, stands on crippled legs.

What is more relevant in today's context are the twin reasons—the confidentiality of data which TIOL has been hammering for long, and the owner-customer coordinates. Let me explain the second issue, first. In short, GSTN is an incorporated creature which is *de facto* if not *de jure*, owned by the Government and its statutory corporations and the ONLY CLIENT it serves are the Governments. Against this backdrop, allowing the paper ownership to rest with others makes no sense, particularly in the light of the first reason as stated above—the confidentiality of data which is now, globally treated as 'modern oil'! Taking a leaf from the ongoing global

data leakage controversies from mega social media players like Facebook and Twitter, the Union of India has finally understood the importance of protecting taxpayers' sensitive data. It now understands well that any leakage of data from the GSTN Server may snowball into a mega political crisis in the country. It would be akin to offering powerful 'explosives' on a platter to the opposition parties. Against this backdrop, it would be wiser for the GST Council to approve the proposal for a complete takeover of the GSTN, which may work closely in association with the DG, Systems of the CBIC.

Though the change in the ownership may not guarantee complete data protection, then the onus falls on the Government which may either opt for blockchain technology in the future or set up many firewalls. A fool-proof matrix of safeguard software would indeed be required to ensure that no data pilferage takes place. Such an issue cannot be underlined better if one goes by the CBIC Chairperson's latest communication letter circulated among the field formations. She notes:

> *... As you are aware, Information Technology has become the platform on which all our activities are based. In this context I would like to underscore the importance of adhering to Information Security best practices in respect of locally procured standalone computers being used by the field formations. Several instances have been reported where unprotected desktops were connected to the internet resulting in data pilferage to command and control centres located abroad and controlled by unknown, possibly malicious entities. I urge all CCs/DGs to take concrete steps to spread cyber security awareness in all formations under their charge ...*

This brings me to another sensitive issue of resuscitation of the much-maligned Sugar Cess! It took several decades for the Union of India to bury this Cess by allowing GST to subsume it. Now, it has sprung back on the Council's agenda as the Union Government is mulling over the recommendations of the Rangarajan Committee Report and needs to create a fund to finance any gap arising from payments to farmers by cane price mills. Though the intention of the Government is noble, the method chosen is likely to be distortionary. When the primary objective of the GST is to neutralise cascading of taxes, going by a specific Cess so early for the new regime is certainly not a mature idea! The GST is a system based on value addition and cascading is neutralised through the input credit apparatus. This clearly means that all such taxes which may result in non-creditable levies should be avoided. If a little extra fund is required, it should be carved out of the actual collection by increasing the tax rate from the present 5 per cent to whatever rate the Council may decide. Any decision to go for Cess may give ideas to even the States which may soon clamour for specific levies if they run out of their own ill-managed finances.

In a nutshell, if the Council decides that the levy of sugar cess is inescapable (The Union of India is not in a mood to share revenue with the States), it should be limited only to non-industrial consumers as no ITC means a tax on tax for the industries—

certainly not a desirable development. Or, it may be made a part of the Compensation Cess or allowed as set-off of Sugar Cess against Compensation Cess to the industries. Besides Sugar Cess, it is also time now for the Council to review the tax rates on certain goods which continue to bear the 28 per cent burden. Cinema tickets could be one of the few services which bear the burden of the highest tax rate. For doing so, the Council needs to go by the feedback given by the various sectoral industry associations and if it finds merit in their demands, it may be revised downwards so that the feeling of being 'burdened' could be eased in the larger public interests.

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Sugar Cess: The GST Council Should not Cave in to Eat the 'Forbidden Fruit'!*

For the audiences outside India and experts of all hues in India, the introduction of GST has indeed been one of the major recent achievements, not only for the Union of India but also for all the States; and it was largely hailed as the inception of a new era of cooperative federalism. Though healthy federalism has always remained one of the cherished constitutional goals in India, full credit goes to GST for bringing all the States—some of them joining willy-nilly—under one umbrella. Thanks to the smooth conduct of the GST Council meetings by the Union Finance Minister, all decisions have so far been taken by consensus or near-unanimity. But the same spirit was evidently missing at the last meeting of the GST Council.

Before I talk about what triggered thick wrinkles in the fiscal cooperative federalism framework which may further snowball into a much more 'disruptive' force, let me briefly talk about a specific political tie-up going sour! The Andhra Pradesh Chief Minister, Chandrababu Naidu, had always been a reliable ally of the BJP. But their political relationship was tenuously dependent on what Mr Naidu has described as the grant of Special Status to his newly-carved out State. The Modi Government, perhaps for its own valid reasons, did not honour the spirit of the promissory estoppel and this led to a predictable fracture in their political tie-up. Even as a tug-of-war was gathering momentum on this issue, the Centre notified the setting up of the 15th Finance Commission. Soon, some of the Southern States noticed that the population based on the 2011 Census was kept as one of the criteria for the central grant to be distributed among the States. This was indeed timely potential ammunition for the disgruntled Naidu Government which lost no time in organising a conclave of all such States which are largely at loggerheads with the Centre, and all of them expressed their concern about the unfairness of the Terms of Reference (ToR) of the Finance Commission. In his statement, the West Bengal Finance Minister articulated that 'States are facing massive deficits'. He further pointed out that the States need to resist the forced ceiling placed on the States' ability to borrow.

Even as such undercurrents of acerbic feelings were gathering momentum, the 27th GST Council meeting proposed the levy of Sugar Cess to help the distressed farmers.

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* TIOL - COB (WEB) – 606, 10 May 2018.

The Centre proposed such a levy as an elusive palliative for the financially-hurt cane growers. Though most State Finance Ministers would privately admit that such distress needs to be addressed immediately, because of their growing ideological schism, many of them opposed it on various grounds. The Kerala Finance Minister asked that if the rubber growers in his State face a similar predicament of the market forces, will the Council propose a similar Cess? No doubt, there is merit in his argument. Similarly, there is merit in the Centre's viewpoint also. But thankfully, the discussion did not stop at levying such a Cess and a larger question was referred to a Group of Ministers: What measures can be taken to meet certain circumstances emerging from contingencies?

Undoubtedly, the GST laws provide wide enough room to levy new taxes or surcharges or cesses or whatever name it may be given. So far as the statutory powers go, there is no dearth of them. But, the much larger question is: Are we faced with a national contingency of such intensity that distortion of the GST system can be treated as a minor price to pay? Having powers to levy new taxes is one thing but exercising such powers at the drop of a hat is essentially an ethical question! How is morality involved in it? Just prior to the introduction of GST, it was unanimously agreed that all Cesses will be subsumed by the GST and the same was done. One reason for such a decision was not to dilute the core virtue of the GST, i.e., the Input Tax Credit. Since Cesses are generally levied for a specific purpose, it tends to deny credit for the same, largely; and it was widely appreciated by the industry and trade. Though Compensation Cess is one exception even within the fold of GST, it was accepted as inescapable, going by the Revenue Neutral Theory.

Now, the GST is not even a one-year-old toddler but the Centre wants to burden the 'young child' with a more complex structure! Such a proposal appears to be originating more from the maxim, old-habits-die-hard, rather than the actual need for additional revenue. The Centre intends to garner about ₹ 7,000 crores to help cane growers. This is certainly not a huge revenue requirement for which the GST architecture should be infused with 'impurities' even before it gets fully accepted by the taxpayers. It has taken more than nine months to marginally spur the compliance percentage from 69 per cent to 69.5 per cent and any more burden on it would further militate against the growing graph of its acceptance. Secondly, it is, by no standard, desirable at this stage to levy a New Cess for such a small sum. If the Union of India really wants to mop up such a small kitty of revenue, it has many other options to do so. One of the routes could be the hike in the tax on some of the no-resistance demerit goods, such as tobacco and tobacco products. For doing so, it does not need to go back to the Parliament as it has the delegated legislative powers to do so. It can partly mobilise some funds by cutting down on some of its not-doing-well schemes or administrative expenditures. Opting for a new Cess on GST would be an easy route. I believe a huge chunk of the fund is piled up under the head National Calamity Fund. By tweaking the definition of 'calamity', all such distress calls can be attended to by withdrawing some money from such funds also. In fact, a simple

widening of the CSR canvas under the Companies Act can also partly do the job if it is linked to large sugar mills' obligations for CSR activities. If 'help' is the objective, there are a good number of large groups of sugar mills which are warranted to spend a certain percentage of their profits on CSR. There is nothing wrong if they are alone permitted to transfer certain benefits to distressed cane growers. It would always be more desirable to look for sector-specific solutions to help the audiences of a particular sector rather than distorting the entire fiscal system.

Our politicians, whether at the Centre or the States, need to realise that the tax system should not be tampered with too often for smaller needs as such decisions go against the spirit of certainty and predictability of a system. A tax system should sparingly be used for direct welfarist activities. Such a virtue has now been accepted after seven decades of experience but the obduracy of the political habits often persuades the top leadership to overlook the 'cracks' in the system and achieve the short-term goals! This calls for a behavioural change among our Finance Ministers at the Centre as well as in the States. Direct benefit transfer is a more secure and trusted route to help the distressed populace and fiscal provisions should not be used to achieve the same. We have seen how tax exemptions have created distorted contours of industrial growth in many parts of the country. Some States have 'outgrown' their size and many States have become '*bimaru*' (ill). Having compiled several decades of such data, it is high time our fiscal strategists now realise that the tax system should be allowed to do its job—to collect revenue for the Exchequer by maintaining friendly skin!

If we leave aside the issue of Sugar Cess and even the proposal to incentivise digital payments, which would be another unpleasant pill for the GST to get complicated with a tinge of impracticality, the larger question of mobilising additional resources in case of contingencies may be addressed carefully. The Group of Ministers (GoM) should not submit its report in unholy haste. It should seek suggestions from experts and various quarters of the economy as the roadmap suggested by the Group would become a stubborn contour of policy for future decisions. Though there can be some very simple methods such as increasing the tax rates on demerit goods or hiking the rate of Compensation Cess, what must be explored is the method which promises the least pain for the economy. It must be remembered that every extra penny that the Exchequer snatches away from the taxpayers, is largely and figuratively, at the cost of economic growth. The simple equation is that lesser money in the hands of the industry and trade would mean lesser investment and lesser job creations, which are an equally challenging front for the Indian economy today; and it has much more serious political implications for any ruling party than providing short-term palliatives to certain specific sectors. Let us hope the GST Council does not 'eat' the forbidden 'fruit' which may appear to be more attractive because it is low-hanging and takes a call on a measure which does not do long-term harm to the newly-born tax system!

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3

GST: Is it Worth Reviving the 'Exorcised Ghost' of Sugar Cess?*

The concept of Goods and Services Tax (GST) continues to hog the headlines not only locally but also internationally. Prior to India, Malaysia had embraced GST on 1 April 2015. Of course, unlike India, Malaysia had done several rounds of preparations, including a special scheme to take care of the disadvantaged sections of the national population. After three years, here comes the news that the new Prime Minister (the oldest in the world) is keen to roll back the GST as he had promised so in his party's election manifesto! Whether such a roll-back is possible without much cost to the economy or the exchequer, is to be seen in the months to come as the Malaysian Ministry of Finance has decided to make the 6 per cent GST rate to be zero-rated from 1 June 2018. It is indeed going to be a global record as it would be the first instance of any economy rolling back the conceptually-sound GST system because of its implementational flaws.

Let us move to our domestic turf. The two Groups of Ministers (GoMs) which were set up after the 27th meeting of the GST Council are gearing up to harmonise their views on the issues of levy of Sugar Cess and incentivising digital payments through concessional tax rates. The GoM on Sugar Cess, headed by the Assam Finance Minister, has sought the views of the Ministry of Law on the constitutional validity of such a levy and from the Ministry of Food on how such a tax revenue is to be utilised. The first reference made to the Law Ministry may appear to be a time-buying tactic as such power is indeed available to the Council in abundance. Let us take a look at two relevant Clauses of Article 279A(4). The Council can make recommendations to the Union and the States on:

> *(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster; and (h) any other matter relating to the goods and services tax, as the Council may decide.*

One way of raising additional resources for a specified period to meet any contingency which may be bracketed as a natural calamity or disaster, is to 'play'

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* TIOL - COB (WEB) – 607, 17 May 2018.

with the tax rates. But the in-built limitation in this Clause is that such resources can be generated only to meet eventualities arising out of a natural calamity or disaster. Now, the issue is whether the present crisis gripping the sugar industry or cane growers, which is largely market-driven, would also qualify as a disaster. No doubt, it is a disaster situation and that is why the Union Cabinet was forced to announce a special relief package but the debatable issue is whether the expression disaster in this Clause would qualify to take under its sweep market-sponsored disasters also. If one takes the view of legal *pundits*, the popular statute interpretation tool one may resort to here is the Doctrine of Harmonious Construction where the expression disaster will have to borrow the meaning from the term 'natural' and such a connotation would probably exclude the market-driven disasters.

This brings us to the next Clause which vests residuary powers in the Council. Going by its wordings—any other matter, it may give the impression that the intent of the Parliament was to offer *carte blanche* to the Council to decide in its wisdom what is right at a particular point in time. Very similar to Entry 97 of the Union List in the 7th Schedule of our Constitution, clause (h) vests unlimited powers in the GST Apex Body to decide whatever is required to be decided. So, the Ministry of Law is unlikely to disappoint the GoM on this issue. But the most pertinent question is: Is it necessary for the economy to revive the Ghost of Sugar Cess which took sixty-one years before it was given a decent and ceremonious burial on 1 July 2017?

The journey of Sugar Cess began with the Report of the Second Finance Commission released in 1957, a part of which has been reproduced below:

> *The Government of India, in consultation with the State Governments, have decided that an additional duty of excise should be levied on mill made textiles, sugar and tobacco, including manufactured tobacco, in replacement of sales tax now levied by the State Governments, the net proceeds being distributed among the States …. In this connection the President has been pleased to decide that the Finance Commission should be requested to make recommendations to him as to the principles which would govern the distribution of the net proceeds of this additional duty among the States….*

Then came the Report of the 12th Finance Commission in 2004, which contained the recommendation*:*

> *…the share of the States in the net proceeds of shareable central taxes be raised from 29.5 per cent to 30.5 per cent. For this purpose, additional excise duties in lieu of sales tax on textiles, tobacco and sugar are treated as part of the general pool of central taxes. If, however, the tax rental arrangement is terminated and if States are allowed to levy sales tax (or VAT) on these commodities without any prescribed limit, the share of the states in the net proceeds of shareable central taxes will be 29.5 per cent. According to estimates available from the budget papers, additional excise duties in lieu of sales tax constituted about one per cent of the shareable taxes in 2003-04 and 2004-05 (BE)*

From 1 March 2008, the Sugar Cess of ₹ 24 per quintal was levied on the production of free sugar. This was transferred to the Sugar Development Fund for the benefit of the sugar industry and was not available for distribution to the States; the specific rate of Sugar Cess was again increased on 1 February 2016 from ₹ 24 per quintal to ₹ 124 per quintal and, consequent to the exemption from additional excise duty and subsequently, deletion of 'sugar' from the First Schedule to the Additional Excise Duty (Goods of Special Importance) Act, 1957 vide Finance Act, 2011, the States were empowered to impose VAT/CST on sale of free sugar. Consequently, the States of Andhra Pradesh, Tamil Nadu, Odisha, and Maharashtra had imposed concessional VAT on sale of sugar. It is pertinent to note that many of the States did not tax Sugar in the VAT regime.

In the GST regime considering the importance of the agricultural input and its connected impact on wide-ranging industries commencing from hospitality and hotels to food and beverages, the GST rate was fixed at 5 per cent. This rate took into account the effective taxes at that point of time and fixed it at 5 per cent *ad valorem*. It is also pertinent that GST on sugar is fully covered under the GST Input Tax Credit regime.

Now, if the exorcised ghost of Sugar Cess is brought back, it should not be at the cost of ITC. If ITC is guillotined, it would lead to cascading taxes and higher input costs. It must also be kept in mind that our GST model is based on the concept of value addition through the mechanism of ITC. So, any proposed change without ITC may distort the system besides the business eco-system. Secondly, the prices of all such food items where sugar is a major input, would also need a revision. It must also be remembered that the Council will be opening Pandora's box by making it a product-specific Cess as some States may come up tomorrow for some relief to their own product-specific constituencies.

In this background, my inputs for the GoM would be that it should look for many other ingenious ways to mop up additional resources in case of market-driven crisis situations rather than hastening to impose a new tax or cess or surcharge. One of the inherent obligations of the GST Council is also to keep the GST system simple and the least distorted for efficient allocation of natural resources among the various sectors in the economy. The GST system indeed calls for practising self-restraint and a lot of self-discipline before a decision in favour of a new tax is taken.

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GST: The New 'Cess'—Flood-Ravaged Kerala May Create a Fault Line in Cooperative Federalism![*]

Nature has been very kind to India. We have virtually everything, a mind-soothing topography may consist of oceans, deserts, mountains, plateaus, islands, forests, rivers, and lakes. But Nature is also the source of human misery if it is not looked after well, and so far as India is concerned, we have indeed not cared for Nature as much as we should have—perhaps for the sake of development! As a result, India gets inflicted by a number of calamities, very much proportionate to the degree of insouciance towards Nature; and today, it would not be wrong to say that calamities and India, statistically speaking, go hand in hand! As per the UN Report, India tops the list of the top 10 most disaster-prone countries in the world. According to the International Disaster Database, India confronted over 300 disasters in the past 18 years. We lost about 80,000 Indians and assets worth over ₹ 4,00,000 crores.

In this background, it would not be wrong to say that wherever there is a calamity, new taxes follow it, and this is what we can see in the case of flood-ravaged Kerala. Its Finance Minister, Mr Thomas Isaac, has called for powers to impose surcharge or cess under the SGST Act to fund the State's reconstruction efforts. When I checked with the Union Government whether any such request has officially been received, the general reply was NO. So, going by the media reports, Mr Isaac is going to write to the GST Council to amend the existing laws to empower the State to levy a higher tax rate under the SGST Act. He reportedly also said that he would speak to other Finance Ministers and request the Union of India to issue an Ordinance in this regard. He has stated that this is the minimum the Union of India can do for the State as he intends to levy Cess or higher tax rates only on intra-state transactions.

Insofar as his need for a large quantum of resources required to rebuild the devastated state infrastructure goes, there cannot be two opinions! The only point which calls for a debate is the means which he has suggested to mobilise additional resources. The GST is certainly not a tax system which can be used to mobilise additional resources on short notice, unlike in the erstwhile State VAT where every

* TIOL - COB (WEB) – 622, 30 August 2018.

State had vested powers and the freedom to levy new taxes at its own ease. When we talk of pooling of sovereignty and cooperative federalism, this is nothing but the 'surrender' of such freedom in favour of a common institution, i.e., the GST Council. Any new levy or higher tax rate has to be decided collectively and recommended by the Council.

In this background of constitutional limitation, what are the chances of Mr Isaac succeeding at the Council? Before I comment on Kerala's chances of mobilising additional resources, let me take the Netizens back to the recent case of Sugar Cess. To help sugarcane farmers in distress, the Union of India wanted to mobilise additional resources. A proposal was mooted before the GST Council and some of the State Finance Ministers had taken a stand that such farmers-in-pain belonged to only a handful of States and in that scenario, why should the taxpayers at an all-India-level be subjected to an additional levy? The proposal was finally guillotined as the majority did not support it. The Union Cabinet had to dole out its own resources as a relief package.

In this background, the chances of a similar question being raised by one of the State Finance Ministers cannot be ruled out. Secondly, it would indeed be akin to stirring the hornets' nest! If a higher tax or a Cess is levied to meet the fund requirement of Kerala, we should not forget that we have just left behind a 'rich' legacy of Cesses prior to the introduction of GST and our States are never in short supply of calamities. In 2017 alone, over 23,00,000 people were rendered homeless because of all sorts of calamities.

Let us also examine the powers vested in the GST Council as per Article 279A(4) of the Constitution 101st Amendment Act:

> *(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster; ...*

While surrendering their individual rights, the States had agreed to vest special powers in the Council which may decide to impose special rates for a specified period to mobilise extra resources during any natural calamity. So far as Mr Isaac's demand goes, it is genuine and the Council has the powers to help him generate extra resources during natural disasters. But there is a hiccup—there is no precedent available nor is there any established mechanism to do it fast! Even if we leave aside the spectrum of politics and ideological differences at the present moment of crisis being faced by the State, the Council is yet to develop a procedure in addition to a consensus among its Members.

So, what is to be done? Before the Chairman (the Union Finance Minister) calls for a meeting of the Council, the Centre should provide some more relief funds to the State on the guarantee given by the Council that the powers vested in it are to be exercised to create a new pool of resources to fund calamity-hit States as and when such a natural disaster happens and the funds 'loaned' by the Centre to be recouped by the new fund to be created for such a purpose. Ideally, an amendment in the

Compensation Cess can do this job by imposing a one or two per cent extra rate for this purpose and the basic design of the GST need not be tampered with. At present, the Government levies Compensation Cess on demerit goods and two per cent extra may be earmarked for a Calamity Fund to be utilised by the Council after going through the presentation of the disaster-struck State about the quantum of damages and it may decide the quantum of relief fund to be released from such a pool of resources, which must not go into the Consolidated Fund of India. This would also leave the larger canvas of goods and services unaffected by a new levy.

Another solution can be a new law legislated by the Parliament which has the powers to allow the Union of India to impose new taxes in the face of exigencies. But such a levy is not desirable as depending on the political party in power at the Centre, the release of such funds may crop up as a bone of political battle in the face of crises afflicting millions. It is always more sensible to let the Council keep such a fund under its belt and decide the relief package as and when a disaster is reported to it.

Given the present inflation level and also the fact that the business sentiments are not very encouraging in the economy, heading for general elections, the Union of India may not be too keen to favour a new levy or higher rates of taxes on goods and services as any new levy would further fuel the inflationary pressure. It is learnt that the Union of India is also exploring the direct tax route to mobilise additional resources but in the middle of the year, albeit it is not impossible, it may not be seen as too desirable to further complicate the matrix of surcharges and Cesses being collected through corporate tax and personal income tax.

It is true that Kerala needs help and such help has to be immediate, as the graph of human misery appears to be leapfrogging on a daily basis. It is equally true that the Kerala case has emerged as a litmus test for the Doctrine of Cooperative Federalism, which the Union of India and the State Finance Ministers have been incessantly talking about for the past two years. No relief to Kerala would cause a scar in the mind of many States' political leaderships and would also perhaps create a fault line in the mantle of pooled sovereignty. It is indeed a difficult time for the Centre and also the GST Council which needs to meet quickly to deliberate on the constitutional and legal issues and find an empirically-acceptable solution to help Kerala. TIOL wishes them good luck!

5

GST: Anti-Abuse Measures: e-Way Bills to be Matched with Sales Invoices*

The GST Council held its 30th meeting through video-conferencing against the backdrop of sticky shortfall in GST collections, demand for the Calamity Cess, and IGST refund denied to certain categories of exporters. Although there are multiple reasons for the tardy growth in the monthly revenue mop-up, the Council accepted the views of many States that in addition to implementing TDS and TCS provisions from 1 October, more needs to be done on the e-Way Bill front, and a proposal to deny the e-Way Bill facility was approved if an assessee fails to file one's returns for two consecutive months. A good move, indeed! There are reports that a good number of traders have been moving goods for the supply purpose but when it comes to filing returns, they turn laggard and sloppy!

The discussion on the e-Way Bill issue also acquired a new shade when it was pointed out by one of the States that there is no uniformity in the procedures being followed by different States. Some States have scaled up their preparations to the level of introducing the RIFD seal to prevent abuse of e-Way Bills generated for a particular consignment. The Council quickly approved the proposal to bring uniformity in the procedures and the technology being adopted by the States on an all-India basis. To further ease the queues at check posts, it has also been decided to install check-post readers so that the goods-laden vehicles could have a barrier-free run. To make better use of e-Way Bills data, the NIC was asked to make a presentation and a decision has been taken to task the NIC to match e-Way Bills generated and the sale invoices uploaded in the GSTRs and provide business intelligence to the officers at the earliest. This clearly means that what most industry experts initially thought was not correct! A time has come for the Revenue to make more efficient use of the data gathered through various means and prevent evasion of tax.

On the issue of IGST refund for those exporters who had imported machinery under the EPCG Scheme, the proposal of the Punjab Finance Minister was debated

* TIOL - COB (WEB) – 627, 4 October 2018.

and stamped for immediate implementation. For this purpose, the Law Committee's recommendation to retrospectively amend some notifications was approved. But what is not clear is whether the Government will go by the same logic and allow such IGST refunds to even those exporters who have availed the Advance Authorisation Scheme benefits. A good chunk of such exporters has also suffered similar setbacks.

This brings us to the issue of Calamity Cess, which has rightly been referred to a larger Group of Ministers representing the coastal regions, the hills and the North-Eastern States, which more often fall victim to Nature's fury. An intense debate ensued on the Kerala Finance Minister's proposal and one of the States was right when it was pointed out that the proposal to levy Cess on SGST of Kerala was a bit ironical as the Cess or higher tax rate is to be collected from the 'victims' of the hydrological disaster in order to provide relief to the same victims! Since such a levy is going to be a precedent for a long time to come, the issue has rightly been referred to a GoM which would be making recommendations on all aspects of such a levy for which the powers stand vested in the Council as per Article 279A (4)(f).

While interacting with the media persons, the Union Finance Minister said that some Members of the Council also suggested exploring the possibility of a Perpetual Fund for this purpose. Although it is not a bad idea if we go by the UN's disaster-monitoring agency data—the USA, China, and India recorded the maximum number of natural disasters between 1995 and 2015, but Clause 4(f) of Article 279A limits the boundaries of the Council to two expressions—'specified period' and 'during any natural calamity'. Since such a levy can be mooted only for a limited period and only during the period of the disaster, it cannot be a perpetual fund at all! Or, Article 279A will have to undergo one more amendment.

Secondly, such levy can be a reality only in cases of natural disasters and not industrial or any other unnatural ones, which may also hurt a large number of people in a community and it may be difficult for the community to cope with such disasters, such as a gas leak or a major fire. So, the task cut out for the GoM is also to prepare a list of geological, hydrological, and meteorological disasters; and even wildfires. Though the expression used in Article 279A is Natural Calamity or Disaster and there can be a debate on these two terms, *the Black Law Dictionary* defines Disaster as a calamity or a catastrophic emergency. So, ideally, the list prepared by the GoM should be exhaustive and inclusive, so that if there is any space disaster tomorrow such as an airburst or a solar flare, a new decision is not required to be taken afresh!

This brings us to the dominant issue of revenue gaps which consumed most of the deliberation time of the Council. Some of the States have done very well and their revenue is growing along the expected lines. Some of the States like Gujarat, Haryana, and Jharkhand are marginally lower but a State like Andhra Pradesh, which was 7 per cent lower last year has recorded 1 per cent more than the guaranteed 14 per cent growth. Some of the States are facing acute shortfall because of their own unique reasons. For instance, Bihar has reported gnawing gaps but that is because it

had imposed additional VAT in lieu of State Excise on liquor after its abolition and had mopped up about 27 per cent extra VAT revenue. Similarly, the State of Jammu and Kashmir had its own 12.6 per cent service tax on works contracts which used to richly contribute to its Kitty. Even Odisha had a Minerals Entry Tax. All such States have experienced certain gaps but certain States like U.P. and Maharashtra have done very well.

S. No.	Month | 2018	GST Collections (₹ | Crores)	SGST Collections (₹ | Crores)
1	April	18,652	25,704
2	May	15,866	21,691
3	June	15,968	22,021
4	July	15,877	22,293
5	August	15,303	21,154

The Revenue Secretary, Dr Hasmukh Adhia, who had visited five States to understand the reasons for slower growth in their revenue collections, made a detailed presentation but I am surprised that no presentation has so far been made about the revenue trend for the Union of India. Every State is worried or vocal about its own revenue gap but the Union of India or the CBIC, the revenue-gathering arm, has not been heard talking much about its own revenue, even though the monthly revenue figures reveal that there has been a huge gap between the CGST and SGST collections albeit the tax rates (for CGST and SGST) are the same on any given transaction (see table)! It is perhaps largely because most large taxpayers prefer paying CGST, first through IGST, and thus a good chunk of the Centre's revenue gets locked in the unsettled IGST. Looking at the latest settlement figures (₹ 30,000 crores for CGST and ₹ 35,000 crores for SGST), it appears that even the provisionally-settled IGST figures have failed to bring CGST revenue at par with SGST. In this background, the no-murmur approach from the CBIC Member (GST) or the Chairman is a little intriguing. Is it a case that the Centre is keeping its revenue trend under the wrap for some future date?

Anyway, one important decision that the Council took last Friday, on a complaint from one of the States, is to order a special audit by the DG, Audit and the complaint is that although the Place of Supply necessitates charging CGST and SGST for local ticketing by the Indian Railways, it seems the Railways has been paying only IGST even if a ticket is booked at Kanpur or Patna or Howrah. In three months' time, the audit findings are to be reported to the Council. Since a beginning has been made for a special audit, it is high time the Council should also order a sample survey of all such large retailers who have been denying the IGST facility to buyers and forcibly collecting SGST by pleading that their retail software has no facility to issue tax invoice with IGST. It may appear that all such larger retailers have been coaxed to

collect only CGST and SGST and no IGST if a buyer insists on it! For instance, if one visits the Home Centre shops in the malls, the common excuse at their outlets is that they do not have the facility to issue a tax invoice with IGST. Who are they favouring? Obviously, the SGST authorities! Such practices not only create hardships for businesses seeking tax invoices with IGST but also result in distortions in revenue collections under the CGST and SGST heads. Let us hope the Council takes note of such artificial revenue shifting practices and also asks the Union of India to make a detailed presentation of its own revenue for a better analysis of the GST collections so far.

E-RETURN, E-INVOICING & E-WAY BILL: PUSHING THE E-ENVELOPE

Introduction

Unlike other economic laws, the hardcore revenue-mobilising tax laws are essentially procedure-driven. If compliance of a tax law is made IT platform-driven, it initially becomes more return and form-driven before backend synergy and integration of data is maximally attained and predictably, it takes years for any reformed system to stabilise. The computerisation of our income tax compliance is an ongoing precedent. Even after more than a decade of computerisation, a good number of taxpayers feel that the IT system is yet to find its stable mooring! Though the CBDT received close to six crore ITRs for the last fiscal, the Infosys-managed portal continues to promise a harrowing time for the taxpayers. Worse, history hurriedly repeated itself when the GST was introduced in India. GST is, by all standards, more procedure and forms-driven as compared to its erstwhile sister laws like the Central Excise and Service Tax. Secondly, it was conceived to be an out-and-out tech-driven tax system right from the word go! Theoretically, it was expected to make a royale roll-out but for the lack of adequate testing of all the functionalities of its vital limbs—and this is what thudded on the horizon as a serious debacle and the resultant chaos for the otherwise most efficient indirect tax variant!

The GST's initial success rested on the trinity of GSTR-1, GSTR-2, and GSTR-3. The rationale was to match input-output invoices right from the inception so that the fear of abuse of ITC could be addressed effectively! There was nothing wrong with the idea but for the flawed implementation and frequent breakdowns. A stop-gap bridge was designed in the form of GSTR-3B, which indeed ensured that the returns could be filed smoothly along with the tax payment. However, scofflaws quietly capitalised on the GSTN failure coupled with the liberal administrative attitude, which was more careened toward holding the hands of the taxpayers and it exploded in the form of detection of organised fake invoices to pass on ineligible ITC. Ably aided by consultants and professionals, small-time businessmen and fly-by-night operators had created a spider-like web of non-existent entities with 'genuine' GST registration details! A quick analysis by the Revenue ninjas scared the policy grandees and the GST Council, which approved a serious dose of procedural changes along with the concomitant amendments in the rules. The loose screws in the registration rules were tightened besides drilling a few extra screws!

Since the faith of the decision-makers in the DNA of the system to somehow achieve the invoice-matching magic threshold was well-entrenched, it was loudly contemplated and also decided by the Council to scrap the GSTR-3B and introduce new returns—GST (RET-1) with two annexures (ANX-1 and ANX-2). A Trojan horse approach! The Council decided to put the new returns in place with effect from 1 April 2020. The not-so-subtle idea behind proposing two annexures was to make

another bolshy attempt to go for input-output invoice matching. ANX-1 was largely a mirror image of GSTR-1. The actual quagmire was ANX-2, in which inward invoices were to be matched with outward invoices within a space of seven days before ITC was to be claimed in the final return. Prima facie, such a short time frame appeared to be impractical and may have played havoc with the ITC, which had already suffered twin blows of Rule 86A and Rule 36(4). Thankfully, the Council backpedalled on its own decision after receiving not-so-salubrious feedback.

This brings us to yet another compliance story. Fidgeting over the soaring number of ITC frauds, the Council advanced the date for the introduction of the e-Way Bill system but not without fiscal filibustering! Intriguingly, responding to disagreement by a few States, it was also thought to leave its implementation to the individual States, which meant different dates for disparate geographical pockets. This obviously went against the core fabric of GST, which was all about uniformity and harmony in laws, procedures, and the working of the administration. After the liquidation of the notorious check-posts on state borders, a survey by the Ministry of Road Transport and Highways had revealed that the logistics sector had gained tangible points of efficiency in terms of coverage of longer distance. Now, the moot point before the Council was: whether the efficiency gain would be lost if the e-Way Bill system is introduced. Willy-nilly, it was introduced with fingers crossed! Drumbeats of protests were initially heard from certain quarters and some instances of excessive demonstration of administrative powers were also reported and finally litigated but the IT-driven system quickly stabilised, and full credit goes to the NIC. Later, some more changes were made and also resisted but the Council stood four-square behind the changes and the taxpayers gradually embraced them.

Yet another measure that, for long, was left uncared for at its embryonic stage, was the introduction of e-invoicing. The fear of losing revenue was so palpable against the horrific tales of frauds being detected at disenchanting intervals, that the Council unwittingly decided to introduce e-invoicing, first, for the large taxpayers. The perspicuity was to moat the overwhelming chunk of revenue coming from barely 7 per cent of the tax base. Though ERP-related challenges did crop up, they were not found to be insurmountable! Once notified, the sporadic din of low-intensity also ran out of puff. Since intensive homework had preceded its introduction, it did not entail taxpayers to sink their teeth into tricky glitches. Emboldened by the successful roll-out, the threshold was quickly reduced to ₹ 50 crore turnover, then to ₹ 20 crores, and now to ₹ 10 crores. The day is indeed not too distant when e-invoicing would be omnipresent for all the taxpayers, irrespective of their turnover. Queasy time lies ahead!

Chapter 1 highlights the pathological features of the galloping ITC frauds and the GST Council advancing the date of e-Way Bill implementation, risking the efficiency gained by the logistics sector after the removal of fabled border check-posts and how it was a close shave for the e-Way Bill, which was taken close to the brink of a fragmented implementation time-schedule; the row relating to the revision

of the already revised TRAN-1; the law governing the time limit prescribed; and the peripheral talk about scrapping the GSTR-3B return.

Chapter 2 dwells on the setback rendered to the taxpayers by the decision of the Gujarat High Court on the issue of time limit being mandatory or directory as per sub-rule(1) of Rule 117 of the CGST Rules, 2017; the tale of missing GSTR-3B in Section 39 and whether it can be construed as a substitute for GSTR-3 and how it impacts the utilisation of ITC for the previous year vis-a-vis the annual return filing in GSTR-9; the need for better understanding of taxpayers' woes on part of the top policymakers; the staring data of over 35 per cent of GSTR-3B filers not filing their GSTR-1; and thus, the resultant mess of ITC claims by large taxpayers.

Chapter 3 talks about the saga of GSTN's repeated failures and the consequential extension of due dates with the waiver of late fee and how it does injustice to those who habitually comply with the due dates by filing their returns in time; and the frequent date extensions for filing GSTR-9 and 9C and the need to take into account the purpose of audited returns if the Revenue audits cannot work in the absence of mismatched GSTR-2A and GSTR-1 except for raising demand for reversal of ITC at a steep interest rate of 24 per cent.

Chapter 4 provides a peep into the sensational decision of the Orissa High Court on the issue of blocked ITC under Section 17(5)(d) and how the same was exuberantly greeted across India; conflicting High Court decisions on the issue of credit, which has been held as a conditional right; a committee of officers being set up to examine the feasibility of combining e-Way Bill and e-invoice facilities; and whether more burden could be passed on to the GSTN and why the Council should make e-invoicing voluntary for small taxpayers.

Chapter 5 talks about how the Council should navigate through the issue of compensation without ending up further upending the walloped economy; whether a State has the option to go back to the VAT regime as threatened by some State Finance Ministers; the complexities surrounding the new proposed GSTRs with the baggage of two annexures; and how such annexures are intended to re-introduce the missed goal of invoice matching but why would it not work at all except for triggering another bout of chaos in the otherwise largely settled GSTR-3B.

1

Tampering with GSTR-3B May Lead to a 'Triple Dip' Disruption of the Economy![*]

Taxation ascending to the level of becoming an electoral plank in a Third World country with an uninspiring tax base may sound incredible! But it has happened twice in India. First, let me take the TIOL Netizens back to the 2014 general elections where high-decibel speeches against tax terrorism were delivered, and all such harangues, against the backdrop of the headline-hogging news about the Indian wealth parked in tax havens, had scored tangible political gains for the BJP. For the second time, a tax reform, in the form of GST, became a serious bone of contention between the political parties in the recently-concluded State elections. Although the GST excessively dominated the competitive political speeches at the beginning of the election campaigns, it finally escaped the ignominy of becoming a decisive factor in winning assembly seats. Going by the poll results of all such 'spots' where sustained rallies were organised against GST a few months back, it may appear that quick and responsive policy changes by the Central Government were taken well by the voters and the GST finally did not eat into the votes of the ruling BJP. Had it done so, it would have dented the strong will of the Modi Government to persistently pursue innovative and disruptive reforms. I strongly hope that the Central Government would now go the whole hog to successfully pilot the mid-course corrections in the GST laws and the business processes with an open mind!

But what has come as a big surprise for the entire economy is the GST Council's latest decision to advance the date for the implementation of the e-Way Bill. Without going into the merit of this procedural requirement, I strongly feel that such a decision is a little premature and may prove to be a 'double dip' disruption for the economy. The trade and industry have been grappling with confidence-wracking uncertainties emanating from the present set of GST laws and business processes. Thanks to the mid-course review effort, the economy has just started limping back to its normal pace of growth. Our badly bruised exports have once again sprung back on their two legs and scored 35 per cent growth in October, even though their refund continues to be caught in systemic and procedural tunnels. At this stage, when the logistics sector is trying hard to run extra miles in a day, putting check-posts to check online-generated permits may push it back to its pre-GST point.

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* TIOL – COB (WEB) – 585, 21 December 2017.

As per the Government's own admission (Ministry of Road Transport and Highways), trucks have begun to cover greater distances—as much as 325 km. per day against 225 km. a day prior to 1 July. Now, the larger question is whether such an efficiency gain can be sustained even after introducing the e-Way Bill. Perhaps NOT! All the 'predators' of erstwhile check posts would be back in action soon. They had a dry spell of almost six months and would now try to set off their 'business losses' before the current fiscal comes to an end. Secondly, introducing the e-Way Bill in a hurried manner may not do any good to the States. Tax evaders would continue to 'manage' their movements of goods and it is only the genuine trade which would suffer. Thirdly, rather than attempting a uniform e-Way Bill system, leaving it to the discretion of the States would further add to the woes of the industry.

Going by the statements of some of the State Finance Ministers, such a decision was perhaps dictated by the growing incidents of tax evasion in many States, and it was causing a loss of revenue. I am sure there must be an element of truth in it but putting an iron shackle appears to be a knee-jerk reaction. First, the States should not be over-reacting to the fear of revenue loss as their revenue is virtually 'insured' by the Centre. Secondly, they should not force the Centre to run a 'horse' even before other 'players' are put in place on the chess board! When all the critical provisions of the GST laws—such as RCM, TDS, TCS, and many others—have been deferred till 31 March 2018, there was no need to panic and trigger a chain of setbacks for the industry which is trying to recover from the disruptions in the past two years—demonetisation + the ill-prepared implementation of GST.

Let me now touch on the point of transitional credit. The CBEC, which is the custodian of the Centre's revenue, deserves credit for showing restraint and advising taxpayers to revise their TRAN-1 as a large number of taxpayers have claimed huge credit erroneously. A preliminary analysis of large taxpayers has revealed that a good number have erred and ended up taking ITC, much higher than what is the trend in a particular industry or what they used to claim in the pre-GST era. An official view has been taken that all such excessive claim is a *bona fide* error and the taxpayers would be correcting the same by revising the Form TRAN-1. The last date for revising TRAN-1 is 27 December and I am sure, a good number of taxpayers would be correcting the same. All such corrections would obviously lead to a surge in the GST revenue collections next month.

Although no large taxpayer would prefer inviting swords from the Department, a good number are also caught in a pincer-like situation as they had revised their TRAN-1 as soon as they themselves had identified some errors in their credit figures. Now, after the CBEC communication promising penal action, a second round of drills were undertaken, and predictably, more errors were pinpointed but TRAN-1 can be revised only ONCE. This is a catch-22 for them. Since such errors were predictable even for the CBEC, it would be in the interest of earning the trust of the taxpayers that the industry is given one more chance to revise their TRAN-1. Such a condoning magnanimity would not only win the heart of the industry about the

taxpayer-friendly policy but also help the cause of the treasury. Secondly, it would be a Herculean task for the Department to audit a large number of taxpayers and then recover the excess credit, which would necessarily trigger litigation; and since every litigation means locking of revenue for many years, it would amount to giving birth to a vicious cycle of litigation.

Before I discuss the possible changes in the business processes, let me first extend my support to the recommendations of the Standing Committee of Parliament, which has asked the Government to continue with the present drawback benefits for exports till the time the GST system stabilises sometime mid of next year. The Government needs to run an errand of mercy to help exports which account for a major chunk of manufacturing growth and job creation in the economy besides bringing in convertible currencies. Given the slowdown in global trade and toughening of the competition in the international market, exports must not be disrupted at any cost.

Before I wrap up this column, I would sincerely urge Dr Hashmukh Adhia and his political bosses not to fall prey to all such ideas which may talk about scrapping GSTR-3B and notifying a completely new return format. GSTR-3B deserves full credit for saving the interests of the treasury and also the industry, which has become familiar and comfortable with its intricacies. It has helped stabilise the GST implementation. Scrapping it so early, even before a new form solicits a response from the taxpayers, would be a horribly bad idea. If that is done, it would be a 'triple dip' disruption of the economy and whatever growth projection has now come from different agencies may start looking like a distant dream. Therefore, I hope the GST Council, which is a bundle of diverse wisdom and experience, would not do anything that would hurt or prevent GST from settling down. The teething problems should not be allowed to run for more weeks than the number of teeth gifted by Nature. The natural principle must be complied with so that GST starts delivering what it is globally known for—an easy, stable, and efficient tax system.

2

GSTR-3B v/s GSTR-3: The North Block is Missing the Wood for the Tree![*]

The Indian Goods and Services Tax (GST) and the controversies are very similar to Siamese twins. The latest melee is over the time limit for availing input tax credit (ITC) for the invoices and debit notes raised in the previous financial year. What has further raised the temperature in the industry and professionals' circles are some of the recent judgements of the higher Judiciary, where the Court has failed to see any merit in interfering with the vested rights of a taxpayer to claim credit if any time limit is prescribed by the Revenue. The latest decision of the Apex Court, in the case of *TNVAT*,[1] has pointed out that the time limit embedded in the provisions of Section 19(11) is mandatory in nature as such provisions are self-contained schemes and credit can be allowed only if the conditions enumerated are fulfilled.

Only recently, while interpreting time limit provisions contained in sub-rule (1) of Rule 117 of the CGST Rules, the Gujarat High Court held, in the case of *Willowood Chemicals*,[2] that merely because the rule prescribes a time frame for making a declaration, such a provision cannot necessarily be held to be directory in nature. Interpreting such powers of the Revenue as merely a directory would give rise to unending claims of transfer of credit of tax on inputs and such other claims from old to the new regime. Doing away with the time limit for making declarations would give rise to multiple large-scale claims trickling in for years together, after the new tax structure is put in place and would, besides making the task of matching of the credits impractical, if not impossible, also impact the revenue collection estimates. The Bench further observed that annihilating the time limit contained in Rule 117 would have serious repercussions. Removing such a time limit would have the potential to lead to utter economic chaos, the HC further added.

In this background, the eye of the latest storm is Section 16(4), which prescribes a time-limit by which ITC needs be claimed. As per Section 16(4) of CGST Act, 2017, ITC cannot be claimed in respect of invoices or debit notes for supply after the due date of furnishing return under Section 39 for the month of September following the

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* TIOL – COB (WEB) – 629, 18 October 2018.

1. 2018-TIOL-385-SC-VAT.
2. 2018-TIOL-133-HC-AHM-GST.

end of the financial year or furnishing of the relevant annual return whichever is earlier. So, what is the problem? The two-fold issues are: First, a good number of suppliers have not filed their GSTR-1 and thus, a good chunk of taxpayers cannot match their GSTR-2A for availing credit; and since all taxpayers have made summary declarations of their ITC in GSTR-3B, any mismatch with GSTR-2A would mean the reversal of ITC with 24 per cent interest rate. Besides, there is still time for certain categories of taxpayers to file their GSTR-1 up till 31 October and even 30 November, locking the matching exercise by coming Saturday (20 October). The last date for filing GSTR-3B for the month of September as per Section 16(4) would mean losing hundreds of crores of ITC. A painful scenario, indeed!

The second issue is the missing phrase of GSTR-3B in Section 39. This Section talks about GSTR-3 which, along with GSTR-2, has been put in a state of limbo with no time frame notified. The first mention of GSTR-3B can be found only in Rule 61(5) of the CGST Rules. The general interpretation is that since the word GSTR-3B is missing in Section 39, it cannot be construed as a substitute for GSTR-3. In this scenario, the next logical due date for availing ITC for the previous year can be the due date for filing the Annual Return (GSTR-9), which is 31 December 2018.

Even as the hair-splitting debate over such supposedly logical extension of due date continues throughout the economy, the North Block, and more unfortunately, the GST Implementation Committee (GIC), which has been mandated by the GST Council to take certain decisions relating to operational problems, are yet to utter a word in this regard. A good number of representations have been sent to the GST Council Secretariat, the Revenue Secretary's Office, and even the Union Finance Minister but there appears to be a subliminal shift in the thinking of the top leadership about the taxpayers' genuine grievances. Even if the taxpayers or the advocates' community may be wrong in stretching the interpretation of the expression 'return' and self-stipulation of the due date for availing ITC, the fact of the matter remains that should our policymakers and the tax administrators indeed behave like this—or, they should be demonstrating a better understanding of the taxpayers' issues, at least for the first two to three years of the new tax regime? But why?

One good reason is that the North Block is aware of some of the ground realities—like even today, about 35 per cent of the return filers who have been filing GSTR-3B have not filed their GSTR-1. Given the fact that the Government has granted certain concessions to such defaulters to file their GSTR-1, such late filing has serious implications for the compliant taxpayers who are trying hard to match their ITC. Given the fact that the matching of sales invoices against purchase invoices has been the primary responsibility of the tax administration right from the beginning, such an exercise has now been undertaken by large taxpayers who have been chasing, threatening, and persuading their suppliers to file their GSTR-1 so that they could claim ITC. Such a drive by the taxpayers themselves would ensure bulk filing of GSTR-1 besides resulting in a long list of all such suppliers who are fit to be blacklisted. Both these functions were to be discharged by the Revenue but with the

turn of events, they are being done by the taxpayers. At this hour, it is in the Revenue's interest to leverage this drive and incentivise the taxpayers to continue with the drive for a couple of more months, but it can be done only if the due date for availing ITC for the last year's invoices is extended up to 31 December. This would further make the filing of GSTR-9 a smooth affair and would also help auditors in filing their GSTR-9C. A pragmatic tax administration should not lose such a golden chance to aid taxpayers to clean up the mess created by extending due dates for different categories of taxpayers in the past one year, which has led to such an impasse! Keeping mum by the GIC would only provoke the taxpayers to go to courts in hordes and litigation would not do any good to the already scarred evolution of the fledgling tax system.

Since we have come to the issue of litigation, another potential area of legal battle is going to be the anti-profiteering provisions. Some writ petitions have already been filed challenging the vires of the provisions and the working of the National Anti-Profiteering Authority (NAA). The industry and the professionals feel that clarity is missing in the working approach of the authority. They expect the NAA to come out with some guidance notes or detailed methodology on how to pass on the tax reduction or ITC benefits to consumers. None can find a fault with the legislative intent of these provisions. Even the industry would like to pass on the benefits but in the conspicuous absence of clear-cut guidelines, some of the industry players have been passing on the benefits in their own chosen manners—more quantity or clubbing of two products or higher discounts.

While addressing a gathering at the CII Meet in Mumbai, the NAA Chairman recently said that this sort of passing of benefits is not acceptable. It has to be product-specific and the MRP should change in proportion to the rate reduction. If it is so, how will the industry know about it? Has the Government or the NAA done any sort of publicity campaign in this regard? Has it issued any definition of 'price exploitation'? Has it done any sort of retail price survey? Ideally, the NAA should issue a monthly price bulletin if it is keen to protect the interest of consumers. A consumer gets cheated at the retail level and any sort of periodic price bulletin would empower the consumers before one goes to a shop. Given the fact that the GST Council may extend its tenure for two more years, it would be in its own interest besides the consumers' interest to make its activities more rule-based and some clues can certainly be borrowed from the Australian experience. Australia had mandated its Competition and Consumer Commission to take action against profiteering and this Commission had started its awareness drive one year prior to the introduction of GST on 1 July 2000. There is no harm in borrowing some good practices even from Malaysia, which did deal with such cases till the time its political leadership decided to guillotine the GST system. I sincerely hope that the GIC and the North Block would show greater vision to help GST settle down faster before it gets caught in the vortex of litigation!

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3

Brawl over GSTR-3 and GSTR-3B: The Tale of the 'Half-Leg' Theory![*]

When the GST was conceived and rolled out, the two key design pillars were the GSTR-1, GSTR-2, and GSTR-3; and a tech behemoth in the form of the GST Network (GSTN). Both turned out to be non-starters even before one could get a 'royal taste' of the grandiose architecture which had earned the initial confidence of the GST Council Members. Ironically, both continue to sputter and stop! The design of the first pillar itself is gone. The GST system is somehow managing with the 'half leg'—the GSTR-1 and an interim GSTR-3B. What may have lent efficiency and ease to the 'half leg' was the 'other leg'—the GSTN. But, unfortunately, GSTN itself needs frequent resuscitation and, thus, has become another 'half leg'! If we leave behind the innumerable tales of its non-operational behavioural patterns, the latest example is its crash on 20 October—the last date for filing GSTR-3B for the month of September. Going by the reported statement of its Chairman, Mr Ajay Bhushan Pandey, it had received as many as 33,00,000 returns for September till noon and about 75,000 returns were being uploaded on an hourly basis on the last day. Later, inching closer to sundown, its server caved in. A large number of taxpayers were left high and dry! Such an unnatural disaster was taken note of by the North Block only next day on Sunday and the due date was stingily extended for five days, including a 'lost' day as the information reached the hapless taxpayers only on Monday. It will be interesting to know if the Government decides to share the data about how many returns are going to be filed by midnight today.

One interpretation of such a mishap can be—those who missed the deadline on 20 October were fortunate as they were blessed with extra time to match their ITC for the previous financial year. This would certainly encourage more taxpayers to file their returns late so that the server crashes and the due date is extended. Such behaviour on taxpayers' part would be unfortunate but it can be attributed only to the self-defeatist approach of the GST bosses in the North Block! When they know that their initial design has let them down and their remedial design is yet to be designed (New GSTR), the empirical wisdom should have been to give enough time to the taxpayers to successfully file their returns and also match their sales and purchase invoices. But the GST top leadership seems to have developed a 'thick skin' and demonstratively turned a Nelson's eye to the taxpayers' services!

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* TIOL – COB (WEB) – 630, 25 October 2018.

The top post of Chairman in the GSTN continues to be vacant. It is being managed by a part time Chairman who holds the full-time charge of Aadhaar. Is it a case of the Search Committee not finding an able professional, or is the Revenue Secretary not keen to find one? Or, is the Revenue Secretary looking for a 'worthy' member from his All-India Service so that the post remains reserved for the IAS? Or, does he enjoy such a good rapport with the present GSTN CEO, a former IAS officer, that he does not need another professional who may interfere with the CEO's *diktat*? The GSTN has consistently been failing the GST but why has the GST Council not been properly briefed and why is it that the Government does not find a substitute for the present CEO? Why is the letting down of the entire economy acceptable to the Government but not shifting or replacing the GSTN top leadership? It is shocking! If one goes by the number of tweets being sent to the Union Finance Minister and other key functionaries of the Government, one may tend to conclude that the GSTN has regularly been letting down the taxpayers. It is partly true! But the other part is the previous tax regime mindset of the key decision-makers in the North Block! The key policymakers are yet to realise that the GST is a historic reform not only by its design but also in the manner in which it is to be implemented. They are yet to believe that their late-night or early morning decision-making on the due date does more harm to both—the GSTN working as well as the taxpayers' interests.

Let us now take a look at the controversy relating to the due date for availing ITC for the last financial year. When the GSTR-3 is not there and the taxpayers have been grappling with the task of matching their sales and purchase invoices on their own, a responsive tax administration should have come forward to extend the due date till 31 December—the last date for filing the annual return. It would not have harmed the Revenue's interest as it cannot be the intention of the Government to 'facilitate' failure for the taxpayers to match their invoices for the purpose of ITC. If a few lakh taxpayers fail to avail a few thousands of crores of ITC, I am sure, the Government is not eyeing such revenue by default for the exchequer! If it is not so, where is the rationale for not extending the due date for ITC availment?

In response to the hundreds of representations sent to North Block, the best which the top leadership of GST could do is to issue a Press Release on 18 October. And it clarified that*:*

> *the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of Section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also.*

From this Press Release, what one may infer is that a taxpayer need not bother about matching the invoices for availing ITC as the same can now be availed in the September GSTR-3B and efforts may continue to coax suppliers to file their GSTR-1 in the months of November and December. What happens if some errant suppliers fail and a compliant taxpayer utilises credit now? Reversal of ITC with 24 per cent interest is the only logical consequence! But the same is not being told in so many words by the GST policymakers. They are rather inviting taxpayers to fall into the trap of availing ITC and reversing the same if one's suppliers fail them in the remaining two months. But the larger question is: Why can't the due date be extended? When the CBDT itself has extended the due date for the income tax return to 31 October, the GIC could have safely done so even for last year's ITC availment.

Secondly, what is the sanctity of only six months' period for this purpose? Why can it not be nine months? ITC availment has nothing to do with the Income Tax returns for which 30 September is the normal due date. Invoice-matching is more relevant from the perspective of GSTR-9 rather than the CBDT returns. It can safely be extended to a nine-month period. One reason for such a deadline is perhaps the inability of the GSTN to keep such data on its server for a longer period as it has to incur extra costs in terms of rental of the Server! If it is true, then it is indeed unfortunate that to save a few lakhs of rental, the taxpayers are being denied their vested right to avail ITC running into several thousands of crores. With this sort of mentality, it is quite predictable that the Modi Government would never be able to achieve what it had initially promised to the entire Nation—an easier tax compliance system with a more friendly face! Both the virtues are yet to be seen!

Let us now move to yet another Press Release which was issued on 21 October. First, this official communication through the Press Information Bureau is silent about what forced the North Block to extend the due date for the GSTR-3B by five days. And, why should it be only five days if the GSTN Server failed the taxpayers? Why didn't the GST bureaucracy think of making it 31 October, which is the due date for certain categories of taxpayers notified earlier? When the GST top leadership knows that the annual return is due and GST Audit is also on the cards, what exactly are the auditors or the departmental audit teams going to do if matching GSTR-2A and suppliers' GSTR-1 is only a 'facilitation'? Are they not going to raise demand or insist on the reversal of credit with interest? If not, what exactly are the auditors going to do? Misleading taxpayers about a certain facility when invoice-matching is in the DNA of the GST system, is indeed highly undesirable and even condemnable! Let us hope the GST Council takes note of all such mishandling of the taxpayers' services and further democratises the decision-making system which appears to be too centralised and IAS-dominated, contrary to the actual DNA of the political system in the country!

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4

GST: The Right Time to Merge e-Invoice and e-Way Bill*

Although the smoke over who wins and who would form the next Government at the Centre will be cleared by the end of the day today, if one goes by the Exit Polls, the NDA is going to re-install itself in the saddle of power. Irrespective of who comes into power, the flames at the GST hearth are going to be much brighter in the coming months and one reason is the soaring litigation curve. The latest chapter has been sponsored by the real estate developers and hoteliers who have been denied input tax credit (ITC). A fresh petition has been filed in the Delhi High Court two days back and it probably draws strength from the recent decision of the Odisha High Court on the issue of blocked credit under Section 17(5)(d) of the CGST Act, 2017[3].

From a close look at the High Court's decision in the case of *Safari Retreats Pvt. Ltd.*, it appears that the entire argument was based on the Doctrine of Equity which is, as per settled law, a stranger to the world of taxation. The petitioner's counsel also assailed the disputed provisions as they ran counter to the basic rationale of GST itself: to neutralise the cascading effect of multi-point taxation. Several decisions cited were also about the Rules being challenged and decided against the Revenue. In this case, what was challenged was the Legislature's wisdom to block ITC and it is again settled law that denial of certain concessions in the world of taxation need not be construed as discriminatory and arbitrary. Article 14 of the Constitution has very little to do with it. Had it not been the case, the Apex Court would have allowed relief to the petitioner in the *Mohit Minerals* case. What comes out more pertinently here is the Bombay High Court's decision in the case of *JCB India*,[4] where the HC has observed that credit is always a Conditional Right.

In the Safari case, albeit the HC has allowed relief to the assessee, it may perhaps not survive the judicial scrutiny by the Apex Court. One arguable ground can be—when the lawmakers have in their own wisdom decided to block certain credit to certain types of transactions and such restrictions have been made a part of the statute itself and not the Rules, its literal interpretation should generally be the denial of

* TIOL – COB (WEB) – 660, 23 May 2019.

3. (2019-TIOL-1088-HC-ORISSA-GST).
4. 2018-TIOL-23-HC-MUM-GST.

credit rather than what could have been the intendment of the Legislature and the larger object of the statute. It is once again settled law that the courts should adopt purposive construction of certain phrases to lend words to certain conditions rather than negating the same and allowing concessions which are not at all intended by the statute. I am sure many experts may like to differ on this issue but this controversy which has led to fresh filing of petitions may only be settled by the Apex Court once the Revenue files appeal against this order.

Let me now move to a major development on which the New Central Government is going to take a call at the next GST Council meeting: the generation of electronic invoices on the GSTN Portal. A Committee of Officers was set up last month and it was mandated to submit its report after considering a large range of issues and practices in other economies. Although the idea is to give yet another responsibility to the GSTN, my first reaction would be not to burden GSTN at this stage if this project has to stand any chance of success. Since the Committee is also required to examine the scope of dispensing with the need for e-Way Bills or combining both e-invoices and e-Way Bills, such responsibility should go to the NIC, which has done a fairly good job by successfully sustaining the e-Way Bill generation system. Combining e-invoice and e-Way Bill makes a healthy proposition as once e-invoices are generated through the NIC server and some unique identification number is assigned to each invoice, it completely rules out the chances of tax evasion or invoice-based ITC fraud. An option can be given to suppliers of goods to fill up a couple of columns attached to their unique-numbered e-invoices and the same can be used for the purpose of e-Way Bills. Such integration would save precious resources for the Government and make it easier for the taxpayers.

Although some officials have pitched such a move as a countervailing measure against tax evasion, it should be marketed more as a facilitation drive for the taxpayers. More importantly, it would make feasible what the GSTN could not do at the time of the introduction of GST—invoice-matching at the backend. The matching of sale and purchase invoices was the backbone of the GSTN-based platform but the IT platform could not do it for various reasons. Through this project, the Revenue can achieve, of course in a phased manner, the matching of input and output invoices which would alienate chances of misuse of ITC. Secondly, it would enable auto-population of data at the time of return-filing, which means a reduction in compliance costs. Once the government portal auto-populates sale and purchase data in one's return, the work of professionals would be eliminated to a large extent, at least for small taxpayers.

Now, the larger question is: Should the GST Council really roll it out first, for the larger taxpayers? NOT AT ALL! Large taxpayers generally have better tax-compliant systems in place. They contribute to the Revenue Kitty and are generally happy with the legitimate quantum of ITC, unless it is statutorily blocked by the provisions of Section 17. Outright tax evasion is an aberration in the case of large taxpayers but the same may not hold true for small and medium-sized

taxpayers. Secondly, the size of compliance cost is generally large for small taxpayers rather than for large ones. Therefore, this facility should first be provided to small taxpayers who can be provided password-based access to the portal to generate their B2B invoices where ITC is a concern. In the first phase, it should be limited only to B2B transactions, keeping aside B2C.

Secondly, it should be turnover-based. In the beginning, it should be extended to taxpayers having turnovers between ₹ 1.5 crores and ₹ 5 crores. In this bracket, there would not be too many invoices but it would help chisel the system in place. Only in the second phase should it be extended up to ₹ 500 crores. In the third phase, it should rope in assessees below the ₹ 1.5 crore threshold and the last phase should integrate the existing systems of large taxpayers like SAP and Oracle-based ERP. Its initial working would give enough idea to leading software providers to fine-tune their products and work on how to integrate their systems with the Government portal.

Before I conclude this column, let me also support the idea of incentivising small taxpayers to join the e-invoicing system on a voluntary basis rather than making it mandatory right in the beginning. Such a facility has been experimented with in many economies and later fine-tuned as per the socio-fiscal behaviour of the taxpayers. India needs to improvise and make an indigenous system which would certainly work if a robust infrastructure is put in place before rolling it out and making it mandatory in a phased manner. It is indeed a good idea and its time has definitely come!

5

New Return: RET-1—Taxpayers Would 'Bless' it if the GST Council Defers it!*

The 39th Meeting of the GST Council has been scheduled for 14 March at *Vigyan Bhawan* in the National Capital. Though the Agenda for the meeting is yet to be pieced together and circulated among all the stakeholders, going by the statements coming from some of the State Finance Ministers, Compensation is going to be one of the torrid issues which may be debated boisterously. Since a time lag has crept into the release of bi-monthly compensation ballooning @ 14 per cent as per the compensation legislation, the States are visibly perturbed and angry with the Centre. On its part, the Centre, which has to rescue the entire economy out of the debilitating recessionary cycle, has no clue as to how to win back the trust of the States or convince them to bear the brunt of the slowdown in revenue collections penny to penny!

Against this backdrop, one may expect high-decibel fulminations at the next Council meeting. Though the Union of India has somehow managed to release compensation funds recently, there is indeed a serious time lag which has upset the financial apple carts of the States. In the light of the clear matrix of facts that enough revenue is not available in the compensation pool and it may further dry up if one goes by the impact of the Corona Virus and the overall decline in the imports of raw materials linked to export orders, it may turn out to be a case of 'default' which many experts have begun to view as 'possible sovereign default'! Though some States and many experts may see it as a case of 'default', compensation is statutorily not the sole responsibility of the Centre. There is an exclusive non-lapsable Fund as per Section 10(1) of the Compensation Act, 2017 and a dedicated Cess which is levied on certain demerit items to funnel revenue into this kitty for the purpose of compensation. The entire mandate is vested in the GST Council to operate it. If the Union of India is today managing this Fund, it is because of the legislative mandate vested in it. But the Parliament has not vested all the powers in the Union of India alone to enrich this Fund. Such powers lie with the Council, which has to bank on extensive computation and projections of the Revenue in this Kitty and if there are signs of a slowdown, the Council may decide to bring certain items under the ambit of Compensation Cess.

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* TIOL – COB (WEB) – 700, 27 February 2020.

Ideally, the GST Council should harmoniously discuss the issue of deficit in the Compensation Kitty and if a consensus or a majority view emerges that more revenue is needed to run the States and their commitments in terms of welfare schemes, it should exercise its discretion. The two options which may be exercised are: (1) Identify some luxury items and bring them under the Cess net, or (2) Levy one or two per cent Cess across the board. Ideally, when most Sectors of the economy appear to be gasping for oxygen, the first option may end up killing a few. The second option may not hurt any particular sector disproportionately but may be partly inflationary, which was one of the experiences recorded during the initial phase of GST implementation across many tax jurisdictions! I am also confident that such an additional burden would certainly be painful for the taxpayers at this stage but it is perhaps the lowest price to pay for preventing any rupture in the cooperative federalism edifice!

I also received a query where the querist asked whether a particular State has the option to break away from the GST framework. Though ours is a dual-GST where the States collect taxes based on their own legislations passed by the respective State Assemblies, they do not have the option to opt-out of the All-India framework created by amending the Constitution. They cannot go back to the VAT days as they can no longer levy VAT on items except for a few mandated by the Seventh Schedule to the Constitution. They have to go for a levy as per Article 246A of the Constitution. However, any reckless decision by a particular State may disrupt the transactions in the economy or may result in unwarranted disputes!

The second possible item on the GST Council's Agenda is likely to be the below-par performance of the GSTN and the complexities surrounding the new GST Return (RET-1) with two annexures (ANX-1 and ANX2). As per the Council's decision, the new GSTR is going to be in place from 1 April 2020. The not-so-mistakable idea behind the design of the new GSTR is to incorporate the letter and spirit of GSTR-1, GSTR-2, and GSTR-3. This basically translates into input-output invoice matching before ITC is claimed. In principle, there is nothing wrong. This is perhaps the only way the wings of the soaring fake invoice cases may be clipped! But, empirically speaking, is it a workable model? Let us discuss the experience recorded so far. ANX-1 is fine as one needs to upload all outward supplies' invoices like GSTR-1. The real challenge is ANX-2 where matching of inward invoices with suppliers' outward invoices is to be done between the 13th and the 20th and ITC is to be taken only if suppliers upload their invoices. If they fail to do so, the recipient's ITC gets stuck. Given the short window provided to follow up with suppliers, a huge amount of ITC is likely to be blocked in this model, and this is bound to create havoc with the ITC again, which has already suffered ruthless scissors under Rules 36(4) and 86A, and even Rule 138E in relation to restrictions on the generation of e-Way Bill.

In my view, the New Return is simply not going to work in the present format. It may work if ITC is allowed and the taxpayer is given two months' time to persuade

their suppliers to upload their invoices in ANX-1. The short window will certainly backfire and there would be another round of cacophony across the economy from GST taxpayers. The ideal solution, as per my understanding, would be to defer the introduction of the New GST Return even if the GSTN may claim that they are ready with the utility tools! Further, it would be more intelligible for the GST Council to order weaving a new return format around the widely-accepted GSTR-3B. In the past thirty months, the taxpayers have developed some sort of comfort with the GSTR-3B. Any new format which has invoice-matching in its nucleus should be evolved from the basics of GSTR-3B and a sufficient window should be provided to the recipients to ensure that their suppliers also comply with the laws. If their ITC is blocked and then they are pushed to do so, it would boomerang more severely in the present conditions of a downturn in the economy where working capital crunch is hurting even the large cash-rich corporates.

Another vital decision which the GST Council should take is not to tamper with the GST design in the name of short-term requirements of revenue. The GST Revenue Augmentation Committee of Officers may come up with bizarre ideas, such as Rule 86A and Rule 36(4), but such a blockage does long-term damage to the trust of the investors and industry in the policymakers' ability to stick to a particular design. Merely because the revenue is down and that is predictably because of the slowdown in the economy, it does not warrant unfair measures like these Rules. Such Rules may ensure a spike in revenue temporarily, but countervail the spirit and trust of taxpayers in the system which, in turn, triggers the downside in overall compliance indices. Secondly, any interpretation of a higher volume of monthly returns on account of tightening of measures is an optical illusion as such a spike can be attributed to quarterly returns. Greater compliance has direct nexus with simple compliance formalities. Complexity always takes a heavy toll on compliance indices!

Before I conclude today's column, I would also suggest to the Council that if a decision is taken to defer the new GST Return, the earlier announcement of introducing e-invoicing should also be deferred till the time the taxpayers are comfortable with their own ERP system. So far, there have not been too many takers of this new invoicing system and more time needs to be given to the GSTN for trial and testing before anything new is introduced for compliance by the taxpayers. This is more so if one goes by the number of writ petitions in the courts on the grounds of poor performance of the IT Platform!

GSTN -
The 'Sandbox Buddy' of GST

Introduction

The GST and the GSTN are like Siamese twins! Both made a harrumphed beginning but have profusely sweated to earn the reputation of being a good example of a tech-driven tax system. They exist for each other. Both rest in each other's arms! And both follow the doctrine of you-scratch-my-hardware and I-scratch-your-software for the harmonious implementation of the business processes and overall success, commonly gauged in terms of monthly revenue collections! What is emblematic of the prevailing synergy between the two are the average monthly revenue figures achieved in the past twelve months! Though the success of GST and GSTN cannot be vivisected for assigning scores, it can be measured against two broad parameters. One is, of course, revenue from the Treasury's perspective and the second is the facilitation to the taxpayers. It has taken them five-long years to scale the height of praiseworthy harmony in collecting tax payments and also extending the limbs of facilitation like return-filing, smooth handling of ITC and cash ledgers, ease of e-invoicing, refunds, GSP services, free accounting and billing services, and many others. It has carefully weeded out the 'dead weight' and managed to expand the tax base close to 1.39 crores from 47,00,000 in 2017 and over 90 crore returns till June 2022. It has made a record of about 25,00,000 returns in a day! Mind it, GST returns are very different from income tax returns. About 6.6 per cent of total taxpayers now pay about 63 per cent of total collections. In the past one year, its performance has been a *tour de force*! It has indeed dunked well for its new normal reputation! But it warranted the new leadership to undertake industrial-scale slathering of ribbons of lava of moribund tools! An uphill task even for the robotic vacuum cleaner—Roomba!

But, so was not the case when the GST was rolled out on 1 July 2017. Though, theoretically, they were expected to be close pals, walking hand-in-hand, for a host of reasons, the 'sandbox buddy' fumbled, stuttered, played cranky, and also went 'bonkers' for a long stretch of time—a fraught time when it also played stroppy at times! With hindsight, it can be concluded without overstating that the GSTN initially failed to be a reliable buddy for GST, owing to the frequent changes in the laws and procedures and some of the reasons of its own making! Since the Council and the GIC were sensitively responsive to even a smidgen of bellyaching originating from even a remote corner of the economy, business processes were tweaked and rules were amended. The Revenue bureaucracy indeed responded with alacrity to notify the changes but the nerdy human resources of the GSTN vendors could not keep pace with the changes and the expectations of the taxpayers. The most challenging task it had been mandated was to match the input-output invoices but it weirdly proved elusive. Though the task seemed coolly doable given the open slather, intrinsic complexities of the organisation made it gigantically arduous; and it

failed but did not turn malignant! Its boast proved a 'hoax claim'. However, its failure was construed as a transitional setback and could perhaps have been set right if adequate time could have been given but the biggest foil was a dynamically shifty tax system. Secondly, its failure frightened and put on the back foot the critical decision-makers who opted for GSTR-3B in place of the initially supposed trifecta of GSTR-1, 2, and 3!

What further made it behave like a startled fish and put it on the road to a string of failures was the millstone of providing dozens of columns in the returns, seeking boatful of information relating to reverse charge invoices, non-GST purchases, and even exempted supplies! Then came the fiscal time-bomb of transitional credit! Its technical glitches nudged hundreds of taxpayers gurgling with pain to knock at the doors of High Courts which passed adverse and chastening orders and directed it to permit the petitioners to avail the TRAN-01 facility even after the timeline had become history. Each of the court orders proved a tall order for its backend disorder: a muggy air of distraction from stabilising the functionalities! Thanks to its repeated downtime, the GIC virtually inculcated the 'extravagant' habit of extending the due dates and granting waivers of late fees and penalty! A sort of new but undesirable culture firmly got rooted. After a string of extensions, when the time for GSTR-9 and 9C arrived, the shadow of past failures of GSTN goaded the decision-makers to grant another extension. Though the blame was to be apportioned between the GSTN and the policymakers for the flawed construction of the returns, all the eggs of discredit were transferred into the GSTN's basket, as it was the most visible but hapless interface for the taxpayers. Its hardware limitation and frequent downtime kicked up the controversial issue of backsliding of the much-touted ease of doing business. Against the unspooling sordid saga, it was expected to behave like a scalded cat but it mirrored more like a Panama sand-eel with no apparent threat because no Plan-B was ever contemplated by the Council! A case of having a tiger by the tail!

So frustrated and defeated felt the Council that at one point in time, it summoned the chairman of the vendor company who was directed to dedicate personal supervision of the proposed development of the necessary tools and report back to the Council in a time-bound manner. To the curiosity-seekers, he also gave a presentation with a tall promise to implement the fundamental idea of input-output invoice matching, embedded in the GST law. Then popped up a new return format, RET-1 with ANX-1 and ANX-2, which was rightly and fortunately discarded after mountains of unsavoury feedback inundated the GIC. Meanwhile, the GIC acted on what I had been chivvying for long, to stagger the return-filing load for different classes of taxpayers so that the server does not conk off—and it was finally done on the basis of geographical parameters. This saved the day and continues to serve its master very well till date. This also enabled the GSTN to buy enough time to set right its backend limbs and quickly develop the taxpayer-friendly tools which it has consistently been doing. An efficient leadership has steadied the ship to such an extent that it is not only effortlessly sailing with the wind but has also begun

providing actionable intelligence with the aid of data analytics and artificial intelligence to the preventive field units of the Revenue, and the same seems to be yielding results if one goes by the pace of outpouring of revenue!

A good sample of such insights, somewhat unpolished during the early days, was profusely shared by the former Chief Economic Adviser in his Economic Survey prior to the Union Budget, 2018. Some of the key findings were—a 50 per cent rise in the number of registered taxpayers; a bulk of SMEs' transactions were B2B and only 17 per cent were B2C; 68 per cent of their purchases were from medium to large taxpayers; over 17,00,000 taxpayers opted for registration, albeit their turnover was below the threshold of ₹ 20,00,000—the sole motivation was to avail ITC; the fear of producer-states about the erosion of their tax base was found unfounded; only five States (Maharashtra, Gujarat, Karnataka, Tamil Nadu, and Telangana) accounted for 70 per cent of India's exports; inter-state commerce was found to be more than 60 per cent; large firms were found to be exporting less, which substantiated the claim of MSMEs being the largest chunk for exports; and the hardcore formal sector was found to be barely 0.6 per cent. If we look at the noisy data of the past five years, merely 1 per cent of taxpayers now pay 35 per cent of total taxes. Among the composition taxpayers, the number of GSTINs making payments has dipped from 8,60,000 to 7,20,000, which means that more and more taxpayers are opting for regular registration. About 1.1 per cent of taxpayers made payments in cash to the tune of ₹ 6,30,000 crores!

The GSTN data has providentially come up as a premium feed for designing welfare and development schemes and designing of tax concessions or other provisions even on the direct taxes side. In the near future, the GSTN would be the most valuable company in the economy, sitting over piles of precious data which should be monetised in the form of providing filtered and chiselled data to the banking and NBFC sectors for advancing loans; credit card agencies; marketing companies; and even for the development of new tech-based utility goods of mass consumption. For dollars to a doughnut, I can say that the GSTN, the sandbox buddy of GST, has a bright future if its data is intelligently mined and the resultant insights are attractively packaged as premium products. I can foresee a long serpentine queue of deep-pocket corporate takers jostling at its counter! *Ou la la!* I just hope that Banquo's ghost does not return as such a lurking fear is realistic in the mercurial world of technology! It is time for the GSTN to tattoo a golden story in its own software code!

Chapter 1 dwells on the madcap scenario arising out of the requirement of filing reverse charge invoices and non-GST purchases, including NIL rate and exempted ones; the compliance mela for professionals who confronted the avalanche of return-filing under the GST besides the income tax; how the much-talked-about ease of doing business was given short shrift by simply staggering the load on the server by extending the due dates; and the lack of interest on part of the Council to insist on

signing a contract with the GSTN, a private company, with the details of obligations and responsibilities.

In Chapter 2, I have elaborated on the pestering demand of the taxpayers for allowing the facility of revision of TRANS-01; the demand of interest for late payment of tax although the fault rested with the GSTN; a vicious cycle constituting a booby-trap for the taxpayers and ironically, the GIC was in the know of all these likely events; repeated failures are a Bellwether of the fact that the GSTN was never ready for the 1 July roll-out; the invoice-matching should have been done in a phased manner; and the need for a technology audit to pinpoint the reasons for such a grandiose failure.

Chapter 3 highlights the tale of how GSTR-3B, which was brought in only as a stop-gap arrangement, has turned out to be the saviour of the GST; the Government, for the first time, admitted that there was some problem with the GSTN server and that is why the extension of due dates; the Revenue bosses also admitted that merely because the GSTR-3B has fitted the bill of the crisis, the intention to introduce the trifecta of GSTR-1, 2, and 3 is not to be abandoned; how and why the GSTN alone cannot be blamed for the entire crisis as a flaw exists in the design of the business processes; the need for a comprehensive review of the design; and whether there was any Plan B in place or was it a case of having a tiger by the tail?

Chapter 4 narrates the story of how GSTN has captured rich data of the different classes of taxpayers and what insights can be gathered by mining such data; a quick study of the data by the Chief Economic Adviser in the Economic Survey prior to the Union Budget 2018 reveals that the number of unique indirect taxpayers is up by more than 50 per cent and this is after weeding out and removing the taxpayers who fell below the new thresholds under the GST; a bulk of transactions by SMEs found to be B2B—only 17 per cent was B2C; as many as 17,00,000 taxpayers took normal registration albeit their turnover was below the exemption threshold; only five states accounting for 70 per cent of India's exports; no element of truth in the widespread fear of the producer-states that their tax base would be eroded; more than 60 per cent of transactions found to be inter-state commerce; large companies export less in India which means that MSMEs account for a larger share of the exports burden and the hardcore formal sector is less than 1 per cent; and how such filtered and quality data can be a precious input for designing welfare schemes by the Governments.

Chapter 5 highlights the yawning trust deficit between the Governments and the taxpayers; the soaring litigation on the grounds of procedural inconvenience triggered by the downtime of the GSTN server; the need for the Union Finance Minister to look into a freaky case of conflict of interest with the Revenue Secretary holding the additional charge of the GSTN's Chairman post; why the Government, which collects over ₹ 12,00,000 crores of revenue annually, should act stingy in fund allocation to the GSTN and why it is the case that India does not deserve the best tech platform in the world with so much of IT talent in the country and if the budget is a constraint, let there be a user fee on the taxpayers as a quality GSTN is only to

ensure a good experience to the taxpayers; a rising default percentage in filing GSTR-9C as the GSTN is once again not equipped to handle such returns; how the GSTN most often resorts to time-buying techniques to wall off pressure on it.

Chapter 6 talks about the psychology of tax compliance behaviour which is often zeal-based and the zeal, in turn, hinges on easy procedures and tech-driven ease; how the GSTN once again turns out to be a muddled kingdom for over 8,00,000 taxpayers whose registration was cancelled for a raft of reasons such as irregular filing of returns and non-commencement of business for more than six months and non-compliance despite an amnesty scheme; and hardening of policy stand by the Revenue disqualifying such a large number of taxpayers who are keen to board the bus again.

1

GST: A Sad Tale of GSTN and the Ease of Doing Business Gone![*]

In the second half of June, I talked about the disruptive potential of GST if implemented from 1 July[1]. I elaborated on the ill-preparedness of the trade and industry which may take a toll on manufacturing and trading and thereby, on the GDP figures. The latest inputs compiled by some of the professional bodies have revealed that the transitional pains have indeed taken a serious toll on the June quarter's profit earnings. With the distributors and retailers declining to stock goods in June, the profits of listed companies have suffered a dent of about four per cent. But so far as the Government is concerned, it is their stand that such a decline in sales and profits is nothing but the price one needs to pay for migrating to a business-transforming tax system. That is why the unfazed Union Finance Minister, after chairing the FSDC meeting in the capital early this week, observed that with the introduction of GST, the macro-economic fundamentals of the economy have improved and become stable.

The Union Finance Minister may be right at this point in time but unless these macro variables are closely guarded against, they may change for the worse. There are many sectors, including manufacturing, which have regularly been writing to the GST Council to review the tax rate burden passed on to them. Theoretically speaking, the GST was expected to correct the negative bias against manufacturing and make the revenue burden a little even, but it has not happened as the GST Council has not attempted any tax rate reform so far since the predominant fear in its mind is revenue neutrality.

Another area which seems to have upset the taxpayers is the delay in creating the Anti-Profiteering Authority as some of the State and even Central GST officials have begun to drop letters and make calls for pre-GST prices and post-GST changes in the pricing strategy. Since this is arguably a sticky area and needs a detailed **guidance note** for the GST field officials, it is important that such a national authority is created in right earnest and proper machinery provisions are made so that the industry could spring back to its normal working methods. At present, even if there is

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* TIOL – COB (WEB) – 568, 24 August 2017.

1. GST - July 1 - Another 'Disruptive' Decision? - (See Cob(Web)-559).

a rise in the material cost or other facets of product costs, one seems to be holding on to the price line as it may invite the wrath of anti-profiteering sleuths. Though the CBEC Chairperson has publicly stated that such a body would be in place in the next fifteen days, what stops the CBEC from sharing the Draft Guidance Note on this issue? It is true that such a note would be finalised by such an authority-in-the-pipeline but there is no harm in sharing the Draft Procedures with them as soon as its Members and Chairman are appointed.

Let me now move to the most crucial and sensitive issue of the growing burden of the compliance regime under GST. The Revenue Secretary and others have, on many occasions, clarified that one just needs to file GSTR-1 and other data would be populated automatically by the system and the GSTR-2 and GSTR-3 would be system-designed. As per their public statements, it was just one return to be filed and not thirty-seven returns in just one State's jurisdiction. But going by the GSTR-3B experience, which also wanted **details of reverse charge invoices and non-GST purchases including the NIL rate and the exempted ones**, it is certainly not an easy compliance regime. Just too many details are required to be submitted every month.

Let us now take a look at the Compliance Calendar to understand the magnitude of the compliance burden which rolled out exactly on the day India got its Independence and freedom was the low-hanging fruit for all Indians. 15 August was the last date to file Service Tax Return for the April to June period. 16 August was the last date for choosing the Composition Scheme under the GST. 20 August was the last date to file Form 3B and pay taxes. Fortunately, it was extended by five days for a bundle of reasons— some States were reeling under massive floods; the GSTN server was not working; and many other technical glitches. Then came the TRANS-01 Form on 21 August and 28 August is the last day to submit the return.

The burden on the taxpayers and tax professionals appears to be never-ending. Their engagement would not end on 28 August. **Traditionally, most professionals have been concentrating on Income Tax returns for companies in the month of September as tax audits are to be conducted before the returns are filed by 30 September**. But, here comes a massive and hectic GST compliance schedule— between 1 and 5 September, one is required to upload sales invoices in GSTR-1 for the month of July. 10 September is the due date for furnishing details of all purchases and 15 September is the last date for filing GSTR-3 for the month of July and 20 September is the deadline for paying GST. It is also the deadline for filing sales details for the month of August. 25 September is the due date for filing GSTR-2 and 30 September for the GSTR-3. Meanwhile, 28 September is the last date for filing TRANS-01 for declaring stocks up to 30 June. Interestingly, 30 September is also the last date for surrendering one's GST registration if one is not liable to pay GST.

The ordeal does not end here. It spills over to the month of October and it starts with GSTR-1 to be filed by 10 October for the month of September. Then, other due dates follow for GSTR-2 and GSTR-3. The months of September and October

are generally busy months for businesses as it is the festival season in India. When the businesses should be concentrating on improving their sales, they would be coping with the rising demand for information from their own professionals who would be under tremendous strain not to make mistakes and to meet the compliance deadlines. In between, the Income Tax returns after the tax audit are also to be filed by 30 September. Since the assessment, refunds, and time-barring deadlines follow soon, it would be difficult for the CBDT to defer the due date.

Given this asphyxiating schedule for tax compliance, the larger question is: Has our Prime Minister really forgotten about something he never used to feel tired of talking about—yes, I am talking about the **'ease of doing business**'! Where is the ease in this compliance matrix, Mr Prime Minister? What may further eat up some of the emaciated elements of ease in the GST return-filing is the poor preparedness of the GST Network. Even for a form like 3B, the GSTN made it tough to submit and pay taxes as its **downtime in the past few days has been more than its uptime**. Right in the middle of the day, when one is trying to pay tax, it shows a blip stating that the site was going through maintenance to enhance the quality of services. Although such a promise was accompanied by a time schedule, the uptime has been deceiving taxpayers for several hours. As late as yesterday, when I myself tried to log in, it did not respond and the critical links were not working. Even when the Govt managed to stagger the load on its server by extending the due date, it is not able to sustain the load (only about 20,00,00 people have so far filed their returns and about another 22,00,000 are yet to complete their migration), then what would happen when another 40,00,000 taxpayers jump on it with tonnes of information and invoices to upload their GSTR-1 and GSTR-2. Its present level of performance evidently fails to inspire confidence in its capability to successfully carry out the most tricky and gigantic work of **invoice-matching**. If it fails or plays truant, it would block ITC worth hundreds of crores for the industry and there is bound to be hue and cry across the country.

I have been frequently reminding the policymakers about the GSTN being the Achilles heel in the entire chain of GST preparedness. I have been asking the Government why it has not signed any contract with the GSTN, detailing its legal obligations and responsibilities. What would happen if it fails? Is the Government going to tell the nation that it has failed? What would happen if its vendor, Infosys, which is also going through a fratricidal war, reports to it that some of its critical hands have left and it is not able to meet the due dates fixed by the Government? Why is the GSTN so poorly-prepared? Worse, why is the Revenue Secretary, who is an excellent task master for the Revenue officials, **so soft on the GSTN**? When I asked this question to some officials, they said that it is perhaps because of his greater loyalty to his All-India Administrative Service (IAS). Unbelievable! But the reality is that the two senior-most officials in the GSTN are retired IAS officers. Its Chairman, whose term ended six months back but was given an extension, is again due for retirement on 29 August and is likely to be given another extension. It

is unfortunate that the Government is not keen to look for a proven technology man to head this body as it seems that the IAS lobby is too keen to keep it within its powerful wrap. But at what cost? Let us wait for the expensive experiences which may unfold in the coming fortnight!

The moot question is whether 'Ease of Doing Business' would degenerate into a 'DISease of Doing Business—with all the returns that are to be filed! By the way, when will the businesses have time to do business?

2

GST Let Down by GSTN*

The feel-good factors which were generated by undertaking well-orchestrated campaigns prior to the implementation of the GST seem to be **on the wane** post-rollout. The GST Council is scheduled to hold its next meeting in Hyderabad coming Saturday and one of its agenda items should be to make an unbiased assessment of the number of technical glitches the taxpayers have been subjected to in the past sixty days, and what have been the responses of the various arms created to deal with them. One of the arms is the GST Implementation Committee (GIC), which has indeed shown tangible signs of quickness, efficiency, and sensitivity towards the ground-level problems, and that is how we have seen extensions of due dates for filing GST returns or even early availability of TRANS-01 for claiming the carried forward credit from the previous tax regime. Another arm is the GSTN, which I would like to talk about at length.

But before that, the GST Council is all set to review the tax rates for many sectors which have represented—such as Plywood, handicrafts, textile, and many more. I am sure that since the GST Law Committee has goofed up in terms of not doing a proper study of the implications of various slab rates on different sectors of the economy and stuck to some random formula to place goods and services under different brackets to realise the revenue-neutral targets of tax collections, the Council would remain under pressure at its meetings in the next one year. But, besides tinkering with the tax rates which may appear to be ludicrous in some cases, the Council should also take a positive decision to **allow the facility of revision of TRANS-0,1** which has somehow been filed by a good number of assessees who had huge opening credit in their books. Since it was prepared and the data was fed furiously at the 11th hour, too many errors have been made by the taxpayers who deserve the facility of correcting such errors.

In this context, let me bring it to the notice of the GST Council that so much harassed are the tax practitioners that the Rajasthan Tax Consultants have filed a writ in the High Court raising both substantive as well as procedural issues. Issues range from compliance, ITC, late fee waiver, interest, and penalty to TRANS-01 problems. A notice has been issued to the Union of India and the State Government and the next hearing is on 13 **September**. The petitioners have alleged that when the GSTN was not ready and the Government was also not ready with everything, why did it

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* TIOL – COB (WEB) – 570, 7 September 2017.

impose a new system on the businesses at the cost of the Exchequer's interests? There are merits in many of the charges alleged. The charge against the GSTN is well substantiated and when the GSTN itself is not able to cope with the load of the traffic, how can the Government demand interest on late payment of tax? Waiver of late fee is fine **but collecting interest on late payment which resulted largely from the inefficient support of the GSTN, which did not allow the taxpayers to submit their FORM 3B, is certainly not fair.** This is where the GST Council needs to take the moral responsibility and grant a waiver of even interest till the time the most crucial chain in the GST Design, the GSTN, starts functioning well.

Although the GIC responded in time and extended the due date for tax payment from 20 August to 25 August, the GSTN failed to cope with the load and failed to provide the services for which it has been set up and that is how a good number of taxpayers who managed to file TRANS-01 but could not file GSTR-3B as the TRANS-01 details were not reflected in time and since credit was not available, one was not able to pay the remaining liability in cash. Thus, the Revenue failed to collect what it would have done in its very first month. Had the GSTN worked well, the taxpayers would have managed to file their returns and also pay taxes, which would have been more than ₹ 1,30,000 crores but for the glitches!

Since the very basic technical glitches continue to hound the taxpayers, the next bout of compliance requirements, starting with 1 to 5 September for filing GSTR-1, naturally looked Everest-esque, and even before one could hear some hue and cry for an extension of the due date, the GIC on its own extended it to 25 September. **Was it indeed a kind and generous reaction from the GIC?** Probably NOT! Had the GSTN been fully prepared, the GIC would not have delayed the GSTR filing. Since it had internal inputs that the GSTN is not yet ready to cope with GSTR-1, GSTR-2A and GSTR-2, and then GSTR-3, it did not take a chance of witnessing chaos of the highest order; and quick came the tweet that the GIC has decided to extend the due dates for July and August.

It is now evident that the GSTN was never prepared for the 1 July roll-out and since it was a political decision to go ahead with 1 July, the GSTN has been caught on the wrong foot. Undoubtedly, it has been doing its best by pushing hard its vendor, Infosys, but it is a great challenge to meet the short deadlines of a complicated compliance-driven tax system. In hindsight, it appears that the GST Committee, mandated with the task to finalise the **business processes, had not done proper homework** with respect to the introduction of a new tax system for a differentially educated layer of taxpayers. Making a robust compliance matrix is one thing and facilitating taxpayers to comply with them is another thing. Here, I find a huge gap in their understanding.

In place of putting all their compliance dreams in one bowl—GSTR-1, GSTR-2, and GSTR-3—this committee should have initially aimed at only getting returns with credit details and tax payments. Invoice-matching should have been a goal to be achieved in a **phased manner**. It was more pertinent to plan so as such an effort had

failed in the cases of two large economies—China and Brazil. Not to risk India's reputation right in the beginning of a new tax system should have been one of the words of caution. But it did not happen and what I find today is that the GSTN is simply not ready with the gigantic task of **matching invoices before the input tax credit is allowed**. Any half-effort made would certainly result in more mess and I do fear, India's bold experiment with tax technology may collapse. Further, more than impacting the revenue collections, it would hurt the political capital of the Modi Government, which has staked claim to a new chapter in the book of cooperative federalism. States may not take any failure kindly.

With a large number of small traders and businesses failing to file their 3B returns, the Traders Body has already demanded an immediate **Technology Audit** of the GST Network, and there is merit in such a demand. Thankfully, the North Block paid attention to the suggestions given in the previous Cob(Web) and has not granted an extension to the retiring Chairman of the GSTN, who had only specialised in making tall statements. Its charge has been taken over by the Revenue Secretary himself, who is undoubtedly the prime mover for the smooth roll-out of the GST system. But he needs to keep a close eye on the GSTN CEO, who appears to be quite good at making presentations but certainly not at other things which matter to the taxpayers.

It is high time the GST Council takes a hard look at the ground reality before the GSTN does long-term damage to the new tax experiment. If one goes by various studies, the GST has already done some amount of damage to the economy, particularly the services sector which happens to be a key driver of growth and job creation. As per the latest Nikkei India Services PMI Business Activity Index, the services sector activities remained weak for the second month and the **economy has contracted**. Though the manufacturing index has picked up, the services stand shrunken. Hospitality is one of the sub-sectors which has taken a serious blow. Worse, some of the MNCs which were waiting for the GST to set up manufacturing plants in India have begun to review their decisions. One latest case is that of HP Inc. All such early warnings must be paid heed to before the good the GST is capable of doing to the economy, is lost forever!

3

GST Mess: Why Blame the GSTN alone? It's Time to Review Business Processes Too!*

The 21st Meeting of the GST Council at Hyderabad, last Saturday, was perhaps the most eventful and also the most tumultuous since the first two meetings when the skeletons of the broad design of the GST were fleshed out by deciding the legal provisions. In fact, some insiders say that the initial meetings of the Council were a seamless ride for all the stakeholders. Anyway, going by the growing din over the non-working of the GST Network, the background for an acrimonious or at least a cacophonous meeting was almost well-cooked, and this is what happened when the proceedings of the Council commenced quite early at 11 AM. There were too many agenda items to review the tax rates of many goods which never deserved to be placed in the demerit category tax rate of 28 per cent; amendment of a few legal provisions; and then the exhaustive presentation on the working of the GSTN.

What gives a glimpse of what may have happened inside the conference room at the International Convention Centre was the number of hours spent inside and also the number of decisions taken. The meeting stretched beyond 6 PM and that is why the Union Finance Minister, Mr Arun Jaitley, briefed the media after 7 PM. At the first glance itself, he did not look too happy or elated to brief the media, unlike the previous occasions. He also looked exhausted and a little pale. When he began talking about the decisions, he took time, perhaps, to overcome some shades of incoherence in his thought process. By the time he talked about the rates being proposed to be lowered for forty commodities and the hike in the Cess on cars; he regained his sangfroid and also talked about the 5 per cent rate on the **deemed registered brand name**; date extension for return-filing; exemption from registration to certain goods even if there is inter-state trade; and finally, the constitution of a Ministerial Committee to review the functioning of the GSTN. In fact, on Tuesday, the Finance Minister announced the constitution of this Committee headed by Bihar's Deputy Chief Minister, Sushil Modi.

The biggest surprise was the exemption from registration granted to job workers. It is not that the job work sector did not deserve it. It was the internal input to the

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* TIOL – COB (WEB) – 571, 14 September 2017.

Government that the prevailing regime was not conducive for the job workers and it had **dampened particularly the manufacturing sector,** which depends hugely on the efficiency of this sector. That is why it was decided to exempt those job workers from obtaining registration who are making inter-state taxable supply of job work service to a **registered person** as long as the goods move under the cover of an e-way bill, irrespective of the value of the consignment. However, this exemption will not be available to job work in relation to jewellery, and goldsmiths' and silversmiths' wares.

A sign of relief was also heaved by the Auto Sector which has been in a state of uncertainty for the past two months. A marginal hike in the Cess, except for the small cars, was much-needed succour for them. The decision to lower tax rates from 28 per cent to 12 per cent; from 18 per cent to 12 per cent; and from 12 per cent to 5 per cent clearly indicates that the Fitment Committee had **not done proper homework** at the time of the introduction of the GST in July. The Fitment Committee had perhaps no inkling about the ludicrous nature of a part of their exercise where they ended up placing items like custard powder, rubber bands, plastic raincoats, idols made of clay and metals, kitchen gas lighters, computer monitors up to 20", ceramic pots or jars, and statues **under the 28 per cent heading**. Similarly, some of the most common items like roasted gram, dried tamarind, saree fall, dhoop batti, and grass or leaf products were placed under the 12 per cent tax rate category. Thankfully, good sense prevailed over many of the Members of the Council and the rates have now been rationalised. I hope with this revision, most of such aberrations have been set right and in the next meeting, not much tinkering would be required.

The most important of all the decisions was to acknowledge the **utility** of the interim **Form 3B** which has been extended up to December. I would not be surprised if it is again extended up to March 2018. What was designed with a sunset clause for two months has finally come to be treated as a **saviour for the GST**!! But why? Should one presume that the GSTR-1, GSTR-2, and GSTR-3 are not doable? What went wrong? For the first time, the media was told that there were problems with the GSTN Server and that is why the due dates are being extended. Though the GSTR-3B are to be filed up to December, it does not mean that the GSTR-1, 2, and 3 are being done away with. This clearly indicates that the top decision-makers have not lost hope against the feasibility of getting these exhaustive forms returned every month.

The larger question here is: **Should GSTN alone be blamed for all the mess?** Was it given sufficient time and technical briefing? Did its CEO have any inkling about the gigantic nature of the workload? Did it study the taxing nature of the 11th-hour uploading by the large community of professionals in India? Perhaps **NOT**! It would be unfair to entirely blame the GSTN. The actual flaw perhaps lies in the **design of the business processes**. It appears that its designers had fallen victim to 'Overconfidence Syndrome'. Rather than making it simple for the

taxpayers and also safeguarding the Government revenue, they were perhaps more moved by the global challenge that no country parallel to India's size has done the job of matching inward and outward invoices. Since they wanted to score over economies like Brazil and China, they did not spare any thought about doing it in a phased manner, and that is how they designed the GSTR-1, 2, and 3—all three are very large containers of taxing information and then, the matching business. The Committee responsible for designing the business processes ignored the ground realities and shifted the Himalayan burden on the GSTN within a tight time frame. All such onus was almost a sure-shot recipe for a failure and this is what has happened (TIOL has been insisting on what the Plan B for GSTN is). It is not that the GSTN cannot do it but it needed time to develop its applications and for a successful pilot run, multiple rounds of testing were required before throwing the portal open to millions of taxpayers.

Even now, there is not much delay to make the transition smoother and glitch-free. All that needs to be done is to **comprehensively review the Business Processes** and put the invoice matching business in a state of suspension till the time GSTN is ready for a pilot. In fact, it would be ideal to introduce it first, for the large taxpayers, and then other layers of taxpayers. Secondly, the Revenue can do well with the GSTR-3B alone which can further be made easy by providing a **staggered time schedule**. Different dates can be provided for filing of GSTR-3B for assessees with ₹ 200 crores and above tax payments; different dates for between ₹ 100 crores and ₹ 200 crores and for less than ₹ 1 crore. Such a staggered schedule would help the GSTN manage the traffic on a given day very well.

What forced the GST Council to set up a Ministerial Committee to look into the GSTN functioning is not only the hardship of the taxpayers but also the **settlement of the States' revenue**. Netizens may recall that it is the GSTN whose efficiency is going to provide quick resources to the States by an efficient settlement of CGST and SGST revenue. As rightly put by Mr Jaitley, IGST is nobody's revenue, it is to be utilised for the payment of taxes—either CGST or SGST. Once it is done, then the money would come to one's kitty. Let us hope the Ministerial Committee takes a 360-degree view of the issues and does not indulge in the blame game. Any protracted blame game would end up hurting none but the GST, a workable concept, if implemented with a tinge of realism and not idealism!

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4

GSTR Data: An Analyst's Delight!*

The cart of Goods and Services Tax (GST) may be seen parked knee-deep in muddy waters but it has done the predictable magic to the world of data crunchers. Much to the delight of statisticians and economists, the GST, implemented through a common national portal, the GST Network, has captured huge and rich data in the past six months, notwithstanding the fact that the GSTN is not yet optimally functional. However, the information uploaded online by different segments of the taxpayers' community has proved to be very rich primary data for the analysts to look for new insights into the changing hues of the Indian economy. And this is what marks the most striking feature of this year's Economic Survey tailored by the Chief Economic Advisor, Dr Arvind Subramanian. Though the printed version of the Survey has gone pink with a different underlying message, the most precious, in contrast to the past years, have been a slew of new and eye-popping findings originating from the taxpayers' GST return details.

The key findings are:

- **The number of unique indirect taxpayers is up by more than 50 per cent**—a substantial 34,00,000. No doubt, the unique number has gone up sharply and the tax base has expanded as was projected at the blueprint-drawing stage of the GST, but one figure which seems to have been overlooked is that of the number of registrations surrendered. Mr Subramanian probably forgot to collect this data from the GSTN. My estimation is that the surrender figure can be more than 10,00,000, and the twin reasons are: (1) a hike in the registration threshold; and (2) businesses and professionals either going out of business or opting for mergers.

  First, one may recall that the entire tax base of the erstwhile regime was migrated lock, stock, and barrel to the GSTN and the option to surrender was provided much later. Since a good number of service tax and VAT registrants who had their turnovers falling between ₹ 10,00,000 and ₹ 20,00,00 are still in the GSTN server, such numbers are required to be excluded from the effective tax base. Secondly, there are thousands of new registrations where professionals had taken GSTIN for specific projects and they are now out of it. Similarly, thousands of small businesses have merged or gone 'silent' or

* TIOL – COB (WEB) – 592, 1 February 2018.

changed the nature of business and would like to surrender their old registrations. Notwithstanding this ground reality, TIOL is very optimistic that the GST tax base would grow further in the coming months with the solid push being rendered to formalisation of the informal economy.

- **Bulk of transactions by SMEs are B2B**—about 30–34 per cent—and only about 17 per cent are B2C transactions. One good reason is that most SMEs prefer to buy their supplies from large corporates. In fact, as high as **68 per cent of their purchases are from medium to large, registered** enterprises so that they could avail ITC. Such a finding is indeed good news for the GST Council as the band for tax evasion is much narrower. Since B2B transactions provide no room for tax evasion because of the continuous flow of ITC, the only space available for tax evasion is the B2C and it can be taken care of by some administrative measures.

- **As high as 17,00,000 taxpayers have taken registration although their turnover is below ₹ 20,00,000**. It is a good sign indicating the fact that the benefit of the GST, i.e., the seamless flow of ITC, has been understood well even by small taxpayers, and it has been achieved because of aggressive publicity and a social media push. Since convincing small taxpayers in any economy is a challenging task and consumes time, India has made a good beginning on this front.

- **Producing States' fear of erosion of tax base is unfounded**—in the run-up to the GST, the biggest fear of the industrialised States was that since the GST is a consumption-based tax, it would shift the tax base to consumption States and they would suffer base erosion and profit shifting! But the data analysed has revealed that the top States which have witnessed maximum registration are Maharashtra (16 per cent); Tamil Nadu (10 per cent); Karnataka (9 per cent); Uttar Pradesh (7 per cent) and Gujarat (6 per cent). These figures tend to indicate that each State's share in the GST tax base is perfectly correlated with its share in the overall Gross State Domestic Product. So, the much-talked-about myth stands busted.

- **Vindication of conventional wisdom: A** State's GSDP per capita is correlated with its export share. The GST data analytics reveal that only five States (Maharashtra, Gujarat, Karnataka, Tamil Nadu, and Telangana) account for 70 per cent of India's exports. These States are not only production zones of India with higher living standards, but they also generate surpluses.

- **Bigger size of inter-state component in GDP**: Unlike in the past, when it was guesstimated that inter-state sales account for about 50 per cent of the domestic trade, it has turned out to be about 60 per cent and the five exporting States are Maharashtra, Gujarat, Haryana, Tamil Nadu, and Karnataka. The top importing States are Maharashtra, Tamil Nadu, U.P., Karnataka, and Gujarat. These findings clearly establish that since they are producing States or large consumption States like U.P., they record more inter-state transactions within the economy.

- **Large firms export less in India**: As compared to Brazil, Germany, Mexico, and the U.S.A., where the top one per cent of firms accounted for 72, 68, 67, and 55 per cent of exports, it was only 38 per cent in the case of India. This clearly means that large corporates focus more on domestic sales because of higher profitability and less competitive market conditions. Since trading across borders is more competitive and also often confronts many non-tariff barriers, they prefer the less unpredictable domestic market. When the top five per cent of firms were taken into account, their share also turned out to be less than 60 per cent, unlike the developed economies.
- **Hardcore formal sector is less than 1 per cent**—the GST data has revealed that about 0.6 per cent of firms, accounting for 38 per cent of the total turnover reported, 87 per cent of exports, and 63 per cent of GST revenue, are from the hardcore formal sector if the twin parameters of tax and social security net are applied. About 87 per cent of firms, accounting for 21 per cent of total turnover, are purely informal as they are outside both the social security net and also tax liability. The final finding is that only about 53 per cent of non-agri workforce of 240 million is in the formal sector. Thus, the estimates for formal non-farm payroll range from 31 per cent from the social security net angle to 53 per cent from the tax angle—and it is much higher than what was largely believed in the past.

All these findings emanating from the GST data are going to be valuable insights for the policymakers who would be using them for designing their **welfare schemes** in the future, besides planning other economic laws. Secondly, once the Reverse Charge Mechanism is notified for the Composition taxpayers, a good amount of data relating to transactions from unregistered taxpayers would also make the GST data much more richer for better analysis of the Gross Domestic Product and the future potential of expansion in the GST tax base and also its corresponding positive impact on the income tax base. Though one may tend to give more credit to demonetisation for hugely adding to the tax base of income tax in the current fiscal, the long-term conversion push for the informal economy to join the formal domain is the GST and its unblocked ITC chain. Let us hope the GST Council rapidly moves in the direction of increasingly unblocking the flow of ITC in the economy.

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5

North Block Watches as GSTN Plays Havoc with the PM's Historic Tax Reform!*

The Goods and Services Tax (GST)—when it was launched from the Central Hall of the Parliament at the stroke of midnight on 30 June 2017, it did swell the chest of the Prime Minister, Mr Narendra Modi, with pride and a sense of achievement! Today, the PM is at pains and it is largely driven by the GSTN coupled with the pachydermic approach of its supervisory authorities! A Good and Simple Tax has been metamorphosed into a chaotic tax which is turning out to be simply impossible to comply with! If we leave aside the contentious aspects of the laws, the tax technology-captive compliance mechanism has largely collapsed! Those who are accountable for providing either due dates or the IT platform, appear to be scurrying around for cover! The esoteric group of technocrats and bureaucrats have simply run out of ideas to make any meaningful headway! They seemingly appear to be caught in quicksand!

The two notable consequences of the grandiose failure of the GSTN and also its supervisory authorities in the North Block are: (**1) A sharp rise in the trust deficit between the Government and the taxpayers, and (2) A large number of court cases on procedural inconvenience grounds.** Let me elaborate on the growing trust gaps where a large swathe of the GST tax base has come to believe that the Government lacks ideas to fix the repeated technical glitches of the GSTN and also streamline the procedures. Even some of the State VAT Commissioners share the same opinion being aired in the CFO and tax heads groups on WhatsApp. Have these top honchos in the corporate world and State Governments' top officials really erred in firming up such an opinion? Or, is the Ministry of Finance making concerted endeavours to fix the problems as fast as a private entity would have done in any tax jurisdiction on the global map?

Going by the present hierarchy of the supervisory authorities for the activities of the GSTN, the Union Finance Minister indeed needs to repair the **hugely-impaired public perception**. The Revenue Secretary represents the Union of India and by holding additional charge of the GSTN's Chairman post, here emerges a potential

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* TIOL – COB (WEB) – 698, 13 February 2020.

case of conflict of interests in the administrative domain. Undoubtedly, the Revenue Secretary is an able technocrat with a heightened sense for selection of the right mix of technological tools (he has proven his skills in the case of *Aadhaar*); but here, he has been putting on two 'hats'—one 'hat' is clearly subservient and accountable to the other. Thus, what is needed is to unburden him so that he would act as a more effective monitor of the GSTN for the Centre as well as the States.

Secondly, the GSTN CEO is a perfect gentleman with many human qualities! But when the horse he is riding has failed the Government, he should himself pave the way for a more worthy successor who could ferry the GSTN out of the muddy waters! A common-sense prescription to deal with the present GSTN-related issues is: How the BCCI dealt with India's one of the most successful cricket captains when he repeatedly failed to live up to the nation's expectations! I need not further elaborate on how the Finance Minister should deal with the present crisis in the GSTN, which has repeatedly been letting down the Government.

The most common question being asked by not only the taxpayers but also taxmen in the field formations is that when the Centre and the States can collect over ₹ 12,00,000 crores from GST and such collections are totally dependent on the IT Platform, why can't the GST Council spend ₹ 25,000 crores **to build one of the best tax technology platforms in the world?** It would be a one-time investment for the Exchequers and the best of the IT organisations in the world would like to deliver it within a given time frame. India is known for its prowess to export high-quality IT tools to large corporations worldwide but when it comes to such a large domestic project like GSTN, why should the GST Council or the Centre act 'penny wise and pound foolish'? If allocating funds is a serious constraint, the GST Council may take a call to charge ₹ 100 or ₹ 200 as **user fee** (in lieu of raising tax rates) like a passenger pays for airport services or a driver pays toll on National Highways. For providing high-quality tax technology services the Sovereign is within its rights to levy user fee! Poor technology selection coupled with poorer management has brought GST to the brink of utter failure and such an inference can be drawn from multiple writ petitions filed in several High Courts across the country.

Before I take up some recent court decisions and observations to make some comments, let me first share some basic data for a better understanding of the readers. The latest legal spat is about the last date for filing GSTR-9 and GSTR-9C for FY 2017-18. For the nine months' period, the total tax base was 92,60,000. Out of the total, about 64,00,000 assessees managed to file GSTR-1 and GSTR-3B and thus, became eligible for GSTR-9 filing. A large chunk of the remaining 28,00,000 assessees were granted late fee waivers to file all GSTR-1 and 3B returns so that they become eligible for the annual return. The due date was extended from November to January 2020.

Let us now take a look at the tax base eligible to file audited returns, i.e., GSTR-9C. Till the last date, i.e., 31 January 2020, only about **20 per cent of assessees have uploaded their GSTR-9C out of 12,50,000**. **The default percentage is about 80**

per cent and the main reasons are the technical glitches of the GSTN. It is true that 20 per cent of assessees did manage to upload their data but the credit for the same goes to the industrious efforts of the filers and **not the random efficiency of the GSTN**. When 80 per cent of assessees above the ₹ 2 crore turnover threshold have failed, what should be the ideal approach for the GST mandarins? Ideally, a positive response would be to enable them to file returns when the IT Platform is not allowing them to discharge their statutory compliance. But it seems that arrogance or non-empirical attitude has taken the GST bosses in its grip and the same can be inferred from some recent decisions. In one such case, the Union of India strangely decided to file SLP against the Rajasthan High Court's decision[2] extending the due date to 12 February without a late fee and penalty. The Union of India rushing to the Apex Court and bothering the Hon'ble judges on such a trivial procedural issue gives impressions about muddled thinking in the corridors of powers! This also reinforces the common perception that the GST bosses have little respect for the High Court orders and prefer involving the Supreme Court of India in every small issue rather than substantive legal and constitutional issues.

Let me now talk about another similar decision from the Guwahati High Court,[3] which recommended consideration of assessees' representations and extension of the **due date for 30 days for several North-Eastern States.** But strangely, and for no plausible reasons, the GST bosses preferred not to club the same case in the SLP filed before the Apex Court. This basically means that the North Block has no issue complying with the Guwahati HC decision but when the Rajasthan HC ordered a twelve days' extension, it called for stiff opposition. Though the due dates were later extended up to 5 February for Rajasthan, one more week extra, i.e., up to 12 February, was presented before the Apex Court—as if it would create havoc with the compliance software! Strange is the way the compliance issues are being handled by the North Block! The **hand-holding approach has clearly disappeared into thin air.** I am, in no way, suggesting that wilful defaulters should not be dealt with an iron hand but those who are keen to meet compliance deadlines but are being ditched by the IT platform do deserve supportive gestures rather than being dragged to courts!

A hardened approach toward compliant taxpayers would go against the basic philosophy of earning greater acceptance for the new tax system in the society at large. This is more so when the ball of default is in the GSTN court and the GSTN seems to be buying time whenever the Union Finance Minister generates heat on it. For instance, the staggering solution for due dates for filing GSTR-3B is just to ward off the rising temperature in the North Block. Rather than overcoming the inadequacies in the software and utilities on the GSTN portal, suggesting such a measure for three months as the decision to switch over to a new Return format from April is already in place, is clearly a short-term solution to ward off pressure or displeasure from the supreme bosses! Going by the poor preparations of the GSTN, it

2. 2020-TIOL-283-HC-RAJ-GST.
3. 2020-TIOL-265-HC-GUW-GST.

seems even e-invoicing is unlikely to take off from 1 April. As per the GST Council's decision, it was supposed to be **optional** from January but what the GSTN has offered is a **trial** version from 6 January! Where did the expression 'trial' come from when the Council has not suggested so? As a result, there are less than **250 takers** for the e-invoicing option so far as against 7,500 (₹ 500 crores and above turnover) and over 2,00,000 (₹ 100 crores and above turnover) assessees.

I am personally of the view that it is high time that the Prime Minister intervenes to save GST from the clutches of adhoc-ism and proven inefficiency before it is too late and the first step which needs to be taken is to overhaul the top management of the GSTN and put there somebody from the inner GST team who knows GST laws, business processes, and also the mercurial technology. Secondly, sufficient resources are to be made available to undertake a parallel project to build a world-class IT platform and the same should be built in less than 365 days. Once the new platform is ready, the New GST Return or other changes should be introduced to save the assessees from unwarranted hassles and pain! I hope that the PM or the FM spare time to dive into the ailing issues and employ visionary tactics to find a long-lasting solution to the festering technical glitches of the GSTN!

6

GST and Tech Mud-Bath: Caught like a Deer in Headlight, but the FM decides Not to Frighten Horses Midstream![*]

Tax compliance is fundamentally a zeal-based human behaviour. What adds gild to the zeal is the tech-based 'pill'! With the advent of Trojan androids, such pills can be a gaggle of comforting features and 'bots' to perform the compliance drill! If the pills promised and hyped do not work, taxpayers turn ill and get 'chilled' towards discharging their time-sensitive obligations! This is what appears to be happening not only to the Income Tax's new multi-featured e-filing portal but also to the GST. For the direct tax, which largely mandates annual compliance returns if we leave aside the monthly TDS and quarterly advance tax obligations, it is a monthly mundane, routine, and bald compliance business for the GST. Against this backdrop, the compliance season is hastily wheeling towards the crest—September-end for individuals and 31 December for corporate taxpayers! Given the salubrious promise made by the Government that chunky data would descend auto-filled in ITRs as soon as one logs in, taxpayers and compliance firms are this time least prepared and slack: No appetite for a last-minute push for extra data!

Against this heightened optimism, and rightly so, as it was promised and the Government prodigiously paid an eye-watering amount of money to its vendor to deliver the 'tentacles' of services and features, the taxpayers and their facilitators find themselves swimming in a turbid tech-based *hammam*! Ever since the new e-filing portal has been launched in the month of June—of course, with tantalising details of tools, features, and services—its biggest success has only been the heart-wrenching failure. Professionals and taxpayers cannot even log in! *Oh la la!* Login itself has become a chance game, or call it 'fantasy sports'! If one in a million manages to be in, an empty-handed return journey is guaranteed after a tech mud-bath! Time for a digital detox, perhaps! When these issues were brought to the attention of the Union Finance Minister, her heart did not go pit-a-pat! She did not get hot under her collar as she knew that the horses chosen for courses are not to be changed midstream! Despite being outfoxed and caught like a deer in the headlight,

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* TIOL – COB (WEB) – 778, 26 August 2021.

she decided not to frighten the horses! She had an inkling that Infosys is using the horse-and-buggy technology and also wowing with its lousy performances but she decided to play it cool to solve the riddle! She also knew that the insouciant approach of the vendor has thrown a curveball at her and she needs to handle it with knack and dexterity as the vendor may turn out to be incapable of embarrassment or not too concerned about its sullied credibility—*a la* some 'entertaining' allegations being circulated in the Internet world which also involves a former high-profile revenue 'titan'!

Applying the art of gentle remonstration, she summoned the CEO of Infosys, a *desi* information technology giant, which appears to be afflicted by technological uppity or titanic *hubris*! As things are rapidly lurching for the worse, the Finance Minister cleverly avoided the stench of humiliation for the vendor but did talk about the chilling lapses. The IT colossus was sensitised to peel off the skin of parsimony and deploy more human and other resources to neuter catalytic collapse! Mr Salil Parekh, the CEO, was advised to put the company's life and limb to balm the growing angst of the taxpayers. He was also exhorted to ignore—critics may bark as loud as they may like, but make it an epic battle for the company's reputation and elite brand before the situation further slides into bedlam! Plenty to chew over! Severely pummelled by a heavy dose of modesty and words of sanity rather than punitive action, as per the SLA in their contract, Mr Parekh promised his best arsenal of human resources and an early capping of the torrid time being faced by the taxpayers! Let us hope that Mr Parekh is able to gauge the monstrosity of the challenge and succeeds in erasing the tech-based piffle!

This brings me to the GST turf—another muddled 'kingdom' on the compliance front, at least for 8,00,000 taxpayers! No, no, I am not referring to the GSTN, which has consistently been doing rip-roaring job in the past six months, voila! I am referring to the 'Neanderthal' class of taxpayers whose GST registration has been cancelled for a raft of valid reasons—non-filing of regular returns for six months and three consecutive periods by composition dealers and non-commencement of business within six months. The GST Council, at its 40th meeting, decided to play kind, understanding, and generous and granted waiver of late fee, capping of maximum late fee and an amnesty scheme to seek cancellation of 'cancel culture'! However, at the 43rd meeting, the Council suffered a bout of 'amnestia' to grant amnesty scheme for revocation of cancelled registration!

The cancellation of registration was done under Section 29 of the CGST Act, 2017. The procedure was to file an application within thirty days of the cancellation catastrophe if it is so! A good number of taxpayers joined the revocation lorry and benefited but as many as 8,00,000 have failed for various reasons during the Corona times. A chunky size of these taxpayers have sent their prayers to various tax authorities that another extension may be provided to do the needful. Interestingly, deliberations have taken place and a favourable view was also taken as the Revenue loses nothing—only gains as more revenue may come! However, strangely, much to

the taxpayers' consternation, the North Block is playing lazy and grum and has coiled in silence! A mirthless act of a dawdler! The yawning uncertainty is eminently eating into the GST lustre—bottomless torments continue and a state of fiscal cul-de-sac thrives! Such a policy approach also invites the allegation of practising what is known as 'ableism'—discrimination in favour of able-bodied taxpayers and leaving behind those who are not able to catch up as they got battered by COVID-19! Oof! Perhaps, braying for a showdown! Ideally, the top decision-makers should intervene and extend the scheme before it lapses on 31 August! They may even embrace silence if they have a firmed-up mind to shoo away the 8,00,000 taxpayers! Good time for scapegoating!

There is a profusion of technical and legal issues involving GST. Let us talk about Circular No. 157 dated 20 July 2021. This has been issued in response to the extension of limitation under GST in terms of the Supreme Court's *suo motu* order[4] dated 27 April 2021. With the pandemic walloping lives and livelihoods, the Apex Court pragmatically extended the limitation periods for all sorts of compliance mandates, applications, and appeals. The order applies to both the parties—the taxpayer as well as Revenue. However, the CBIC appears to have come out with certain views, of course, based on the vetting done by the Ministry of Law. As per the Circular, the SC order will apply to quasi-judicial proceedings by tax authorities and appeals against such orders but there is a large spectrum of issues where it will not apply. Fine! Ideally, the Revenue should have filed a miscellaneous petition before the Apex Court and kept the court informed about its views so that a clarificatory order could have been issued or future litigation could have been avoided. But no, notwithstanding a National Litigation Policy and oft-repeated promises by the political leadership that the BJP Government would not promote the culture of the Government being an obsessive and compulsive litigant, nothing has been done even after carving out too many exceptions to the Apex Court's order.

In this background, let me discuss the Circular issued by the Tamil Nadu GST authorities. This Circular was issued on 7 April 2021. The CBIC Circular has taken a contrary view. In the first place, such a Circular should not have been issued by a State without consulting the Union of India—for the sake of uniformity in practice! However, as per the TN Circular, the Apex Court's order applies to even the exceptions carved out by the CBIC Circular. Ideally, the CBIC should have either asked TN to withdraw the Circular or amend it in line with the theme embraced by the CBIC. Against such conflicting situations, how does a taxpayer react if one falls under the jurisdiction of CGST in Tamil Nadu. The taxpayers under SGST authorities can relish the fruit of the Apex Court order but the taxpayers under the CGST authorities need to practise the art of self-denial or perhaps, the famous art of cribbing!

4. 2021-TIOL-222-SC-MISC-LB.

An expensive option is to file a writ petition in the High Court! I am sure that many would do it under such an unpleasant stand of the Centre but it can be avoided either by the Centre by filing a miscellaneous application in the Apex Court or by persuading the TN authorities to withdraw the Circular. But, sitting duck or shooting the breeze has been the favourite pastime of the policymakers, which makes the GST a hollow tax system or a fiscal gesture for litigation or let the virus of distortions enter into the DNA of GST, where it may mutate for long-term injuries! Much choppier days lie ahead for the GST taxpayers who may be grappling with such avoidable issues! My only recommendation to the top layer of the revenue tsars would be to not behave like a hovering boss in the office and avoid giving latitude for disputes! Shepherd the GST taxpayers' community well and with sensitivity, and have a monthly dancing weekend with higher GST collections—a much salubrious option, indeed!

GST and Real Estate: A Fiscal Drag

Introduction

The Real Estate Sector is truly a 'real' hero-contributor to India's GDP. It presently accounts for 7 per cent of the GDP and, going by the frenzied pace of investment including FDI, it is projected to corner about 13 per cent of the GDP by 2025 and about 18 per cent of the GDP by 2030. Wow! About USD one trillion turnover-size. After agriculture, it is the second largest employer in the economy. The most unique feature of this sector is that it is home to a large number of unskilled and semi-skilled workers. Its housing segment is one of the world's top 10 burgeoning markets. Of late, it has emerged as one of the key FDI-tethering sectors with many global investors aboard the growth ship. Some of them are the U.S. realty firm, Haines; Blackstone; and UAE Developers. Though its size and turnover have grown, its image in the eyes of tax-gatherers in the country remains the same! It continues to be seen as a mega sooty umbrella for the shadow economy of India. Because of the presence of multiple layers of private players—some are well-structured and reputed companies; some are just okay-type big contractors, and some are weirdly fly-by-night operators. The cash transaction culture has a strong patron in this sector. Since it has traditionally been a loosely-regulated sector, black sheep dominated and gobbled up the lifetime savings of the home-buyers!

Against this backdrop, the GST Council had a tough task cut out for its members! Prior to GST, the Centre used to levy 4.5 per cent service tax and the State VAT ranged between 1 per cent and 5 per cent. The Council, like many other sectors, decided to keep it integrated in the ITC chain and imposed a 12 per cent GST. Then came the thunderous noise of bellyaching by home-buyers against higher prices. A quick study of senior officials followed and it was found that the ITC benefits were not being passed on to consumers. The Council, in its wisdom, set up a Group of Ministers to recommend a new tax regime. Based on the recommendations, the Council decided to lower the tax rate to 5 per cent for under-construction homes/flats and 3 per cent on affordable housing schemes, but without ITC! Such a tax regime was hammered out despite stiff resistance from the grandees of the industry who argued that if ITC is denied, it would jack up the price of flats and the lowering of the tax rate may ultimately be self-defeating! The hue and cry by the industry did not bear any fruits and the band-aid remedy was widely construed as worse than the malady itself!

On nagging demand for a review, the Council reduced the tax rate from 3 per cent to 1 per cent for affordable housing and decided to freeze the carpet area—60 sqm. in metros and 90 sqm. in non-metros. In terms of super area, it was notified to be between 750 sq. feet to 1100 sq. feet. The second chokehold which was notified was the capping of the price—not more than ₹ 45,00,000. To avail a lower tax rate, a

developer was required to satisfy both conditions. Not to leave any faucet for revenue leakage, the Council put the putty by notifying the metros with suburbs like MMR for Mumbai and Noida, Gurgaon, and Faridabad for Delhi. Since the purpose of demonetisation had not yet paled in the memory, the Council also imposed the fetters like the developers will have to source their inputs from GSTN-registered suppliers. The Council also decided not to tax some of the payments made against TDR, JDA, Long Term Lease Premium, or FSI. Applying the principle of vertical equity, the Council rebuffed all demands to review or enhance the abatement of one-third of the land price, which was argued that it constituted a higher component of the price of a flat! The GST Council also deserves credit for making the new tax regime optional for existing projects for the purpose of JDA, TDR, and FSI. This stymied the kerfuffle and most developers opted for the 12 per cent tax rate with ITC. Another praiseworthy decision was to exempt TDR and FSI provided that all flats constructed under this option had to be sold before a developer obtained the completion certificate.

Notwithstanding exemptions and lower rates, most developers today echo disgust and bucketful of woes because they feel excluded from the ITC chain. Ideally, the Council should have weighed the rationale of a value-added tax which is globally not used as an instrument to appease consumers. The end-users in the economy benefit from an efficient business eco-system and the consequential reduction in the cost of doing business which leads to the diminution of product price. Since the GST moats against cascading of taxes and becomes seamless with ITC, it cannot be used as a retributive tool for errant sectors of the economy or an errand of mercy for some stakeholders. It is a pass-through tax and it should be allowed to play as per the designed legal playbook! It is true that some developers swindled the flat-buyers who went for drumbeating against the tax regime and some even trousered the ITC. But, to deal with them, the Council had put in place anti-profiteering provisions and apparatus. Secondly, the Council should have trusted the RERA authorities in the States who should have kept a check on the rising prices through audits and other tools. Creating auspicious optics for the common man by playing with GST tax rates is neither done nor desirable!

Chapter 1 deals with the GoM recommendation to impose a 5 per cent tax rate on the sale of under-construction flats and 1 per cent on affordable housing but without ITC; stiff resistance from developers who argue that it would harm the industry as well as the consumers and denial of ITC punctures the lumbar vertebra in the backbone of the GST design; another setback to the GST skeleton comes from multiple exemption thresholds to be followed by different states; and to top it all, a severe blow came from the decision to permit Kerala to impose flood cess on intra-state transactions.

In Chapter 2, I have dwelled on the arguments being put forth—the remedy decided by the Council for the real estate sector is worse than the malady itself; what nudged the Council to sully the original design of the GST and go for a new tax

regime and how an official study finds that the ITC is being pocketed by the developers rather than being passed on to the consumers; to putty all the holes of revenue leakage and misuse, the Council caps the area including super area and the price of affordable housing projects and makes it mandatory for developers to source raw materials only from GSTN-registered suppliers; and also decides to exempt payments linked to TDR, JDA, and FSI and stubbornly rebuffs any review of one-third abatement notified for the land component of the price of a flat.

Chapter 3 touches on the sensitive issue of how low credibility proved fatal for the real estate sector which lost out despite accounting for more than 7 per cent of the GDP; sandwiched between a ginormous inventory of unsold flats and tapering demand, the sector collapsed under its own intrinsic weight of financial irregularities and how the lowering of the tax rate is unlikely to do any good to home-buyers; and the suggestion as to how the Council should have trifurcated the issues roiling the sector and worked out a raft of solutions.

Chapter 4 deals with some of the critical decisions taken by the Council with respect to the real estate sector, such as making the scheme optional for the existing projects; exempting TDR, FSI, and JDA albeit conditional; the rationale behind these changes and why GST should not be used as a tool-kit to appease consumers and secondly, at the cost of ITC which earns brownie points for an efficient tax system; and how the Council failed to trust the RERA authorities which could have smoothly done what the Council intends to achieve by laying down a complex web of procedures and provisions.

Chapter 5 is dedicated to the magnum opus Notification running into 66 pages; stitching legal clothes for all the decisions of the Council was an arduous task but kudos to officers who did it; how this Notification lent wings to naysayers who raised doubts about the impractical provision notified by amending Rule 42 in relation to the reversal of ITC since inception—1 July 2017—and how it may engender a serious bout of litigation as it curtails substantive right of taxpayers; the timeline fixed by the Council also turned out to be a cause célèbre as no developer could have opted for one of the options before raising an invoice; lack of clarity over the expression 'Residential Real Estate Project'; and finally, one of the real-life situations for the application of the inverted duty structure (IDS). Most of the IDS cases have recently been corrected by the Council on the basis of the GoM's recommendations accepted at the 47th GST Council meeting but no change for the real estate sector thus far!

1

GST - Real Estate - Yet Another Composition Scheme - A Fratricidal move, Indeed![*]

THE Interim Budget brouhaha is over and the economy is back to much more serious issue of Goods & Services Tax (GST). Since the Nation is on the cusp of general elections, the Central Government is too keen to make a few more tax concessions to appease certain segments of the *janata janardhan*! And that is why a palpable rush was noticed when the Group of Ministers on Real Estate met in New Delhi and also finalised their recommendations. And the crux of their collective wisdom is to strike one more blow and break at least one more 'rib' of the basic GST Design. And that is the Input Tax Credit mechanism.

The GoM has recommended to the GST Council which is likely to meet through video-conferencing on February 20 that only 5% GST should be imposed on sale of under-construction flats and 3% on affordable housing schemes, but without ITC. The GoM believes that a comedown from the existing 12% tax rate to 5% would be a mega relief to the middle class flat-buyers and it may earn some brownie points for the Modi Government! And this is going to be in the form of yet another Composition Scheme in the armoury of GST!

Interestingly, such a scheme has been recommended notwithstanding stiff opposition from the captains of the Real Estate Sector. But why? As per industry insiders, such a scheme may harm the interests of both - the buyers as well as the sellers! Since sellers would not be entitled to ITC, which works out to be in the range of 8%, it would add to their costs and may push the prices up and the lowering of the levy may not benefit the buyers. However, it would certainly ensure more litigation on the alleged charges of anti-profiteering. The Industry has opposed the Scheme but the GoM has gone ahead with its recommendation, largely because it may create favourable optics!

Secondly, the GoM has not taken the trouble to assess the extent of damage it may cause to the fundamental merit of the GST system i.e., the seamless flow of ITC. Though the real remedy for all the ills of this sector lies in the **inclusion of this sector within the fold of GST** but the Council has not opted to apply its mind to this larger

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* TIOL – COB (WEB) – 646, 14 February 2019.

issue. Meanwhile, the GoM has come up with a band-aid solution, knowing fully well that it may not do any good to any of the target audiences.

Let me now touch on the issue of the proposed 3% levy on affordable housing schemes, but without ITC. Since denial of ITC not only fractures the lumbar vertebra in the backbone of the GST skeleton but also adds to the cost of the industry which ultimately passes through to the consumers. Ideally, if any tax relief is to be granted to this sub-sector, 1% levy with a threshold of Rs 25 lakh - Rs 30 lakh flat price should be the scheme, which would break the ITC chain yet would not add much to the costs. Since most affordable houses would cost a price in the range discussed above in many cities, such a levy would have helped more!

Besides this new proposed Composition Scheme, one more Composition Scheme is in the pipeline and is going to be made effective from April 1, 2019. And this is going to be for the service providers who had an aggregate turnover of less than Rs 50 lakhs in the preceding financial year. With 6% tax rate and no ITC, it is another blow to the ITC artery but our politicians do not mind punching such blows to the GST design.

Another blow which is being fleshed out is going to be multiple thresholds in different States. Even as the exemption threshold for Services will remain at Rs 20 lakhs, it would range between Rs 10 lakhs to Rs 40 lakhs for the goods. Hopefully, if the Law Committee recommends, it may be uniform at Rs 20 lakhs in the special category States except for Assam, J&K and Uttaranchal, which have opted for Rs 40 lakh bracket. But what may further complicate the GSTN system is if the GST Council decides **to exclude the sensitive commodities from the newly-raised threshold**. A fresh guideline may be expected to prevent splitting of businesses by taxpayers to take undue benefit of the new thresholds.

Yet another blow to the basic GST Design has come in the form of Calamity Cess, which the Kerala Finance Minister was permitted by the Council to announce in his State Budget Speech in the form of 0.25% Flood Cess. And how much revenue it is going to generate? - **Only Rs 600 Crore**!! This is what I had argued in Cob(Web)-622 titled GST - New 'Cess' - Flood-ravaged Kerala may create fault line in Cooperative Federalism!. The question that was raised in this column was - Is it worth the pain to levy such a CESS and further complicate the dual GST system?

In his speech, Dr Thomas Isaac has admitted that the GST collections in his State are not doing good unlike the States of Maharashtra, Karnataka, and Gujarat, largely because they are industrialised States and Kerala, despite having **much higher per capita consumption** as compared to the industrialised States, has to depend on goods produced in other States. It accounts for about 75% of the consumption basket and what is levied on it is the IGST, which goes to the common pool. Since the flood cess cannot be levied on such inter-state commerce, despite obtaining the powers to levy a new CESS, Kerala is not going to be benefited much.

Secondly, Kerala has been forced to put this CESS on hold as the GST Network, the technology platform, is not yet ready. It would take five more months to tweak its software to create heads for such a CESS. And the same would be the fate of every other revenue gathering exercise or for that matter any dole out via a structural change in taxation that the Central government proposes with an eye on the elections. It is worth remembering that the proposals can see the light of the day only when the law and the GSTN work in tandem. There is no point in placing the cart before the horse!

This, precisely is the point I have been highlighting in my column that if the GST is to be preserved as a Good and Simple Tax, a price has to be paid! And had the Union of India or the GST Council decided to do so, the Calamity CESS could have been avoided for some more years or till the time the GST would have stabilised. But the GST was born with its enemy present in its embryo and that was 'partisan politics'! All the negative changes which have been made in its basic design have been driven by vote-gathering politics and not the welfare of the economy. Let's hope that the next Government at the Centre would not undertake any repair work but opt for a new GST Version 2!!

2

GST - Real Estate heading for a PAINFUL Tax Regime!*

WHILE concluding the two-session meeting (33rd), the GST Council last Sunday decided to put in place a new regime for the real estate sector. Ironically, the Council's decisions are expected to reverse the festering fortune of the Sector but the key players of the Sector are against the so-called pain reliever!! But why? They believe that a tax rate without Input Tax Credit is a disadvantage for them. In other words, they are of the strong opinion that the remedy doled out by the Council is worse than the malady itself!!

Now, the larger question is – Why should the Council agree to a remedy which is of no help to the Sector? Also, when the Council knows that any tax rate minus the ITC goes against the fundamental principle of value-added tax, why should it decide so? And the answer to both the questions is an unpleasant ground reality which is clearly attributable to the players of the real estate sector. Several studies conducted by the officials found that the **real estate developers were not passing on the benefit of ITC to the consumers**. And such a benefit, as per various computations, amounts to about **SEVEN** per cent. Shockingly, this has been happening notwithstanding the fact that this sector has been burdened with huge inventory of unsold flats for more than four years. Though the key developers are better aware of rising cost of holding on to such inventories but not much concerted efforts were made to pass on the benefit of the pass through tax i.e., GST paid on inputs (ITC).

Such a scenario apparently forced the politicians to think of a new and simple tax regime where even if the developers have knowingly been keeping their oxygen cylinders at arm's length, the need for a better optics, at least for the consumers, was acutely felt, particularly when the polls are round the corner. The Council was undoubtedly in the know of the fact that such a decision would amount to an **undesirable aberration** in the GST design but it perhaps took them, keeping in mind the fact that the same may be revisited post-polls.

Apart from the taxation angle, no ITC actually declares the real estate sector an economic outcast! It is true that this is the second largest source of employment after Agriculture in the economy but its key players have lost several opportunities to earn the status of a reliable and bank-credible sector for better financing. Because of their

* TIOL – COB (WEB) – 648, 28 February 2019.

unquenchable thirst for extraordinary profits and poor management of their finance, including accommodation of cash component, they failed to burnish the image of this vital sector in the eyes of the common man.

Apart from making it 1% for affordable and 5% for other housing categories the Council also decided to **LOCK** the carpet area - 60 sqm in metros and 90 sqm in non-metros. In terms of super area it can be above 750 sq feet to 1100 sq feet, going by the present trend in this sector. Another circuit-breaker is the price, which can be only up to Rs 45 lakhs. **Both the conditions have to be fulfilled to avail the affordable housing tax rate**. Not to leave it to any speculation, the Council also decided to name the metros with their suburbs like MMR for Mumbai; and Noida, Ghaziabad, Faridabad and Gurgaon for Delhi.

Though the broad skeletons were decided by the Council but the fleshing out was left to the Fitment and Law Committees, which would, by March 10, arrive at some of the critical conditions for implementation of the new regime from April 1, 2019. Since the Council feared that the **cash component may stage a royal comeback** to this sector it also decided that the developers will have to buy their raw materials from **GSTN-registered suppliers**. But how much? The GoM had recommended 80% but the actual percentage is to be deliberated upon and recommended to the Council at its next meeting through video-conferencing and only after detailed guidelines are approved, the notifications may be issued in the third week of March. The Council will also approve what percentage of the total area for a residential project can be earmarked for **commercial purposes**. Above all, some sort of a roadmap is going to be prescribed for the transition period - moving from the present to a new regime.

Apart from the tax rates, the Council also approved the proposals to not levy GST on some of the festering issues like TDR, JDA, Long Term Lease Premium or FSI. But the exemption is going to be conditional. These are not taxable only for residential property on which GST is payable. Conversely, when these transactions are not for residential property, they become liable to tax. And this would continue to be a pain-point for the industry, which is of the view that Lease Premium, in particular, if it is for more than 33 years, is akin to transfer of land and it should not attract GST.

Another pain-point which many States have been raising is that only one-third abatement is not close to the price one pays for the land. So, the GST is being levied even on the value, which is being paid for the transfer of land, which is a State subject. Though it is true that the value of land constitutes a major component of any consideration being paid for a flat but the Council was not keen to review such a condition at this juncture. It is more so if a project is for luxurious apartment which is normally at a central or well-developed zone where the land price is generally very high. In such cases, a buyer has to shell out higher tax but since such buyers constitute a different class, the principle of vertical equity in taxation is perhaps being applied.

Before I conclude, I sincerely hope that such a regime does not last long and the Council in its new *avatar* reviews all its decisions which have gone against the laudable canons of value-added tax, particularly the ITC. I also hope that the Council at its future meetings would carefully review all the Composition Schemes, which largely represent the 'broken spokes' in the giant wheel of GST. One such Composition Scheme is 5% tax rate for restaurants. Less than 50 taxpayers have so far opted for it and the consumers have been left to the mercy of the big players who know the art of playing with the printed prices on their menu cards!

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3

GST - Real Estate looking for 'REAL' Solutions!*

THE Real Estate Sector is knee deep in REAL trouble! This is certainly not of any recent making! Its fortune has been on the decline post-2008 and rapid decline post-demonetisation! The most bizarre thing to happen is that although it accounts for close to 9% of the GDP and may rise to 14% of the GDP in the next six years, the NDA Government, strangely, did not pay much heed to its woes. Going by a number of policy decisions such as according 'infrastructure status' to affordable housing for securing finance and a range of income tax sops it would be wrong to say that the Government did nothing for this sector but all such piece-meal steps finally turned out to be Band-Aid solutions for its structural ills!

Before I touch the issue of the new GST Regime for this sector let me first explain the wider range of ills afflicting it. In the first decade of 2000 the Real Estate Sector was having a bull-run. It received about USD 25 bn investments between 2005 to 2008. The prices of flats shot up to a new high. A good number of developers hurriedly switched lanes and joined the bandwagon specialising in luxury apartments – with much bigger size and stingingly-high prices. Most developers kept on shuffling funds from one project to another and **kept their eyeballs set on only bookings and funds flowing into their kitties**. **No attention was paid to what they habitually promised to most buyers - timely delivery!** Delays in execution proved to be a double whammy - a hole in their purse in terms of cost-overrun and a rude blow to the trust of home-buyers. Then came the global shock with the financial meltdown in 2008. Forces of recession got embedded at the Centre of the Sector and began pulling down its lady luck!

Then came RERA in the year 2016, which protected the payments made by flat-buyers for a project; followed by the Demon of Demonetisation. Since most developers were habitually playing with the twin cards – black & white, demonetisation proved a cash guzzler and left nothing for the bottomless pit, the real estate sector was widely known for cash! Quick came the Benami Properties provisions, which further scared the 'endangered species' of cash-rich buyers, post-demonetisation. Soon came the GST which raised the tax bill from 8% to 12%. Prior to GST, the Service tax was around 4.5% and VAT ranged between 1% to 5%. Though 12% with ITC was not a back-breaking burden but the optics of 12% for

* TIOL – COB (WEB) – 649, 7 March 2019.

a low-credibility sector proved fatal. It further dampened the demand. In the last four years the twin graphs which literally ran in opposite directions were - the growing inventory of unsold flats and the sliding graph of demand!

During this period FDI paled and institutional credit also collapsed against the rising NPAs of the banking sector. To some extent, some support came from the NBFCs but in the light of its **own intrinsic weight of financial irregularities, even they collapsed.** Though demonetisation made our banks flush with funds and eased the interest rate for credit but the off-take continued to be poor because of various other reasons, including mistrust of the buyers!

In this background, what was needed was a **holistic solution for all the ills of this sector**. But, what pre-occupied the policy space of the Government were many other issues, including taxation. The real estate sector literally missed the bus as the five-year-term of the Government had come too close to its expiry for it to be taking any major initiative. The only option to create an interpretation-friendly optics was to play with the GST tax rates. Since the Group of Ministers (GoM) had the impression that this sector is notorious for profiteering (GoM recommended) it should be taxed without the facility of ITC. As a result the GST Council has finalised a new regime, which should ideally have been decided to be **OPTIONAL** rather than **compulsory**, so far as residential property development goes.

Since ITC has been denied to the businesses, notwithstanding the single-digit tax rate, the prices of flats are going to go up rather than come down. **The denial of ITC is unlikely to do any good to the buyers of flats.** Since the real estate industry itself was divided - following two types of practices - a) some of them were passing on the benefits of ITC to buyers, and b) a good chunk was profiteering! The Government thought it wiser to deny ITC for all and it would now push the price up for the buyers. In the end, the lower GST rates may not help either the buyers or the developers.

What the GST Council ought to have done is to **TRIFURCATE** the indirect tax issues of this sector. First, a different treatment is required to be given to the inventory constructed prior to July 1, 2017. Government may extend some sort of assistance here to help this sector. Post-GST, no help should be given. Secondly, normal rate of 12% with ITC should continue for both the residential as well as commercial property development. Thirdly, the lower rates should be made optional with detailed guidelines on residential-cum-commercial components. An unambiguous roadmap for transition is the need of the hour.

If 'Housing for All by 2022' is the noble goal for both the Centre as well as the States, the need of the hour is to put a simple GST regime without damaging the GST Design and keeping the biting tooth of profiteering at arm's length for some time so that the gasping-for-breath sector could start breathing freely again! Let's hope what finally comes out in the coming week is a leaf of panacea and certainly not a 'sleeping pill', which would put this sector in a comatose state!

4

GST - New Tax Regime - Is it really toxic for Real Estate!*

THE GST Council at its 34th meeting approved a new tax regime for the Real Estate Sector. It was also the last meeting for its Chairman, Mr Arun Jaitley, who was wished good luck by most of the Members. The next meeting of the Council will now be held only after Lok Sabha results on May 23. Depending on the constitution of the new Government, whoever takes oath as Union Finance Minister will chair the Council at its 35th meeting. But before rising from the chair Mr Jaitley did not miss the opportunity to exude his confidence to continue chairing the future meetings after May 23.

Let me now move to the subject, which was tactfully discussed at the Council's meeting. Some of the State Finance Ministers did not favour the proposed amendment in the tax regime in general and some suggested exemption of the premium paid on long term leasing, JDA, TDR and FSI from GST. Let me also congratulate the Council for thankfully making the new regime **OPTIONAL** for the existing projects. This has indeed averted a great deal of possible chaos in this sector. Armed with this option, I am sure, over 99% of the existing residential projects would prefer paying 12% with ITC rather than meandering through a complicated transition phase, which also talks about reversal of ITC on pro-rata basis.

Another good decision is to exempt TDR, FSI and premium on long-term lease from GST. But this is conditional. All flats constructed under this model have to be sold before a developer obtains the completion certificate. In other words, the tax liability has been deferred to the date on which such a certificate is obtained (a non-GST scenario). To ensure parity, the withdrawal of exemption will be confined to one per cent of value, in case of affordable houses, and 5% of value, in case of other than affordable houses. I am sure it is a good relief for all such developers who would be joining the new tax regime from April 1, 2019.

Let me now go deeper into the reasons for proposing such a change in the tax structure for this sector. Was it really needed? Did developers or consumers demand such a change? Or is it a politics-driven fiscal amendment? First, Goods & Services Tax (GST) is a value-added tax and worldwide it is not USED for appeasing consumers. It largely makes business transactions more tax-efficient. Thus, it reduces

* TIOL – COB (WEB) – 651, 21 March 2019.

the cost of doing business and often leads to reduction in product price. Since VAT also obliterates cascading of taxes, the price line in any economy finally goes down after the system settles down and becomes seamless. GST is certainly not a system to PUNISH a particular important sector if it goes errant or fails to overcome poor practices internalised over the years. If ITC benefit was not being passed on to consumers, depriving the sector of ITC by tampering the basic design of GST was certainly a no-no option. This is more so when it is heavily documented that this sector has run into financial quagmire and may take years to exit from the suffocating tunnel of business cycle. Secondly, GST is not a panacea to treat such ills of a business sector!

Then, why did the BJP Government opt for it? One possible reason can be the rising decibel of noise of flat-buyers left high and dry by developers. Secondly, a part of this sector was alleged to have pocketed the ITC rather than passing on the same to its consumers. The best way to deal with such a problem was **to leave it to the RERA authorities to revisit the cost calculations of the project and then force the developers to lower the price.** Not trusting the RERA authorities working under the tutelage of State Governments was perhaps one of the compelling reasons as polls were also round the corner. It appears that the change approved by the Council was a purely politics-driven decision, which has been taken to create an **OPTICS for the common man** that the BJP Government has reduced the tax rates to the minimum - 1% and 5%.

Will such lowering of tax rates lead to any reduction in the cost of flats? **Will it really help flat-buyers?** Does lower rate necessarily mean lowering of flat prices? **Or denial of ITC is really going to push the price up?** Let's take a look at two scenarios, which the GST Council has tried to address.

A) One segment of the real estate sector has honestly been passing on the benefits of ITC to flat buyers. If their cost was Rs 100/- it was working out to be Rs 112/- @ 12%. After availing 7% ITC the incidence of GST was only 5%.

B) A major segment of this sector was factoring in the ITC component in their cost itself and it was Rs 107. After tax, it used to work out to Rs 119.84 and after availing ITC, it used to be Rs 112.84. So, the tax component in this example was only 5.84%.

Now, the new tax regime is largely going to address CASE B (which is going to be the common cost in the industry with ITC denial) where five per cent tax rate on Rs 107 brings the cost to Rs 112.35. So, what the GST Council expects from such developers is to **absorb 0.35% excess burden in their own margins and not to tamper with the price of flats** already locked for flat-buyers for the project. Even if it is done, the reduction of tax rates makes **NO CHANGE in the final price of Rs 112,** which we discussed in the CASE A.

So, going by these examples, **no flat-buyer should really expect any lowering of the price nor developers should attempt any increase in the price as the incidence of**

tax with ITC denial is minimal, which it is expected to absorb. Secondly, the GST Council should keep all RERA authorities well-informed about the implications of the GST rate changes and its minimal impact on the cost of flats so that no application for price revision is approved. An exclusive workshop for RERA officials would go a long way in safeguarding the interests of consumers and there would be no need to invoke anti-profiteering provisions.

In the end, what I understand from this new regime is that the flat-buyers have no valid reason to expect any lowering of prices because of lower GST rates (it is only the optics!). Secondly, developers will not have much valid ground to increase the price as there is no substantive change in the incidence of tax on them because of denial of the ITC. However, Mr Jaitley may need to be on guard to counter a possible slugfest in the media when experts join the bandwagon of analysing its toxic implications!

5

GST - Real Estate - A Few Clarifications & Amendments Needed*

THE month of March is traditionally very good for the Revenue. For GST, festival seasons like Diwali and the last quarter of the fiscal year are historically a phase of buoyancy in revenue collections. So, like the previous year when the Revenue had crossed the threshold of Rs one lakh crore, it has shown 10% growth to scale a new high of about Rs 1.14 lakh Crore. I am sure many revenue number-crunchers may not be too impressed with such a growth rate. However, the contraction in the economy should not be ignored if we go by the latest projection of the GDP growth rate. A long period of policy uncertainty on account of general elections has taken a tangible toll on the health of the economy where business sentiments do require some substantive policy announcements by the New Government before the growth cycle gets a kick!

Though there is no substantial jump in the number of GSTR-3B Returns, which continue to hover around 72 lakh but thanks to the provisional settlement rules relating to the IGST collections, the States and the Centre are comfortable having pocketed in the ratio of 50:50. In the months to come, with many new measures, it is expected that the growth would further pick up.

Meanwhile, TIOL continues to receive many vexing queries from GST taxpayers and one of them is related to the legal validity of Removal of Difficulty Order (ROD) issued by the Government as per Section 172. As per the CGST Act, to overcome any difficulty in the implementation of the GST, the powers have been vested in the GST Council to approve issuance of such orders – some of them may also appear to be substantive. The doubt in the minds of some expert– is that when the Council is not meeting how is the approval for issuing such orders is taken or is no approval sought at all? If latter is true, it may trigger litigation later. I guess such doubt is unfounded as the Committee, which exercises the powers of the Council is the GST Implementation Committee (GIC). This has representatives from the Council Secretariat, the Union of India, and the States. This Committee discusses issues, which are brought to its notice by the Law Committee or others and a decision is taken to facilitate the taxpayers. And, as soon as the Council meets, all its orders are

* TIOL – COB (WEB) – 658, 9 May 2019.

presented for its formal approval. So far, the Council has not struck down any order but has certainly debated over certain decisions of substantive nature. Later, the same are tabled in the Parliament and also State Legislatures for their routine approval.

Let me now move to the hottest component of the GST - the new tax regime for the Real Estate Sector. Undoubtedly, it was a tough decision and tougher was the drafting of the complicated notification. Thanks to many vital sub-components such as area and price conditions for the affordable and non-affordable categories; the definition of on-going project, reversal of ITC on unsold flats after completion certificate is obtained; supplies from unregistered suppliers and then percentage of commercial area within a project, the Notification ran into 66 pages. Though it is very complex in its structure and challenging to understand even to a veteran expert in the indirect tax domain but let's give credit to the Revenue officers who have managed to translate the INTENT of the GST Council into words with minimum omissions and errors. However, it is not to say that a detailed FAQ or a few Circulars followed by some Instructions for the field officers are not required. I guess some corresponding amendments in several old notifications are also required for its smooth enforcement.

Meanwhile, I have come across certain doubts being raised about the retrospective amendment to Rule 42 of the CGST Rules, 2017 relating to reversal of ITC from the inception of the residential project or July 1, 2017. Such a scenario would arise in case the developer obtains the completion certificate and a few flats remain unsold on such a date. I do agree with the majority view that since most developers have availed ITC in books, reversal of such credit would definitely trigger litigation, depending on the quantum of such credit. And the ground for litigation is likely to be the retrospective nature of the amendment, which warrants surrender of substantive right to ITC. There are many court rulings which have expressed displeasure over **curtailing substantive rights of taxpayers through Rules** and made it clear that Rules cannot be given retrospective effect to make substantive changes in the law. And it is likely to be a potential area of dispute.

Another area of discontent among most developers is that although the GST Council has given them time till May 10, 2019 to opt for the new tax regime, but such a breathing period becomes pointless if one is forced to decide the option before the issue of any invoice post April 1, 2019. Though the developers have a point but I guess, the CBIC needs to make it clear that as per Section 34 of the CGST Act, a taxpayer can always revise such invoices issued between April 1 and May 10 once an option is exercised. And it can be done by issuing credit or debit notes.

One of the suggestions received by us is that there is a need to further expand or clarify the expression 'Residential Real Estate Project' (RREP) to include residential buildings for communities, including residences for the elderly, students, children and other social groups such as retirement homes, hostels, orphanages, and homeless shelters. Similarly, the term REP should be expanded to include commercial or industrial building, public entertainment building, and administrative buildings. Such

clarifications would put to rest an array of views being given by consultants to different developers. What is also bothering many minds in the real estate sector is the **missing expression of Joint Venture**. The Notification does talk about the landowner-promoter and developer-promoter but the term JV is not mentioned in the Notification No 03/2019. In case of a JV, one partner contributes land and the other manages funds and the JV supplies flats. In such cases, the JV should be treated as the supplier as it is an independent juristic person.

If we talk about some vital omissions, the first Notification which warrants immediate amendment is 11/2017-CT(R), dated June 28, 2017. In a case where a developer sub-contracts either as works contract or construction service, the tax @18% has to be suffered by sub-contractors but the tax which is going to be collected from flat-buyers is only 5%. This is a typical inverted duty structure scenario as ITC would accumulate but no ITC is allowed in the new regime. So, a solution lies in lowering the tax rate on contractors to 5%. There are many other areas of grievances, which the GIC should move quickly to address so that such a vital sector of the economy, which not only generates jobs but would also meet PM's target of homes for all by 2022, does not pay the price of uncertainties!

Beyond the Arc of GST: The Side-Effects!

Introduction

Prior to the introduction of the GST, it was widely touted to lend between a 1 per cent and 2 per cent leap in the GDP besides spurring the process of formalisation of the economy. Though the truthers sniggered at such claims, post-implementation statistics indeed left them wide-eyed and open-mouthed. Debatably, demonetisation also chipped in to speed up the process of the formalisation of the economy but what acted as a coercive toolkit was the reverse charge mechanism (RCM) under the GST law. The RCM operates by transferring the liability to pay tax from the supplier to the recipient. Though the RCM is globally not favoured as an efficient tool except for the import of services, it had proven its credentials under the Service Tax Law, State VAT, and the Central Excise regime. To deal with politically radioactive groups of taxpayers, the Central Government had, on many occasions, taken shelter under the canopy of the RCM under the service tax regime. Some of the most violent and sustained resistance had come from the transport sector and the legal practitioners. To placate them, their liability was shuffled on the recipient of their services. It was also experimented with in the case of Central Excise duty on molasses. To some extent, State VAT authorities also used it and earned an 'appetising' experience!

Being in a state of demonetisation-induced mood in early 2017, the State and the Central officials proposed the insertion of a new Section 9(4) to deal with unregistered suppliers who end up generating and storing cash and whose transactions remain beyond the hem of formal accounting. Although the RCM existed in the Model GST Law, Section 9(4) was never deliberated upon. Anyway, it was approved by the GST Council and strangely, with a low threshold of ₹ 5,000 per day. What this meant was that a registered taxpayer may source goods from unregistered suppliers but only to the extent of the cap notified. If the value goes beyond the notified brim, the GST was to be paid on the entire sum by the recipient and not the supplier. The supplier was exempted from registration on two grounds—small businesses and the annual turnover being below ₹ 20,00,000—and such suppliers generally came from the informal sector consisting of agriculture, trading, transport and storage, hotels and restaurants, real estate and renting, and health and education. The dominant form of their transactions was believed to be cash, which also meant that their economic activities were outside the perimeter of the GDP.

So, here come the eye-popping side-effects of the RCM provision! What the CBDT could not achieve by amending its provisions and introducing more anti-avoidance tools, the RCM did, to a large extent, in a shorter time frame! It reduced the size of the wiggle room for cash transactions; accounted for the supplies of informal units and also instilled fear in the minds of businesses from booking bogus expenses to minimise the size of their taxable profits, thanks to the ₹ 5,000 daily cap!

In addition, it also widened the tax base of not only the GST but also income tax, as unregistered suppliers who used to be habitual stop-filers or even non-filers of the income tax return felt coerced to declare their income for if the GSTN shares the data with the CBDT, the actual size of their transactions would be disclosed. The tax base under the Income Tax Act indeed spiralled and continued to register high growth even after the pertinent Section was put in suspension in the later years! In the year 2019, the CBDT reported a substantive jump in its returns from the salaried and presumptive tax return filers—a mega boost to the process of formalisation of the economy! Of course, not without the victims of the Darwinian Theory of Evolution—thousands did perish!

Another relevant side-effect of the GST came from the decision of the Constitutional Bench of the Supreme Court of India on the issue of the Right to Privacy. One offshoot of honouring such a right was the doctrine of data protection, which dragged GSTN within its radar! With the taxpayers' data about purchases and outward supplies being stored in the GSTN server, this decision was a timely reminder for the Revenue bureaucracy to insist on inking a data protection agreement with the GSTN—the then private entity. Though the GSTN bosses reiterated their oft-repeated statements that adequate guardrails are in place to protect the taxpayers' confidential information, no formal legal framework was constructed in view of the Justice Srikrishna Commission developing a data protection architecture for the common citizens! While talking about certain fetters on the Right to Privacy, the Bench enumerated six different reasons and one of them was taxation. Though this decision was a timely reminder for both the Revenue Board and the GST Council, the larger public interest was lost in the narrower alleys of sordid politics!

Here comes another side-effect of the anti-avoidance procedural requirement under the GST i.e., e-invoicing. A new regime for the B2B invoices was rolled out for the large taxpayers having turnovers of over ₹ 500 crores. In the first month itself, the total volume of invoices machine-cushioned by the NIC scaled the height of 5 crores! Buttressed by the gangbuster response, the threshold was quickly lowered to above ₹ 100 crore turnover. The same has finally been reduced to over ₹ 10 crore turnover. One direct implication of the new preventive regime was the serious pummelling of the compliance costs for the taxpayers. With the NIC deciding to allow access to its facility only through GSPs and ERPs, there was no sweetener for the MSMEs and the cost of the GSPs' e-invoicing software was as high as ₹ 15,00,000. Going by such a cost and the number of qualifying large taxpayers—36,000—the market size of the compliance software worked out to be a whooping ₹ 6,000 crores! If the cost of the software for e-Way Bill is added to it, it makes it look dinosaurian! Ideally, a free software needs to be developed and shared with the taxpayers at the earliest so that the baleful trend of huge compliance costs quickly disappears in the rear-view mirror!

This brings us to the most 'intaxicating' side-effect of the GST—and that is the staple diet of the bottlers of intoxication—ENA (extra neutral alcohol). With the 101st

Constitution Amendment Act leaving alcohol for human consumption outside the regime of GST, a dispute cropped up between the Centre and the States over the levy. Since the States had been collecting VAT from ENA and always believed that ENA is also alcohol, they did not permit the GST Council to pass a verdict. Such a situation of indecision indeed suited the industry as long as the States collected only 5 per cent VAT. Then came a new era where certain taxpayers were subjected to pay 18 per cent GST besides the VAT—a double whammy! Yuck! This goaded one manufacturer to move the court and the High Court, while interpreting the new Article of 246A, ruled that the ENA does attract GST levy and the States have no constitutional right to tax it. Though the State Government concerned has filed an SLP in the Apex Court, no positive ruling is expected as the Supreme Court has already ruled that ENA is not fit for human consumption. If that is so, taxing it as non-GST alcohol would not survive! Meanwhile, one side-effect of such a war of attrition has been that the saddlebags of arrears have been gaining weight and may end up breaking the financial spine of the industry! Whoops!

Chapter 1 narrates how the top Revenue bosses borrowed a leaf from demonetisation and decided to further spur the process of formalisation of the economy and sledge-hammer the spinal cord of the black economy and proposed a new provision which was missing in the GST Model Law and inserted the Reverse Charge Mechanism (RCM) under Section 9(4) for supplies from unregistered small suppliers; the rationale was to shift the burden of the tax onto the recipient but to account for such supplies which would reduce the component of cash in the economy and also add to the quantum of the GDP and a resultant outcome would be the formalisation of the economy; and having rich precedents in the previous tax regimes, the new provision was notified and it worked wonders for the CBDT in terms of widening its tax base and reduced booking of bogus expenses to minimise taxable profits.

In Chapter 2, I have elaborated the latest Apex Court's decision on the Right to Privacy and how it has a direct bearing on the working of the GSTN; while talking about the doctrine of data protection, the Bench has referred to the fetters on the Right to Privacy and the obligations on the Government, in particular, the tax departments, to protect the personal data of taxpayers; and how the onus falls on the GSTN, Customs, and the income tax departments which should in-build such protocols and share the information to instil confidence in the taxpayers.

Chapter 3 talks about the side-effects of the GST on direct taxes; the CBDT disclosing an abnormal rise in the number of personal income returns filed by the salaried and the presumptive taxpayers; although the CBDT's press release does not admit or elaborate on the reasons for such a rise, an intelligence inference can be made and full credit is to be given to the GST for spurring such a rise in the income tax returns; and finally, how once an audit is undertaken for the GST taxpayers, the direct tax base would grow further.

Chapter 4 looks into the roll-out of the e-invoicing regime for B2B—all taxpayers having turnovers above ₹ 500 crores are covered in the first phase and how the decision of the NIC to provide such a facility only through API of GSPs gave rise to a new compliance industry; one of the GSPs which cornered 30 per cent of the market, priced its software above ₹ 15,00,000 and going by the number of over 36,000 qualified taxpayers, the size of the market works out to be ₹ 600 crores; if the cost of e-Way Bill software is also added, the market size would be much larger; and why should Government provide free software to neutralise the side-effects of the e-invoicing provision as it would swell the overall compliance costs of the GST and hurt the taxpayers?

Chapter 5 peeps into the world of 'intoxication' and its key raw material, ENA (Extra Neutral Alcohol); the levy of GST if one goes by the 101st Constitution Amendment Act, which inserted the relevant Article 246A for the levy of GST on all goods except alcohol fit for human consumption but the States insisted on keeping it outside the radar of GST and treated it as their own turn and levied VAT; also, the story of how some CGST officers demanded GST and the bottlers who were coolly roosting, got agitated and moved the High Court which ruled that the States have no jurisdiction over ENA except under the GST Act but the States continue to play the political squid game and the industry fears large saddlebags of tax arrears unless the issue is decided; and what may transpire in the Supreme Court as the UP Government has challenged the High Court order but experts believe that in view of the past judgements of the Apex Court, the issue is largely settled against the States.

1

RCM *Brahmastra* under GST: The Income Tax Department to be a Key Beneficiary*

For the GST caravan, which has travelled for more than five weeks now, it may be said that it has evidently escaped the much-speculated bumpy ride. The initial hiccups and the fear of the unknown have paved the way for aggressive FAQs, 'master classes', and problem-solving by the tax administration as well as the GST Council. Undoubtedly, many more problems, specific to certain sectors, do remain unresolved and more may crop up once the return-filing season begins from September, virtually hand-in-hand with the festival season for the industry and trade. But the mood is upbeat in the corridors of power about the smooth implementation of the new tax regime. The comfort of the political leadership may be gauged from the fact that it is quite prompt in rectifying the mistakes done in the calculation of the Compensatory Cess on automobiles. Unmindful of the possible criticism, the GST Council, at its 20th meeting, decided to hike the percentage of Cess from 15 per cent to 25 per cent. Since it entails an amendment in the Act, the Union of India is keen to explore the Ordinance route for the same.

What adds to the perked-up mood of the tax administrators in the North Block is the latest jump in the number of online Income Tax return filers. It has grown by more than 55,00,000—from ₹ 2.24 crores to ₹ 2.79 crores in one year—the Government has attributed the spurt in the number to its demonetisation drive. True, without going into the controversial aspect of its success, demonetisation did make a dent into the 'storage' aspect of black money in the economy. Some critics of this policy decision were also harsh on the Government as all its efforts to pull out black money from the 'black hole' did not succeed much if one goes by the final tally of declarations of unaccounted money in response to the Amnesty Schemes introduced by the CBDT. Even as the Government was not sure of what to do next to target the parallel economy, the final shape of GST laws was slowly emerging on the horizon—and quick came the suggestion from some of the State VAT Commissioners that the actual salvation against the large size of the cash economy lies in the Reverse Charge Mechanism (RCM) applied on a minimal scale in some of the States. It did catch the fancy of the top leadership in the Central Government and that is how even though the RCM,

* TIOL – COB (WEB) – 566, 10 August 2017.

particularly Section 9(4), was not there in the Model GST Laws, it finally found its place of pride in the laws passed by the Parliament.

What is RCM? In simple words, it transfers the liability to pay tax from the supplier to the recipient. Though globally speaking, RCM is not a very popular instrument to collect tax, it is used to levy tax on the import of services in many countries, including Canada. In India, it was utilised as a tool to collect Purchase Tax from buyers by a couple of States. Then, it gained wider acceptance among the taxpayers in the case of Service Tax law (Finance Act, 1994). During the Service Tax regime, it was used largely as a political tool to pacify the ruffled feelings of all those constituencies of taxpayers that could flex their political muscle as organised vote banks. One good example was the week-long strike by the transporters. When the tax administrators and the political leadership were left with no choice from the incalcitrant transporters' unions, the RCM was resorted to as a rescue provision. Thus, wherever the government of the day met with some sort of resistance, the RCM was notified as a pacifying solution—and that is how more and more services were brought under its expanding ambit.

But in the case of the Modi Government, which had launched a war against black money and had also launched the 'Digital India' Mission, its Himalayan challenge was to expand the share of the 'formal' economy. It did try the *Jan Dhan* campaign to expand the base of financial literacy but formalisation was a sticky quagmire—and here came the RCM under the GST laws. What is significantly different from the Service Tax Regime and the GST regime is the expansion of the RCM weapon to many goods (even under Central Excise, it was used to tax molasses). That is why there are two vital sections of RCM in the GST laws. Section 9(3) of the CGST Act deals with the levy of GST on as many as 12 Services under the Reverse Charge, and Section 9(4) is an omnibus provision which brings under its sweep all unregistered suppliers of goods or services. Even if an assessee is below the threshold of ₹ 20,00,000 or is even exempted, if any service is availed from any of the 12 notified services under Section 9(3), one is required to take registration. Once, the registration is taken, all other provisions of the law will follow: tax payment, return filing, audit, and many others.

In my understanding, it is the combination of Sections 9(3) and 9(4) which would go a long way in formalising the large swathe of the informal sector of the Indian economy. If we ask an economist to define the 'informal sector', he would refer to the production and distribution of goods or services or both by individuals or household units which stand distinguished in terms of no regulation, low scale of economy, the virtual absence of technology, and virtually no accounting of income and expenditure. Major components of the informal sector in India are agriculture, trade or commerce, transport and storage, hotels and restaurants, real estate and renting, and health and education. This sector accounts for over ₹ 44 crores of the total ₹ 47 crores of the workforce in the country but their preferred mode of transaction is cash. This is what constitutes the eye of the informal sector and the RCM has been designed to hit the 'bull's eye' to formalise the economy.

Since the RCM covers all supplies received by a registered entity from unregistered suppliers and also requires it to file details of their supplies, values, and the supplier (his PAN and address) and file GSTR-1 for them, all such data is going to be stored in the GSTN Server. Once all such data captured over a period of twelve months is analysed by the taxmen, the two major findings could be: What is the total value of all the supplies made by such unregistered suppliers to many registered entities in the country over a period of time? Once the value of the total supplies crosses the threshold of ₹ 20,00,000 but they prefer to be unregistered, the taxmen can easily knock on their doors, egging them on to join the mainstream of the GST regime.

So, such a system is going to enhance the effectiveness of the 'preventive eye' of the tax administration. Secondly, since all such data is going to be shared with the Income Tax Department, it would be too easy for the income tax sleuths to hold them by their collar and make them file returns and also contribute to the Exchequer. So, the twin benefits which would be derived by both the Revenue Boards are: the widening of the tax base and the contribution to the direct tax kitty. A collateral benefit would be the accounting of the expenditures, including the cash which would obviously go down over the years once the taxpayer begins complying with the Income Tax provisions. This would not only formalise the economy but also reduce the use of cash in day-to-day transactions.

The RCM is also going to be a serious blow to the common tendency among businesses to book all sorts of expenses to reduce profits in books. It is commonly known that we have a huge number of taxpayers who have good turnovers and large operations but very little taxable profits. That is what gave birth to Minimum Alternate Tax (MAT) in the Income Tax Law. Now, with Section 9(4) stipulating a threshold of only ₹ 5,000 for exempted supplies from all unregistered suppliers during the day, it will definitely curtail the propensity of the business houses to book sundry expenses to reduce the quantum of taxable profit or to pre-determine what tax is to be paid in a particular year. If one books expenses of more than ₹ 5,000 from all suppliers in a day, one is required to raise an invoice and pay GST on all such supplies. So, it becomes a double whammy—first, the Government collects the GST and secondly, the Income Tax Department gains indirectly. In other words, what the CBDT could not achieve even by inserting too many provisions to disallow bogus expenses, the GST is certainly going to achieve the same for the CBDT.

The last but not least beneficial effect of the RCM is going to be a mega increase in the size of our GDP. Given the humongous size of our informal economy, a major chunk of legitimate economic transactions goes unreported to our national statisticians who compile data to quantify the size of the GDP. Once the process of formalisation begins and more and more individual and household units are roped in under the GST ambit, it would obviously balloon the size of our GDP which, as per my expectations, should double in less than a five years' period.

In a nutshell, the industry and trade may abhor the presence of RCM provisions in the GST Law and some economists of left leanings may say that the RCM takes a toll on the Doctrine of Social Equity as it discriminates against small traders or businesses, but the fact remains that RCM has the potential to prove itself as *'Brahmastra'* to eat away the parallel economy and also to do multiple good to the Indian economy and the health of the Exchequer.

2

GST Network and Data Protection: Shadow of the SC Judgement*

The last few days have been quite eventful for the GST canvas, which continues to be the quickest headline grabber in the media. With the GST Council at its last meeting firming up a view to hike the Compensation Cess on vehicles so that a tangible error made previously in terms of reducing the incidence of taxation on the sector, the Cabinet approval was virtually on the cards. The Union Cabinet gave its nod to promulgate an Ordinance to hike the Cess rate as the Compensation Cess Act had to be amended to vest such powers in the Union of India to notify the hike, and it is going to impact motor vehicles for the transport of not more than 13 persons, including the driver, falling under sub-headings 870210, 870220, 870230 or 870290 and 8703. After the Presidential Assent, the Notification will be issued in a couple of days. Obviously, the automobile sector has not welcomed it but the guiding principle for decision-making by the GST Council has been a status-quoist approach—no tax rate reform in the initial months. Once the Union of India and all the States are comfortable with the revenue collections trend, the Council may review its decision.

So, here comes the Union Finance Minister, Mr Arun Jaitley's, press briefing detailing the total collections as on 28 August, the last date for filing TRANS-01. The visibly happy Finance Minister said that the GST collections have surpassed the redline fixed by the GST Council—₹ 91,000 crores. The actual collections even crossed ₹ 92,000 crores for the month of July. In fact, it is likely to be in the range of ₹ 1,20,000 crores in the weeks to come once a large number of taxpayers who are yet to file their returns and could not do it because of certain technical glitches file their returns. A good number of them are first-timers and they do need assistance. As per the latest data, about 60,00,000 taxpayers were expected to file their returns but only about 39,00,000 could do it. A whopping 20,00,000 more would file with fine and the total tax kitty may swell beyond ₹ 1,00,000 crores in the next few days as the week to file GSTR-1 will roll out in the next 24 hours. As per the data, there are a little over 72,00,000 taxpayers in the GSTN Server but about 13,00,000 are yet to complete their migration process for various reasons. The Finance Minister said that up to 28 August, as many as 19,00,000 new taxpayers have registered with the GSTN. They are first-timers and would take time to comply with the complicated

* TIOL – COB (WEB) – 569, 31 August 2017.

maze of procedures. In fact, a good number who have opted for the Composition Scheme are required to file returns only on a quarterly basis, and this is one of the reasons for lesser returns than what the total tax base is.

Another reason for a little subdued collection is also what a taxpayer from Surat communicated to us. The taxpayer had managed to do RTGS/NEFT on Friday (25 August) but the GST Network and the banks are yet to align their technology to reflect the fund transfer in the cash register of the taxpayer on a real-time basis. Since the fund was not reflected and the next two days were holidays (the 4th Saturday and Sunday), the taxpayer could have done it only on Monday (28 August). But since there was a delay as per the system, one was required to generate one more challan to pay a late fine and only then one could pay tax and file GSTR-3B. For no fault of the taxpayer, mental agony and a financial penalty were inflicted on such taxpayers which the Union of India needs to look into so that genuine taxpayers are not roughed up for no fault of theirs. For a good number of taxpayers, here comes another bad news as the GSTN portal has announced that from the evening of 30 August to the evening of 31 August, no services would be available. Unfortunately, some taxpayers wrote to us that while filing TRANS-01, some of the columns did not take more than a certain number of entries. So, if one had more entries for capital goods, such assessees were stuck as they could not file their TRANS-01.

Against this backdrop, what may appear a timely and sound word of caution is what the NITI Aayog has stated in its three-year Action Plan. It has stated *that:*

> *We need to develop an efficient GST operational system and minimise the disruption caused by the transition from the current indirect tax regime to the GST. The steps towards this include: (i) A well-functioning GST council; (ii) Advocacy and outreach programme to help the stakeholders (especially new taxpayers) adjust to the new system; (iii) A robust tax administration system by the Union and the state governments; and (iv) A well-functioning GSTN system ... Moving forward, under the real spirit of the GST, we should move gradually towards fewer number and lower level of rates. Since the GST system will expand the tax base, we should be able to lower the tax rates without loss of revenue.*

The NITI Aayog has suggested a roadmap and certain milestones to be achieved. Overlooking all other milestones, I would like to focus on the need for a well-functioning GSTN as emphasised by the NITI Aayog. Unfortunately, the GSTN has so far not lived up to one's expectations. It is also a case of poor anticipation index. In other words, the GSTN failed to foresee what all a taxpayer filing returns or paying taxes may require. That is why such a basic aspect of tax payment through RTGS or NEFT has become incongruous. If a taxpayer has hundreds of entries to make, it has restricted the column size or data size which, deprives the taxpayer from doing what is statutorily required to do. There would be thousands of cases of non-compliance because of the malfunctioning or inadequacies of the GSTN facilities. Let us hope the Revenue Secretary takes note of the Achilles heel of his entire GST-related homework.

In this context, what may appear pertinent to make a reference to here is the GSTN and the Supreme Court's latest Constitution Bench's judgement on the Right to Privacy. While giving expressions to various dimensions to the Right to Life and Right to Liberty, the Apex Court Bench put emphasis on the Doctrine of Data Protection, which is unfortunately in a state of disarray in India. So casual has been the approach of the Sovereign towards a citizen's personal data that the taxpayers' data about their entire purchases and outward supplies to their buyers now rests with a private body, i.e., the GST Network, which may have some moral obligations but no legally binding protocols with penalty clauses if certain data is leaked. True, the senior GSTN functionaries have been giving reassuring statements but what if something is leaked and how would one fix the responsibilities? Strange, it was an opportunity for the policymakers to enter into an agreement with the GSTN to legally bind it to take necessary safeguard measures for taxpayers' data and if it is found to be leaked, what would be the financial and other consequences that may ensue? Such a casual approach was adopted after the Government had set up the Justice Srikrishna Committee to suggest a data-protect framework for the entire nation.

While talking about certain restrictions or fetters on the Right to Privacy, the Bench listed six different reasons and one of them is: taxation. It states that the regulatory framework of tax and the working of financial institutions and markets may require disclosure of private information. But then, this would not entitle the disclosure of the information to all and sundry and there should be data protection rules according to the objectives of the processing. There may, however, be processing which is compatible for the purposes for which it is initially collected. These words clearly put the onus not only on the GSTN but also on the Directorate of Systems of the Income Tax and the CBEC, which collect huge amounts of data from the taxpayers. A formal data protection matrix must be built and shared with the public to instil confidence in the Government's intent to protect their personal data.

Let us hope the Union Government takes note of all these aspects of taxation and the need for data protection. Comprehensive legislation should be the goal of the Modi Government before it goes to polls again, perhaps towards the end of 2018. With the internet technology taking long strides with each passing day and huge amounts of personal data being collected on the social media by various non-State and State actors, it is high time that data protection is made one of the key pillars of the taxpayers' services in the days to come.

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3

GST Collections' Woes Continue but Earn Happy Smileys for Income Tax!*

Tax rates have stabilised worldwide—direct as well as indirect. The latest OECD Report notes that except for a few tax jurisdictions, such as the U.S.A. and France, which have undertaken big-bang tax reforms to leg up investments, the corporate tax rates have stabilised in all OECD countries. So far as VAT goes, it has also stabilised except in South Africa. India is another member country of the BRICS group where VAT (GST) is in the process of settling down so far as tax rates go. A large-scale, seemingly hurried, tax rationalisation decisions have been taken by the GST Council at its recent meetings. Let us examine the recent GST collection figures to measure the impact of all such decisions and also find out why the total tally has unfailingly been falling short of the ₹ 1,00,000 crore benchmark for the past twelve months except for April.

The July taxes paid in August have fallen short of the June taxes paid in July by about ₹ 2,500 crores. The total in July was about ₹ 96,500 crores and the current total in August is about ₹ 94,000 crores. The ugly gap is to the tune of about ₹ 6,000 crores! Is it really an insurmountable shortfall? Perhaps not! There are several reasons for the August figures to be less than the July figures. One obvious reason is the growing peccadillos of the taxpayers falling below the ₹ 1.5 crore turnover and also the composition dealers who have been given the facility of quarterly return-filing. Let me explain. A large number of such taxpayers also believe that the taxes are to be paid only when they file their quarterly returns. Such a trend can be seen among even hundreds of large taxpayers in the banking and insurance sectors. The time lag in the case of a good number of large taxpayers varies between three to six months. Such time lag amounts to deferment of tax payment which could have otherwise shored up the revenue collections. Since the first quarter's return was filed in June, the next cycle would come only in September and therefore, August month lost out in comparison.

If we look for the second reason, the most shocking one is perhaps the GST Network's inability to auto-calculate interest payment on taxes being paid late. Albeit the GSTN has activated the computation of late fees if a return is filed with a delay, it does not auto-compute the interest liability!! Why it has not been activated is hugely perplexing! Is the GST Council aware of such a state of affairs? Is there some

* TIOL – COB (WEB) – 623, 6 September 2018.

sort of official approval for such non-activation of the interest clause? If one goes by the provisions of the law, 18 per cent interest is to be paid on delayed tax payment. Though non-payment of interest at the time of discharging one's monthly liability does not absolve one of its liability, what is strange is why should a tax system leave out interest computation to be done at a future date, either at the time of assessment or audit? Is it not much simpler and certain to collect the same at the time of discharge of one's liability? Ideally, no taxpayer paying taxes with delays should be allowed to discharge one's liability unless interest liability also gets computed and clubbed with the original liability. It not only reduces the cost of collections but also shores up the revenue collection figures. I am sure no official exercise has been undertaken to quantify the amount of additional revenue Dr Hashmukh Adhia would have collected to inch towards his benchmark figures. My guess is that it may finally turn out to be in crores and in four digits. Secondly, if interest is not to be collected along with the original tax liability, the interest provision tends to lose its efficacy. Is it something the GST Council wants to achieve by incorporating such provisions? It is high time the GST Council fixes the accountability for such a lapse!

The third reason is a huge gap between the tax base of 1.44 crores and the number of taxpayers filing returns. Even if we subtract the composition dealers and the 'dead' taxpayers who are waiting for cancellation of their registrations, this number would be in the region of about 1.1 crores and there is an apparent non-compliance by almost 40,00,000 to 50,00,000 taxpayers. A large number of small businesses have taken registration but they are obviously not filing returns nor paying taxes albeit they are collecting taxes from their buyers! It is going to be a huge challenge for businesses to ensure that their suppliers deposit the taxes and file their invoices in GSTR-1.

To a large extent, this problem is going to be rectified by 30 September, when the ITC adjustment for the previous fiscal and the H1 of the current fiscal is going to be finalised. This exercise, albeit a humongous one for small as well as large entities, is going to witness large-scale credit reversal with interest. My guess is that it would be equal to several thousand crores as a major chunk of taxpayers had initially taken ITC on their purchases but an equally large number of suppliers have not uploaded their invoices nor paid taxes. Secondly, a good number of them self-amend invoices after sharing them with their buyers and there are glaring mismatches between the value and the quantity supplied. This is another problem area which may also trigger litigation.

So far as the tax rate rationalisation relating to the white goods sector goes, it would be showing its impact on the revenue collections from September and October but one saving grace for the Exchequer is going to be the onset of the festival season when the sales would be soaring up to a new high.

Let me now move to another set of statistics released by the Government along with the GST collection figures. 31 August was the last extended day for e-filing personal returns and the two mega categories of taxpayers which have recorded abnormal jumps are the salaried and the presumptive taxpayers. The jump has been

as abnormal as 2.25 crores as compared to the last fiscal[1]. Both the categories had recorded an addition of more than one crore new taxpayers. Although the CBDT Press Release does not explain the reasons for such an abnormal growth, the GST has done the magic in association with demonetisation. With the GST roping in a large number of professionals and traders in its fold, there was virtually no escape route for them not to file their income tax returns. Secondly, with the CBDT and the Companies Act putting a huge onus on the CAs certifying books of their clients, a large number of such professionals have begun to advise their clients to make correct declarations rather than fudge books by showing salary payments in cash. A good number of employers have begun to pay salaries through the banking channels and it has also prompted individuals to file their returns. Whether they have also paid taxes or not is to be examined by the CBDT, which should be coming out with a statement in the coming weeks and disclosing to the Nation whether it has only received e-returns or taxes as well. In the past, as many as 2 crore returns were filed with NIL income. It is to be seen now when we have about 6 crore taxpayers, what is the actual size of the tax-paying returns?

This size of income tax return filers would further grow next year once the audit clause, which has been deferred on protest, comes into force. Once GST details are disclosed in the income tax returns and the CAs are made to certify the authenticity of such data, it would further become easier for the income tax authorities to detect the discrepancies and make additions. I personally feel that the CBDT Chairman should organise an official function and give a sumptuous treat to the Members and other officials of the CBIC for making their job easy and adding a large number of taxpayers to their tax base. I am sure the CBDT would be reaping much more tangible benefits when a large number of MSMEs belonging to the formal sector, registered as LLPs or companies, will be filing their returns by September-end and would also be contributing to the direct tax kitty richly! There are more than 6 crore MSMEs and if GST brings even 1 per cent of them under the CBDT's fold, it would be more than 6,00,000. I do expect another round of abnormal jumps in the corporate tax base! In the years to come, with the growing stabilisation of GST, the direct tax kitty would have a concomitant growth in its tax base as well as tax revenue; and the days are not too distant when India's tax-to-GDP ratio would be in the region of 15 per cent!

Fingers crossed!

1. (See Cob(Web)-566 - RCM Brahmastra under GST - Income Tax Department to be key Beneficiary)

4

GST: e-Invoicing Battens Down the Dinosaurian Market and the Corporate Goliaths!*

In the past nine months, COVID-19 has sickened the Indian economy but the GST-turf remains scorched for good as well as bad reasons! With the GST revenue bucket ebbing on to a new low, the architects of GST, indulging in intense tittle-tattle in the menacing maze of the power corridors on Raisina Hills, have, of late, been busy designing 'Trojan horses' to rope in more taxpayers and also to plug revenue leakages. The economy, under siege, has shown a shade of limping-back to recovery and so has the GST mopey mop-up in the past two months. Thanks to a series of procedural changes and punitive measures, the GST collections breached the ₹ 1,00,000 crore mark again for the month of November. The most significant recovery has been on the import front. Import IGST logged about 5 per cent growth and it simply means a re-ignition of one of the growth engines in the economy.

One of the far-reaching changes has been the new e-invoicing regime for B2B. It was rolled out for assessees having turnovers above ₹ 500 crores turnover with effect from 1 October 2020. In the very first month, the total volume reached close to ₹ 5 crores—only B2B e-invoices. B2C e-invoices with QR codes should have commenced from 1 December 2020 but to help prepare it, a penalty has been waived off for any sort of technical infractions. Buttressed by the gangbuster response (the number of GSTINs jumped from 27,000 to 32,000 by mid-November) to the Scheme, the policymakers quickly doubled down their efforts to expand the coverage of the tax base by lowering the threshold turnover to ₹ 100 crores with effect from 1 January 2021. In a few months' time, maybe by 1 April 2021, it may further plummet to ₹ 5 crore turnover! Going by the gingerly pace of expansion, it appears that the policymakers are indeed working like a Trojan! The ballyhooed scheme also reinforces the public perception that the policymakers are quite blasé about the risks of their accelerated pace.

One of the dangers, widely acknowledged by experts, is the serious pummelling of the compliance costs! The implementing agency, the National Informatics Centre

* TIOL – COB (WEB) – 741, 10 December 2020.

(NIC), is believed to have decided not to facilitate direct access to all assessees above turnovers above ₹ 100 crores but less than ₹ 500 crores. The only options which are going to be made available are API integration through GSPs and ERPs. MSMEs may also be allowed piggyback ride on ERPs of 'friendly' assessees already integrated! In other words, the policymakers are not keen to throw in sweeteners to make it cost-effective for MSMEs. If one goes through the price lists of GSPs, the e-invoicing software being marketed by many would cost a bomb—close to ₹ 15,00,000! Gobs of money!

One of the GSPs which has cornered about 30 per cent of total e-invoices generated in the last months has been offering its software for such prices! Assuming that about 36,000 taxpayers would mandatorily be generating e-invoices under the newly-notified turnover bracket, the size of the compliance software market would be in the range of a whopping ₹ 6,000 crores. Many corporate goliaths would be born in a short span of time at the cost of faint-hearted taxpayers! If other software sub-markets like e-Way Bill are reckoned into the total sum, GST is going to be the bedrock for a dinosaurian market. Though it may be viewed as propitious for the IT sector and also the Revenue, obsessed to curb ITC frauds, it would be a pyrrhic victory for the Government. It is highly unfair on part of the ravenous policy makers to add such huge costs to the already-ballooned compliance burden. The North Block seems to have completely overlooked the requirement of the Global Ease of Doing Business Index, which entails turning back the clock of the ludicrously-soaring tax compliance costs! Secondly, piggybacking others' ERPs may posit the risk of data confidentiality.

The present baleful trend in the GST e-invoicing software market needs to quickly disappear in the rear-view mirror and a perfect foil will be a free software developed or provided by the GST Network. Or, a healthy caffeine shot would be a detailed policy to regulate the prices of such software. The fact that GSPs are licensed by the GSTN, there is no kosher reason to gift them a *laissez-faire* market! It should not be a case of *laissez-aller* for the ERP developers, too! Their steep prices also need to be fixed by the Government before they are permitted integration with the e-invoicing server. Such regulations would certainly fit into the width of canons of the taxpayers' services which the GST Council appears to be 'killing' with a thousand cuts!

Another seminal development on the GST-turf flows from the larger bench decision of the Apex Court. The festering issue of the constitution of the GST Tribunal and the astronomical rise in GST litigation has, for long, been like a slow-motion horror! The time has now come for its end! With leery optimism, I expect the next GST Council meeting to approve the constitution of Benches as several States have already submitted their blueprints. The highest court has directed the Government to set up the National Tribunal Commission, which would monitor the functioning of 19 Tribunals as an independent body and also defend tongue-tied members from fatuous complaints and provision for proper infrastructure. Although the Apex Court has given some time to the Ministry of Finance to do so, any

appointment made by it during the interregnum may not be beyond reproach and nightmares! Hence, it is advisable for the top mandarins and the ACC to quickly plough ahead with the constitution of the Commission and rescue itself from any 'moral injury', if not the meaty allegation of cronyism!

Once the constitution of the GST Tribunal is notified, the GST Council should, without piercing its cranium, take a call to defenestrate the inordinately incompetent and refreshingly boring forum of the Authority for Advance Ruling and its appellate forum. Their 'orphaned' contribution, in the past three years, has been to make the GST muddier and foggier! The latest development is the admission of a PIL by the Calcutta High Court. The petition by CA Rajendra Kumar Duggar has questioned the *raison de'tre* of the authorities. '*Coram non-judice*' for the absence of a judicial member is the key plank of the petition! The challenge is also based on an intriguing jumble of reasons. But the pith is that AARs have been giving unfathomable orders with gusto and not serving even an iota of cause for justice!

I am not so blithely optimistic that the GST Council would not be loath to give up on the AARs and may indeed resort to any measure of dovishness! Similarly, it may not do anything substantive on the e-invoicing front, which may amount to a smack in the face of profiteering software providers! In view of the conspicuous lack of speedy actions, it may run the risk of treating taxpayers like cattle and policymaking may widely be perceived as symbolic and cockamamie! Some weeks are still left for the Government to grit its teeth and take some meaningful steps to bolster the spirit and compliant behaviour of taxpayers!

5

GST: Right Time for the GoM to go Rabbiting on ENA for 'inTAXicating' Revenue!*

The air of festivities hangs thick from the months of September till year-end in India. The cultural-cum-religious rejoicing for the people at large also turns 'intaxicating' for the Central and State exchequers! Consumer demand, including liquor sales, traditionally peaks at a new crescendo during this time of the year. The twin pointers to such a trend are the unsustainable jumps in the GST and State Excise Duty collections. For the GST, it was ₹ 1,17,000 crores in September and then ₹ 1,30,000 crores in October. For the liquor revenue, tales of myriad taxes and collections abound. Albeit largely an inelastic good, its sales and tax collections parallelly run north during the festive season and also the following wintry months. Since taxing liquor is a constitutionally enshrined privilege of the States, the zombie of revenue collections varies from State to State, depending on the philosophical hues of the Governments ranging, from conservatism and liberalism, to nihilism! Conservatives tend to control farm-to-throat distribution and run their own retail outlets very much like the many conservatism-shielding States in the U.S.A.

Liberals, like the NCR Government, which recently auctioned all its 850 retail outlets in 32 Zones to private parties, keep experimenting with new ideas to mobilise dollops of extra revenue! What nudged Delhi to experiment with a new all-immersive Excise Policy was the dire fiscal straits after COVID-19 that walloped the VAT and GST revenue potential of the States and the Central Government too. The pandemic has, in fact, pushed revenue heads underwater across the world! To wriggle out of straight-jacket, what the Delhi Chief Minister, who is known for his sartorial simplicity and also occasional 'duplicity' on many vital issues of public interests, has done is to follow a simple nous of the contemporary fashion-forward economics, and that is—if more milk is to be 'milked', you simply sell the cow! The spreadsheets approach in corporate jargon! Sounds heuristic, indeed! Anyway, the Delhi Government's Twitterati are united in their expectations to garner ₹ 3,500 crores of extra revenue from their new 'grain-testing' idea—truly, 'intoxicating'!

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* TIOL – COB (WEB) – 789, 11 November 2021.

In contrast to the wet Delhi, the officially dry State of Bihar has, of late, been in the news for consumption of the very same watery 'social evil' it had banned for political reasons! A few years ago, the Nitish Kumar Government had choreographed political events for censorious disapproval of liquor and hubristically decided to go dry when the world around Bihar's geographical coordinates was getting wetter and perhaps, also better in terms of tax collections! It imposed puritanical regulations to curb consumption, as well as production, in gargantuan contempt to the pompous history of the 'burning water' (*aqua ardens*) since the boozing days of the Sumerians and the Chinese! The collective political sagacity of the State Government simply slurred over the ancient and modern slates of wisdom! Casting magic spells for a gender-specific political constituency, the party in power used the magic-wand-rod to squelch the whiffs of disquiet originating from tipplers whose throats, unfortunately, could not put up with the titillation of dryness!

Thus, there opened a salubrious window for the illicit trade to drive and thrive, and then arrived the disastrous sequel to such a trade under prohibition—the unstoppable greed for quick and filthy lucre! A sort of *laissez-aller*! This led to a belligerent and *laissez-faire*-style sales of spurious liquor in the Wild West space! A predictable consequence followed—Over forty quaffed to painful death and many were being treated! This is despite the district administration and the police being lumbered with a bizarre and complex array of regulations! A pie-eyed review of the bittersweet policy is long overdue! The State Cabinet, I believe, had a closed-door 'Turing test' of enforcement apparatus and the need for a matrix of additional regulatory cobwebs! Wow! A case of driving a speedboat in a bathtub! The State Government needs to avoid hoopla and borrow a leaf of experience from other countries and also some empirical studies which have established that prohibition does not work in the long run! If the welfare of the poor is to be enriched, the State should stop 'rabbiting' with quirky ideas to vanquish the favourite vice of the masses! Rather than putting them under the wheel, the overarching solution lies in imposing punishing taxes and the extra resources collected therein should, rather, be spent on strengthening social spending by designing a scheme tailor-made for the targeted constituency. Post-COVID-19, Bihar stands a glorious loser with looser enforcement of leftover fiscal options. Its GST collections are insipid and depleted and it has already forfeited, with jollity, its excise duty revenue in a weird political 'Squid Game'!

Let us now switch the turf from consumption to manufacture or supply of liquor. At the time of moving the 101st Constitution Amendment Bill, all State taxes, except the local bodies' taxes and Alcohol for human consumption, were proposed to be subsumed in the GST. Since the States had taken an intransigent stand on liquor and petroleum products, a status quo was maintained with the preening assumptions that buoyant revenue collections under GST may dilute their resistance in the future! Thus, petroleum products, natural gas, ATF, and other six items remained in Entry 84 of the Union List of the 7th Schedule to the Constitution. Similarly, Entry 54 of the

State List contained six items, including liquor for human consumption. The Bill was enacted and all other items—raw materials for manufacture and supply—came under the sweep of GST *vide* Article 246A and Article 366(12A) of the Constitution. Then appeared on the horizon, with a plonk, the hydra-headed issue of taxation of ENA (Extra Neutral Alcohol). Though going by the amended constitutional scheme of the new levy, except for the items specified in the Entries in the Lists I and II, which were later backed by the opinion of the Attorney General also, all other goods and services fell in just one deep bucket of GST. But the spirit of cooperative federalism overshadowed the legal arrangement on demand from the 'hawks', backed by the voice of silence coming from the 'doves' among the States! They literally pulled out all the stops and the GST Council, with certain theatrical flair, kept on debating, with no destination in sight, right from the 20th meeting when the ENA issue was brought on the roster.

The GST Council literally acted ne'er-do-well on this issue and a status quo bolstered the 'spirit' of both—the States as well as the liquor industry. How? The industry felt more cozy with the VAT authorities and the States joyously treated it as an extra funnel of non-sharable revenue to their kitties. After late, Mr Arun Jaitley, the present Chairperson, also found the issue as slippery as an eel. Though the entire arguments of the States seemed nuts, the circumstantially-beleaguered Chairperson preferred *détente* in place of locking horns! Meanwhile, the industry kept on quaffing pint after pint over the fiscal indecision! But, like every good time, the pina colada session of the industry rammed into its expiry date! In many States, it was saddled with demand from both—the VAT authorities as well as GST authorities. Double taxation! Ouch! Many called it a reptilian tax regime! Nothing 'quaffable' about it! The wrenching time had arrived, and they began to flood inboxes of State and Central policymakers with their representations for pain-sequestering measures. No response tellingly began to trouble the industry, which had started hankering for certainty-in-taxation in the interest of long-term investments. The saddlebags of arrears also kept on gaining weight!

Thus, a group of squirming-in-pain taxpayers filed writs against the UP Government's levy on ENA, phraseologically described as a 'non-GST Alcohol', and the Allahabad High Court has, in its decision in the case of *M/S Jain Distillery Pvt. Ltd.*[2], ruled what was ubiquitously known to all stakeholders: Upon enactment of the 101st Constitution Amendment Act, the State lost its legislative competence to enact laws to impose tax on the sales of ENA. It quashed the UPVAT Notification and made it clear that for the lack of any saving clause to impose such a levy, all goods which are specifically not mentioned in the pertinent Entries in the Union or State Lists, are liable to only GST levy. ENA, not being fit for human consumption, is a raw material and is covered under the purview of GST laws. It further stated that the phraseology like 'non-GST Alcohol' is a misnomer. Referring to the SC's decision in

2. 2021-TIOL-2022-HC-ALL-GST.

the case of *Synthetic & Chemicals Ltd.*,[3] the HC further reiterated that since ENA is not fit for human consumption, it cannot, therefore, be clubbed with the specified items in Entry 54 of the State List, which does not cover alcohol, fit as well as unfit for human consumption.

No doubt, the State of UP would like to file an SLP by planking its ground on the undenatured aspect of the spirit but now that the legal space stands 'decarbonised', it throws an opportunity for the recently-set-up Group of Ministers (GoM) with a clear mandate to suggest measures to buoy up GST revenue collections. In view of the Allahabad HC's decision and also the TRU's views backed by the AG's opinion, ENA is an industrial raw material, well covered under the GST and the GoM should settle the issue once and for all—no wiggle room to play baddie! No matter in which rate bucket it may be plonked, what is relevant for the industry is that it does not survive as a prodigious source of future legal wrangles!

One more inference of the HC's decision which may be drawn is that in view of the lucid elucidation of the constitutional arrangement of taxation, even the GST Council cannot decide to 'gift' ENA back to the States to continue with the present arrangement as the Constitution itself does not vest any such legislative competence in the States. Article 279A of the 101st Constitution Amendment Act vests unfettered powers in the Council to levy taxes, including Cess and special taxes, but certainly not to exercise the 'right to gift' a particular good or service to the States so that no political ruckus is kicked up! Wateriness of the devilishly-entangled issue may nudge the GoM to make a flawed recommendation to buy peace with the States, but such a road ahead would have too many legal potholes to be overcome! There is no tangible reason to be a total rabbit over the issue! It is also the time to count the cost! Cosying up States at the cost of a clear interpretation of the constitutional scheme may bring punditry of the Council in question! More importantly, if GST is levied on ENA, the States would not tend to lose revenue as they would continue to collect SGST and also claim a share in the Central collection through the divisible pool. I sincerely hope that the GoM would not try anything which would, at best, be standing on broken legs and also elements of utter hollowness!

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3. 2002-TIOL-723-SC-CT.

GST Administration: Tapping on the Opposite Shoulder!

Introduction

The man behind the machine is important and will always remain critical, no matter how big a role Governments across the world may assign to the machine! Such a universal truth applies a tad more in the case of tax administration, which is also an apparatus-by-design! With the rise of the information and communication machines across all human activities and their soaring applications by the Governments in their interface with the citizens, the conventional apparatuses, including the tax administration, are expected to be more efficacious in terms of gathering tax dues and more efficient in terms of providing taxpayers' services. So far as India's historic indirect tax reform in the form of GST goes, its key architects gifted it at the time of its birth, with a trailblazing, futuristic 'Godzilla-sized' machine monikered as the GST Network. After finalising cautiously-debated data sets of foresight, a large swathe of tax administration's functionalities was assigned to this machine. The governing rationale was to make the drudgery of compliance IT-enabled, convenience-oriented, and requiring minimal physical interface to slash chances of any face-off with the taxpayers and, of course, a smooth collection of taxes. In fact, let us not be shy and deny the plaudits and the gongs to the architects of the functionalities of the GSTN, who indeed deserve them! No way, it was claptrap or hubristic belief! The madcap and the rotten tomatoes that the GSTN received after the implementation of GST for two long years was largely attributable to a lack of adequate time for testing its new limbs and also, the ping-pong it was made to play with the North Block bureaucracy, for taking critical decisions! I would not like to agree if they are tagged as catastrophists! However, admission of *mea culpa* would have earned them more praise!

Anyway, let us not rake over the ashes and extend full marks to the GSTN for transforming itself into the cat's whiskers! It efficiently discharges multiple responsibilities of the tax administration and also supplies critical data analytics with actionable intelligence to the Revenue's field offices for timely preventive operations. A case in hand is that of the scary ghost of fake ITC rackets across India. When the field offices found themselves stuck in a glue pot, the GSTN came to the rescue by passing on the details of pale-looking invoices staking claims to oodles of credit and such inputs enabled the preventive units of the CGST and SGST administration to carry out searches and seizures and also attachment of bank accounts of Trojan horse entities. Though the GSTN has become a reliable and safe pair of hands to assist the GST tax administration, it does not mean that its field offices have run out of responsibilities! Besides audit and preventive functions, the onus falls on its head to extend the arms of facilitation to minimise the instances of lamentation!

However, the GST bureaucracy strangely acquired a new but controversial feature, during the initial months, when it began driving the administration with the help of tweets on social media and also through press releases. One of its press releases which was issued in response to the rising drumbeats over the levy on legal services was taken on record by the High Court for legal scrutiny. The Judiciary directed the Government Counsel to explain the legal validity of such press releases and file an affidavit after consulting the Union of India. A noisy debate was initiated by the purists in the legal fraternity who wanted to see any clarification in the form of a Circular or an Instruction to the field offices. The second cardinal error that the tax administration committed was to coerce legal service providers to take registration even though they were covered under the Reverse Charge Mechanism. A case of tapping on the wrong side of the taxpayers' shoulders!

At a time when the GSTN was not able to steady its ship despite deploying all its hands on the deck and the Judiciary had resorted to tongue-lashing and reeling out unsavoury orders, the tax bureaucracy weirdly got out of the bed on the wrong side and decided to set the cat among the pigeons! The 'Doctrine of Lathi' first fell on the composition dealers! Though it was too early to make use of the weapon of last resort, the field offices were asked to take punitive measures. Rather than tweaking the laws and procedures with a tinge of pragmatism, the GST bureaucracy bewilderingly ran out of puff! The golf iron-kit is an effective foil only if the number of errant is a handful or in hundreds but certainly not in lakhs! To deal with the masses and to help them adapt to a new tax regime, what was needed was an errand of mercy. For greater voluntary compliance, the modern trope of sophisticated tax administration should be to enable taxpayers to comply with the laws and not to put them in handcuffs!

No doubt, since gathering revenue would always remain the primary duty of any tax administration and so would its functions such as audit and prevention of revenue leakage, like different methods of salvation and enlightenment in life, one can jolly well choose a more friendly path to reach one's destination! Twisting ears at a time when the businesses were losing faith in the new tax system and the economy was also on the brink of a slowdown, was certainly not an imitable and replicable method. After hosting an All-India conference of senior revenue officials, the GST bureaucracy had finalised the nine-point agenda to deal with scofflaws. The Revenue was well within its right to strategise and sensitise its field offices but creating a thick air of fear through media publicity was a serious faux pas. When the business sentiments in the economy towards the end of 2018 and 2019 were fragile, indiscriminate issuance of audit notices substantiated the conventional perception about the tax administration being the enfant terrible of the new tax system! Another example of tapping on the opposite shoulder of the taxpayers!

Yet another jarring goof-up which created a febrile atmosphere in the economy was the instruction passed on to the field offices to recover interest on late payment of tax, amounting to more than ₹ 48,000 crores, and such a *diktat* was telegrammed

when the beneficial amendment in the relevant Section 50 of the CGST Act, 2017 was passed by the Parliament. It was unnecessary and avoidable. Taxpayers across the country jumped like a cat on hot bricks and represented before the Council aggressively. Though there were arrears also under the SGST Acts, the *à la carte* approach raised the temperature shooting beyond the upper limit of the thermometer. Though the fault for this issue was to be apportioned among all the three stakeholders—the GSTN, the Revenue, and the taxpayers—the millstone was simply put around the neck of the taxpayers only for not paying interest which was automatic and mandatory in nature. When the GSTN did not provide any utility for computing such liabilities, how could the taxpayers have paid them? Secondly, why did the tax administration play possum over it for years? There were multiple instances of tapping on the wrong shoulders of the taxpayers in the last five years but it was an equally enchanting and learning phase for the tax administration, which may be expected to be more friendly for the compliant taxpayers and relentless for the black sheep!

Chapter 1 dwells on the conundrum created for the exporters under Rule 96A; SEZ units being asked to take separate registration in different states; an attempt to nourish a new culture of issuing legal clarification through social media tweets and press releases; how the same was brought under legal scrutiny in the case of legal services; and how the CBIC goofed up on agitating the mind of legal practitioners who were also asked to take registration even though they were covered under the RCM.

In Chapter 2, a peep is provided into the contentious issue of TRANS-01 and how it was messed up and the Judiciary felt coerced to make harsh observations about the tax administration; how widespread non-compliance by the Composition dealers provoked the Revenue to resort to the 'Doctrine of *Lathi*', which should have been the instrument of last resort; how massive pile-up of IGST collections created a rift between the dual tax administration; excesses committed on the issue of ocean freight; and the demand for permitting the use of ITC to pay tax liability under the RCM.

Chapter 3 narrates the overdependence of the Revenue Secretary on officers of his own cadre and not involving in critical decision-making the officers of the CBIC who had decades of experience in the domain; how centralisation of decision-making delayed and messed up the roll-out of the new tax reform and strangely, assigning the job of review to the same set of officers who were responsible for the implementation; and how the restructuring the indirect taxes Board was delayed and left to the successor of Dr Hashmukh Adhia.

In Chapter 4, I have detailed the right of the Revenue to take preventive and audit measures to plug revenue leakage but the ear-twisting measures proposed do not sail well at a time when the sentiments of the businesses were sinking; the finalisation of a nine-point agenda to take harsh action against the taxpayers and how such a decision scared not only the fraudsters but also compliant taxpayers; and what added

to the lurking fear in the air was the excessive and loose media coverage of a simple event like inking of agreement among the GSTN, CBIC, and the CBDT for periodic exchange of information through API.

Chapter 5 illustrates the rationale behind the staggering of due dates for filing returns; the yawning gap between the registered taxpayers and the number of GSTR-3B being filed and its impact on the monthly revenue collections; the casual approach to dealing with the issue of interest on delayed payment of tax under Section 50 and how an avoidable controversy was fuelled when the CBIC gave directions to field offices to recover ₹ 48,000 crores in arrears; how all the stakeholders such as GSTN, the Revenue, and the taxpayers, messed up this issue for long and none bothered for years; and when a beneficial amendment was passed by the Parliament why the tax administration should take coercive measures and not wait for the relevant notification.

1

GST-Related Clarifications: Press Releases and Tweets a Risky Culture![*]

The Goods Services Tax (GST) continues to be the dominant flavour in the economy. With the Modi Government being able to answer most of the taxpayers' queries either through tweets or TV Channels or other forms of media, most of the issues of the small and medium enterprises appear to have been settled or clarified, and, the general opinion among experts is that the much-expected tumultuous roll-out has finally turned out to be an event least irritating so far! Additionally, GST has been riding a quiet time. With the Ministry of Finance leaving no stone unturned to directly interact with the taxpayers and having indeed shown a hitherto unseen approach to using media proactively, the number of problems has dwindled to a minimum. Such a taste of success evidently prompted the Prime Minister to call for the 'GST Spirit' in his pre-Monsoon Session appeal to the opposition parties.

Though the Union of India may relish its success for a quiet GST roll-out, several sectoral problems continue to swell. One such sector is the exports sector. As per Rule 96A of the CGST Rules, a registered person has to execute a Letter of Undertaking (LUT)/Bond for the export of services without payment of IGST. Since the GSTN has failed to provide this facility online, the CBEC quickly stepped in to allow the manual filing of LUT to the jurisdictional Assistant Commissioner. Though the format of GST RFD-11 has been accepted by the field officials, exporters have been directed to submit a **draft first** for their vetting and it is causing an avoidable delay.

Let me now go to SEZs, which are a stable source of exports and hugely contribute to the recently-recovered growth rate in our exports. There are assessees which have registered their principal place of business and others like SEZ or STPI or DTA units as branches in one particular State. All such establishments have just one GSTIN. Now, what comes to add to the prevailing confusion is the direction to separately register SEZ units online, and if one is not registered, one is not allowed to execute LUT. This **nullifies** the principle of 'one registration' taken for a State. There are many more such sectoral issues which need immediate attention for smooth compliance.

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* TIOL – COB (WEB) – 563, 20 July 2017.

Let me now move to some substantive issues where the substantive powers of the GST Council, set up as per Article 279A, have come to be questioned in a writ before the Delhi High Court, and the service involved is the legal service, which has the inherent potential to grab headlines. It did it in the past when the then Finance Minister, Mr P. Chidambaram, a lawyer himself, resisted any proposal to tax legal services but Mr Pranab Mukherjee did it in 2009, and it was done to bring lawyers on equal footing with other professionals who were already under the Service Tax net. The way out was found in the form of the RCM and the same method was retained even under the GST.

Now, after the Government issued the CGST notifications, a writ petition was filed before the High Court, challenging the vires of the Notifications which, according to the petitioner, do not completely translate the decision of the GST Council in its wordings. Even as courtroom dexterity had begun to unfold, the Ministry of Finance, in its wisdom, decided to issue a Press Release clarifying that there is no change in the legal position with respect to the taxation of legal services; and when the second round of hearing began, this mode of issuing clarification through Press Releases itself came under heavy assault before the Bench.

Although the Bench has asked the Government counsel to explain the legal validity of such Press Releases, and an affidavit is to be filed at the next hearing, it is true and strange that instead of issuing a **Circular,** the Union Government chose the route of issuing a **Press Release** for such a clarification. It was indeed a strategic error or one may call it too much reliance being placed on the social media or any form of media to explain a substantive legal provision. Some sort of discipline is required to be followed at the Government-level to avoid unnecessary litigation and confusion. A similar error was committed when all the Sections of the 101st Constitution Amendment Act were notified, deleting several Entries in the Union List of the Seventh Schedule to the Constitution (See 'errors' in GST Notifications: Dr Adhia, do not let them snowball into huge embarrassment!). In reply to the raging controversy, the Government only '**tweeted**' that everything is fine with the Notification.

A similar approach continues even today and the Ministry of Finance prefers putting out Press Releases to clarify major legal doubts. The basic purpose of issuing Press Releases is to provide broad information to the media which, in turn, adds value to the inputs or simplifies the issue for its own readers or does padding of old information to bring continuity in the development of a news item. But a new dimension seems to have been added by the Modi Government, which is detested not only by the purists but by the entire legal fraternity and now, the Judiciary too. Undoubtedly, major clarifications should come in the form of Circulars and not Press Releases. This is a loose method of dealing with a serious issue. This is also addictive if one goes by the latest releases. In one such release, the Ministry of Finance recently clarified even the lower tariff rate on five-star hotels charging less than ₹ 7,500-a-room tariff per day. Tax on sale of old jewellery by consumers is another episode. Such a style of clarification may lead to more legal disputes once

some field formations refuse to accept the legal authority of such releases and raise a huge demand for tax. The new dimension given to the world of Press Releases may be quick to answer a query but not substantive legal clarifications. Let us wait and watch how the Delhi High Court comments on this Press Release culture at its next hearing in September.

Meanwhile, the challenge in the legal service case is whether the Union of India is required to use the GST Council's decisions *verbatim* in its Notifications and has no authority to play with the words while giving legal expression to the same intent. Going by the Constitution Amendment Act, the GST Council is only a recommendatory body and its recommendations may be altered or rejected by the Parliament, which is constitutionally supreme. When the Parliament has legislated the CGST Act based on the recommendations of the GST Council, can our Courts really stick to the decisions of the recommendatory body for interpreting a legal provision? Although it is a debatable issue, as per my understanding, going by the Doctrine of Preponderance of Constitutional Wisdom, it tilts in favour of the Parliament.

However, going back to the raging controversy, it *prima facie* appears that the TRU has not done justice by saving a few words and commas which should have been a part of the expression used in the Notification. Greater clarity should have been the focus of the drafting team but perhaps, to meet the 1 July deadline, they were also short of time. Anyway, a simple answer to overcoming this legal impasse is to issue a Circular and put an end to it when there is no change in the intent of the GST Council to levy tax on a reverse-charge basis.

A connected issue, in this case, is that of mandatory registration of advocates or firms already registered during the Service tax regime. When certain assessees are **excluded** from paying taxes even under the GST laws, where was the need to put an onus on all such assessees to take registration and then de-register? Why such a fruitless exercise? What purpose does it serve? Once the GST Council has taken a call that certain services are to be taxed under the RCM, why **to force** the service providers to take registration? The petitioners indeed have a valid point here and the GST Council should quickly take a call to do the needful rather than wait for the Judiciary to direct it to do the obvious.

The GST Council so far enjoys the clean and enviable track record of taking all decisions by consensus and it should not wait for the Judiciary to direct it to do the most obvious things to do. Then, a connected question arises: Can our courts direct a recommendatory body to make a specific recommendation? Anyway, the GST has made an excellent beginning so far and it must be allowed to stick to its stated path of no litigation and confrontation with the taxpayers where the scale of justice is tilted in favour of the taxpayers. It must be remembered that demonetisation was a different sort of drive where the Press Releases method worked but the GST is a taxation law enacted by the Parliament and it needs serious methods to clarify doubts.

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GST: Set your House in Order Before Using Lathi![*]

In my previous Column, I had argued to establish the 'theory' that the Union Budget, 2018 was a perfect 'election budget' for the Modi Government. Now, what is becoming unmistakably clear is that the shadow of general elections appears to be bringing under its fold even the Goods and Services Tax (GST), which unarguably requires quick repair work to put it back on the track. Such a presumption can safely be made from the palpably missing political enthusiasm among the chieftains of the GST Council. What is clearly conspicuous is the absence of a sense of urgency to complete the revamp job in a record time. Meanwhile, the graph of tax compliance has scaringly been on the decline, but it would be wrong to put the entire onus of non-compliance on the taxpayers alone. There are multiple factors responsible for such a tectonic change.

Let us run through the key reasons for the changed scenario which may lengthen the period of GST stabilisation in India. The first and foremost reason is the poor IT architecture of the GSTN along with the missing robustness of the hardware assembly. Even if a pardon may be granted to the political and other decision-makers in the Indian bureaucracy, the same cannot be recommended for the GSTN vendor, which is a specialist corporate body and it should have taken all caution not to mess up with the new tax regime. Even after seven months of the mess being admitted and acknowledged, not a very substantial improvement has been reported so far, and one spin-off of the festering mess is the rise in the number of writ petitions filed before the High Courts across the country—most of which are relating to non-functioning features of the GSTN portal. One latest writ is about the failure to file TRAN-1 by the due date and the High Court directing the Revenue to reopen the portal for enabling such filing.

In a similar case, the Bombay High Court recently observed that:

> *A tax like Goods and Services Tax was highly publicised and termed as popular ... These celebrations mean nothing. The special sessions of Parliament or special or extraordinary meetings of Council would mean nothing to the*

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* TIOL – COB (WEB) – 594, 15 February 2018.

assessees unless they obtain easy access to the website and portals. The regime is not tax friendly. We hope and trust that those in charge of implementation and administration of this law will at least now wake up and put in place the requisite mechanism. This is necessary to preserve the image, prestige and reputation of this country, particularly when we are inviting and welcoming foreign investment in the State and the country. We hope and trust that such petitions are rarity and the Court will not be called upon to administer the implementation of the law, leave alone monitoring and supervising the working of the individual officials, howsoever high ranking he may be.

The message from the higher Judiciary is loud and clear. If the festering IT-related problems linger on, the Judiciary may not be able to exercise the doctrine of restraint and may be compelled by petitioners to issue a fresh set of directions. The deadline set in this Order[1] is 16 **February 2018,** which is tomorrow. The GST Implementation Committee (GIC) has not yet come out with any tangible relief for such taxpayers who could not file their returns—GSTRs or TRAN-1. I sincerely hope that the counsel for the Revenue would reveal some substantive decisions taken by the GIC before the Bench and the same would be implemented as soon as the current cycle of tax payment gets over by 20 February.

Though the GST Council has pinpointed the growing incidence of non-compliance in the case of composition taxpayers, putting the entire blame on them would not be completely fair. I am sure there would be a large number of such taxpayers who may have decided to take undue advantage of the poll-driven business environment in the country but there would also be an equal number of taxpayers who must not have **fully grasped the essence of the GST laws and also faced GSTN-related problems** at the time of filing their quarterly returns. I am sure a good number of such taxpayers must have been ill-advised by their paid professionals, who probably banked more on the election-driven reality of the current calendar year to do so.

To facilitate the behavioural change among the composition dealers, the GST Council has gone back to the Doctrine of '*Lathi*'. I strongly believe that such a decision is hasty and too early. The GST Administration certainly has inherent powers to use a stick to collect fair taxes but **relying on such powers so early, when the implementation itself is at such a nascent stage, is not so pragmatic.** Rather than the stick, the GST Council should bank more on legislative and procedural tools to mend the changed behavioural patterns of the taxpayers, and the proposed introduction of the RCM would go a long way in addressing the grievance of the GST Council. The focus should be more on speeding up the legislative amendments rather than the kit of sticks. **One stick which is bound to have a seriously disruptive effect is the recently-failed e-Way Bill, which is conceptually a counter-productive tool**. On the one hand, the GST Council is yet to bring the promised comfort of a good and simple tax to the taxpayers and on the other hand,

1. 2018-TIOL-05-HC-MUM-GST.

the Council is hastily resorting to the disruptive and disparate e-Way Bill systems, which would be a potential irritant to the ease of doing business besides adding to the compliance cost.

Let me now quickly visit another but interesting area of concern for the GST Council—the IGST. Going by the experience of the past seven months, it can be said that there are **certain issues with the IGST Design** and the continuing lull period is the right time to have a close look at some parts of its design, which has led to a **massive pile-up the IGST collections**. It is believed to have crossed ₹ 1,50,000 crores and is just lying in the system. Since IGST is **conceptually an ITC** which is to be utilised for payment of taxes—IGST, CGST, and then SGST—the cause of worry for the Council is its **non-utilisation**. One possible reason could be that the trader-importers have been paying IGST at the stage of imports but not utilising it for the reason that a good number of them might be selling their goods at higher prices and also in cash. If non-utilisation of IGST is made up for by the higher price realisation, it is but natural that more and more IGST credit would be piling up in the coming months. Of course, there are more reasons but the one reason just argued needs to be looked into seriously and some sort of procedural tweaking can perhaps make this **India-unique design** a little more efficient.

Since we are now on the page of legislative changes, it is important for the GST Council to amend all such provisions which have given rise to writ petitions and also fare poorly on the scale of fairness. For instance, the latest writ petition before the Gujarat High Court is on the issue of the IGST levy on ocean freight. Since ocean freight is an integral part of the entire value of imported goods and the IGST is payable on such values, asking them to pay again on the transportation of goods by vessels is an issue which deserves to be looked into. Similarly, the issue of the design of the Appellate Authority for Advance Ruling needs a fresh look. If we go to the latest writ petition filed before the Gujarat High Court, the petitioner has questioned that the absence of a judicial Member on the authority impinges on the domain of the Judiciary.

However, certain other recast of the GST laws may go a long way in making the GST journey much more friendlier. One such step could be permitting the taxpayers to make use of the ITC in the Credit Ledger to pay taxes under the RCM and automatic refund of the ITC lying in the Ledger on an annual basis to the bank accounts of the taxpayers. Once the financial year is over and the return for the month of March is filed by 20 April, the balance credit may be transferred back either fully or in half to the bank accounts of the assessees. It would go a long way in shoring up the working capital of businesses and also avoiding the additional paperwork of sanctioning refunds. Before I conclude, I would like to urge the GST Council to quickly finalise the new GSTR Form if the invoice-matching concept is not to be dropped or let the present system of GSTR-1 and GSTR-3B continue till polls are over. The twin benefits for the economy and the Modi Government would be that the present shape of the GST would stabilise

and the industry and trade would get used to it and there would be no hue and cry for the poll prospects of the Modi Government to be adversely affected! Let us hope good sense prevails and long-term damage to the certainly beneficial indirect tax reform regime is avoided!

3

Adieu to Dr Adhia and *Bon Voyage* to Dr Pandey![*]

It is indeed a very 'fulfilling' day in the life of a career bureaucrat if the Political Master announces his retirement and talks about certain personal endearing virtues which are going to be missed by one and all, and it happened last week in the case of the outgoing Revenue Secretary, Dr Hasmukh Adhia, a 1981 batch I.A.S. officer of the Gujarat Cadre. One of his personal traits—a very strong passion for Yoga, as per my understanding, brought him closer to the then Chief Minister of Gujarat, Mr Narendra Modi and it was indeed a turning point in his otherwise straight-jacketed career growth path. As the Principal Secretary to the Chief Minister, his other personal traits, hitherto suppressed to a large extent, got wings and he decided to do a PhD, followed by studies on innovations in public administration, particularly Human Resource Management. He authored a book titled ***Reinventing Government through HRM Strategies*** in 2007.

In the foreword, the former Director of IIM-Ahmedabad, Prof Pradip N. Khandwalla, heaped praise on him for his innovative studies and ended up observing that '*... the species of scholar-administrators is an endangered one'!* He particularly praised the five innovations done to motivate about 3,50,000 State Government employees in 2006 and the findings that monetary benefits motivate only about 9 per cent of the public servants. He also commented on the 'localisation' of the Western New Public Management (NPM), which is about the decentralisation of powers and responsibilities to public-spirited Government servants who are professional and accountable to the rules established for the purpose. To what extent Dr Adhia followed the core principles of NPM is something I would like to talk about later.

So, when Mr Narendra Modi came to Delhi as the Prime Minister, it was quite predictable that Dr Adhia was in for a larger canvas to have another round of tryst with his innovative ideas in public administration, and he did it as the Secretary, Financial Services, to some extent. Soon, he put on the mantle of the Revenue Secretary in 2015 and he took no time in realising that the size of his canvas to be painted with different policy brushes was extraordinarily large, having a bearing on the purse of almost every taxpayer as well as non-taxpayers, guarding the piles of

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* TIOL – COB (WEB) – 634, 20 November 2018.

their black money. Since black money was one of the electoral planks for Mr Modi during the elections, Dr Adhia lost no time in initiating a host of innovative measures to make a dent into the shadow economy. A couple of amnesty schemes, the Black Money Act, and a new version of the Benami Act in addition to a draconian Prevention of Money-Laundering Act (PMLA) was given an impetus. When he realised that all these measures would take a long time to make an impact, it is believed that he could soon smell the desperation of his political masters for quicker results and supported the idea of demonetisation (DeMo). No doubt, depending on the colour of the prism, the failure and success of DeMo may be looked through today but its side effects sprang substantive reasons to his political masters to latch on and make a political virtue out of the same!

Quick came another opportunity for him to make a mark—the Constitutional Amendment Bill for GST. The political 'waters' were so favourably fluid that the Bill sailed through and the GST Council, as a new powerful apparatus, was constituted and the post of Revenue Secretary was saddled with a huge role as the Member Secretary of the Council. Dr Adhia spearheaded the preparations of the GST roll-out with lots of positive energy and he was personally instrumental in finalising many components of the GST—the same is profusely acknowledged by the Union Finance Minister, Mr Arun Jaitley, in his Facebook farewell note. Everything went off well, initially! Then came a more challenging and excruciatingly painful era when the industry and trade, largely confused in the initial months, wanted quicker facilitation and solutions to their problems. This is where Dr Adhia made some cardinal errors by leaning on the shoulders of his fellow I.A.S. Cadre officers from the States and almost ignored the institutional wisdom gathered over several decades by the Revenue Service officers. He picked up only those officers who had no experience **nor expertise in propounding opposite views to remove the thorns either in the GST laws or the procedures.** His inclination for the officers of his All-India Service became more evident when he did nothing even in the face of repeated failures of the technology platform—the GSTN. Let me not recall these unpleasant sagas of GST-related controversies here but I do not mind observing that while taking crucial decisions, he forgot the core principles of New Public Management—decentralisation! He ignored the key role of the CBIC as a Board and preferred dealing with a handful of Joint Secretary-level officials and even when **the time for a review came, he entrusted this task to the very same officials who were largely responsible for derailing the implementation of GST!** I could clearly see an element of rigidity in his approach which finally led to what Prof Khandwalla describes as **the polar nights of dysfunctionality**!

Anyway, before I switch to his successor, I would like to fully agree with Mr Jaitley's observation, which has been reproduced below:

> *He was unquestionably a highly competent, disciplined, no-nonsense civil servant and of course, with impeccable integrity. His only diversion from his duties was his passion for spirituality and yoga.*

On this note, I would like to wish him a fond *adieu* for his post-retirement life!

The new Revenue Secretary, Dr Ajay Bhushan Pandey, who is an IIT-ian and a PhD in Computer Science, is a worthy successor of Dr Adhia. He is not a novice to the complexities of revenue. As the Aadhaar Chairman, he has been holding the additional charge of the GSTN Chairman also. He was also heading the Committee tasked to design the new GSTR, which is going to unfold in April 2019. Going by the ACC order, he will continue to hold the Additional Charge of the UIDAI. As the Revenue Secretary, he would also be heading the GST Council Secretariat. Given the gigantic size of each canvas, I am referring to, it would be too difficult for him to do justice to all of them. If the Government wants him to focus on the Central Government's revenue kitty, let him stick to his revenue charge in addition to the GST Council and his two other responsibilities should soon be transferred to others.

Though he would have many serious challenges in hand, one of them he should be dealing with on an immediate basis is that of the **CBIC restructuring**. Looking at the journey of 500 days of GST, he should be going back to Mr Jaitley, who had last year approved a new structure of the CBIC. Dr Adhia probably did not agree with the same and that is why it was never implemented. As per the FM-approved scheme, Member (Budget) has been rechristened as Member (Tax Policy), having the charge of TRU-I and II. As per this Scheme, Member (GST) would have three JS/Commissioners and four for Member (Customs). This is where a minor change is required. There is no need for four Commissioners under the Customs. The **charge of Export Promotion can logically be clubbed with the JS (Drawback)** and one post vacated here can be shifted under the Member (GST). Here, the GST Policy Wing clearly needs a well-thought-out structure—two posts of Commissioner (one should be looking after the issues relating to taxability and other law-related problems and the second charge should focus on all procedure and IT-related issues). A new shape of the CBIC should be approved and kept ready to be implemented from 1 April 2019. By this time, the interim budget would be over and the Government would be going for the polls. As soon as a new Government comes into power, the apparatus would be ready to deliver. In fact, based on inputs, even the CBIC cadre review should be planned in such a manner that it manages to cope with the pressure of GST evolution.

I am sure several changes are required in the manner and also the Committees set up to take GST-related decisions. Some of the administrative tools devised need a fresh look and I would prefer to talk about them in my next week's column so that the New Revenue Secretary could deal with them with a fresh air of novelty and ingenuity!

4

GST: Preventing Frauds—Media is a Double-Edged Sword, Use it Wisely![*]

The Indian economy has been battling out many macro forces of contraction. Commenting on the sharp dip in the growth rate in the current fiscal, a Nobel Laureate observed that India is close to the precipice of a serious recessionary phase! Though the Union Government would predictably like to take a diametrically opposite view as the Government has indeed taken several demand-push and investment-spurring policy decisions, for the experts and sceptics, the ground reality is a strong indicator of a sustained slowdown! Even multilateral institutions have indicated so! No doubt, FPI-led investments have registered an unprecedented rise in recent months but private investments have not shown any signs of shedding lethargy. Though NPA records have improved, the banking sector continues to reel under the sheer weight of the malady, ignored or squinted for a prolonged period.

In this background, the Union Finance Minister, whose mind has been in the constant grip of the very familiar deficit syndrome, has made a statement at the Traders' Event that the Government is trying hard to further simplify GST return-filing and all necessary steps are being taken to do so. Parallel to this news, threatening headlines were carried by many newspapers from the official Press Release on the Second National GST Conference of the State GST Commissioners and CGST Chief Commissioners, chaired by the Revenue Secretary. Although I am more inclined to welcome such transparency in the working of the Government, what dismayed me was the **timing** of giving such wider publicity to **screw-tightening measures** being contemplated by the tax administration!

Putting in place a detailed preventive architecture is one of the core functions of tax administration in any tax jurisdiction. The Government is well within its rights to take as many precautions as it can to plug revenue leakage and enhance preventive audits but, giving wider media publicity to such ear-twisting measures at a time when the businesses are losing faith in the steam of the economy is certainly not a decision based on thoughtful deliberation. Though top industrialists (investors or wealth creators) may be seen standing next to key icons of the Central Government, they privately believe and talk about **exercising maximum caution and minimum**

* TIOL – COB (WEB) – 693, 9 January 2020.

optimism about the short-term recovery of the economy. When such industrialists, who have access to the corridors of power, are not too sanguine about India's growth story, how does the Prime Minister expect smaller businesses to put their heart and soul into the market-driven recovery path!

Against this backdrop, pan-India publicity to the Nine-Point Agenda finalised at the high-profile conference has indeed gone against the positive sentiment being attempted to be created in the economy (I did get many calls: 'What is happening'?). This is certainly not to say that what is being done by the tax administration is wrong or unjust but the way the decisions taken at the conference are being portrayed has scared not only fraudsters but also honest corporate entities. A leading business channel extensively reported a Section 65 Notice as an illegitimate outreach by the CGST authorities and also commented that when books of accounts have been closed for the FY 2017–18, why is such an exercise being undertaken today—only to harass assesses? Half-baked reporting also adds to the fragile business sentiments in the economy. Given the fact that 31 January is the deadline for filing GSTR-9 and 9C, an indiscriminatingly issued audit notice prior to it is being viewed with a pinch of salt!

Even an innocuous communication with the DGFT to take due precautions in paperwork before granting **the** '**Star Status**' **to any exporter** in view of the ongoing IGST refund frauds has led to wider negative publicity. Some newspapers have even written editorials, describing such a step as anti-exports! The prevailing business milieu in the economy is such that even a harmless communication may 'harm' the faith needed for the short-term recovery of the economy.

Let me now move to what was decided at the Conference, where besides the CBIC and SGST Commissioners, representatives of CBDT, FIU, DoR, GSTC, GSTN, DRI, and DGGI were also invited for better coordination among various economic enforcement arms of the government. A detailed presentation was made for use of artificial intelligence, data analytics, and machine learning for the early detection of bogus assessees. Focus was put on the early sharing of data with the CBDT and the FIU for curbing tax evasion. True, technology can play a much bigger and timely role in catching tax evaders and businesses set up only to commit frauds. A detailed administrative framework was discussed to recover unmatched ITC, enhance revenue, and reduce compliance gaps. All the decisions taken at the conference were overdue but equal emphasis is required to be put on using modern technology to facilitate compliant assessees. **A monthly struggle close to the 20th of every month is not yet over.** When the fate of GST collections depends on the reliability of an IT platform, it is equally important for the top policymakers to talk about the issues being heard and adversely commented upon by the writ courts.

A decision to enter into an MoU among the GSTN, the CBIC, and the CBDT was on the cards for a long time! I have talked about the benefit of such an exchange of data through API (Application Programming Interface). It is going to be done on a quarterly basis. Such an exchange of data would certainly help create a unified

profile of economic offenders. Such action on part of the Government was largely expected but the same information, if presented in a different manner, may scare even genuine businesses as harassment to them cannot be ruled out when the enforcement of an accountability framework is missing in the tax system.

Several good decisions have been taken to protect the revenue but ill-timed publicity of half-baked information is generally counter-productive. One good example can be the suggestion to provide a single bank account for foreign remittance and refund disbursement. Though it is perhaps needed to curb the IGST refund, it is also a well-known fact that export proceeds sometimes take a much longer time to come and if refund disbursement is delayed, it would hurt the working capital of an exporter. If the inward remittance is not linked to refund disbursement, how is it going to help the Revenue? All such questions would certainly be answered once the Government decides to implement it but at this hour, it hurts the sentiments of the exporters who are facing a tough time pushing their goods in the protectionism-marred international markets. Let us hope that while collecting tax dues and protecting revenue, due care is taken to provide a cushion to the growth-promoting sentiments in the economy, which is the need of the hour! It also ought to be remembered that the media is a double-edged sword and needs to be used wisely!

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GST Bureaucracy Needs to Develop the Art of Listening![*]

For the *Modi Sarkar*, although it rightly claims credit for its introduction, GST continues to be a tough nut to crack! It is not that the PMO and the North Block are not undertaking the right mix of corrective measures! The problem largely lies with the sense of timing! The top GST bureaucracy is rarely amenable to new ideas coming from outside the majestic Lutyens-designed corridors! Let me go straight to what has finally been done yesterday: GSTR-3B filling has been permitted in a staggered manner. For assessees with turnovers above ₹ 5 crores, the 20th is going to be the due date like the present one. For less than ₹ 5 crores, two due dates—the 22nd and the 24th—have been decided by splitting the States into two distinct clubs. One of the parameters was obviously the number of returns being filed. Such a decision has apparently been taken to de-stress the GSTN server, which has consistently been playing truant right from the word 'go' in July 2017. Even on January 20th, lakhs of assessees failed to file their GSTR-3B for complex technical glitches. Such glitches are not new and have regularly been pointed out in the past thirty months but the GSTN supervisory authorities always preferred to listen to the GSTN technocrats rather than the taxpayers. No improvement with each passing month predictably widened the trust deficit between the Government and the GST assesses, who used to initially exude optimism in the collective wisdom of the Government to set things right. Of late, I have noticed that most tax veterans in the private sector, who contribute to the GST kitty in thousands of crores, have stopped cribbing about technical glitches and when questioned, their pithy answer was—loss of faith in the Government's ability to care for the pain of assessees!

Nonetheless, I, along with almost all the taxpayers, do welcome the decision to introduce staggered due dates for different assessees based on their turnover and geographical pockets of location. My only grievance is: Why was it not done long back when it was pointed out as far back as September 2017? Having laboriously studied all the aspects of the business processes notified and the half-cooked preparedness of the GSTN, I had suggested:

> *…the Revenue can do well with the GSTR-3B alone which can further be made easy by providing a staggered time schedule. Different dates can be provided for filing of GSTR-3B for assessees with Rs 200 Crore and above tax payments;*

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* TIOL – COB (WEB) – 695, 23 January 2020.

different dates for between Rs 100 Crore & Rs 200 Crore and for less than Rs one crore. Such a staggered schedule would help the GSTN manage the traffic at a given day very well.

Though such a suggestion was debated and feedback was also given to me, the top GST bureaucracy was 'intaxicated' by its own ideas of dragging the painful processes till the time it becomes unbearable, not for the assessees but for the policymakers themselves—and it seems when the pain point became too unbearable for the PMO to process swelling complaints from all the parts of the country, a decision was finally taken. What may have prompted such a decision was the huge shortfall in filing of GSTR-3B for the December month. As on the 20th, it was close to only 66,00,000—l6,00,000 less than the November month. If the GSTR-3B is not filed, how will the Revenue realise its goal of the ₹ 1,50,000 crore monthly target set till February and the ₹ 1,25,000 crore goal for the March month? When the Government realised that its monthly target is getting dented, it looked for a solution! Their decision, obviously, was not prompted by the rising pain of the assessees but the pain caused to the prospects of the monthly revenue target!

Anyway, it is better late than never! But it is indeed a mere cosmetic change. The serious malady has its roots in the overall design of the GSTN. Most technocrats appear to be giving predominant weightage to their own technical comforts rather than keeping the assessees in the eye of all decision-making. They are missing the woods for the trees! The *raison d'être* for the GSTN is to promote and facilitate compliance. But it seems the present dominant philosophy is misplaced and more focused on gathering business intelligence. Although it is equally important, all such intelligence inputs or data analytics can come only when the basics of compliance are fulfilled—facilitation of returns. If assessees fail to submit returns, where will the intelligence come from? In a nutshell, the time has come for a comprehensive revamp of the GSTN's internal processes; timelines, and selection of technologies.

Let me now draw the attention of the top GST bureaucracy to some of the beneficial amendments passed by the Parliament but not yet notified. One of the Sections is Section 50 relating to interest on delayed payment of tax. Though the beneficial amendment was a part of the Finance Ac, since the GST Council did not set a time frame for all the States to pass the corresponding amendments in their SGST Acts, it has not yet been notified. I believe that there are, even today, five or six States, including UP, which have not yet passed these amendments. As a result, a constant pain point continues unaddressed—whether interest is to be **paid on a gross or net basis**. Since it is a beneficial amendment which is clarificatory in nature, going by the golden principle of interpretation, it is likely to be retrospective. But most experts believe that unless they see the Notification, they cannot risk any interpretation and if the Revenue does what many believe—making it prospective—it may lead to a fresh bout of litigation! Therefore, my suggestion would be that the GST Council should fix an outer time limit for all the Members to amend their own statutes and such a time limit should ideally not be more than four months!

I am discussing the time frame for parallel amendments in the SGST Acts more because the GST Council, at its 38th meeting, has approved several amendments including in **Sections 122 and 132** and they are going to be a part of the Finance Bill, 2020. Once the Union Budget is passed, if no strict time frame is suggested or stipulated by the GST Council, the GST regime would once again be heading for a similar cycle of inordinate delay in making corresponding amendments in SGST Acts. Although the Council had notified 1 January 2020 for the previous set of amendments passed in the Finance Act, 2019, some of the States have exhibited scant respect for such a deadline. This is where the Council needs to apply its mind and perhaps, also suggest some punitive measures!

Secondly, I would also like to draw attention to some of the significant observations of the Writ Courts in various GST-related petitions. In one case,[2] the Gujarat High Court has pointed out inconsistencies in the provisions of Sections 129 and 130, which are eminently in fashion and are being invoked liberally by the State GST authorities across the country. The High Court has hinted to the Legislature to examine, in particular, the expression 'with intent to evade payment of tax' in Section 130, which is obviously a more stringent condition for the Revenue to fulfill before goods or conveyance are confiscated. Such an expression is missing in Section 129. It also appears that such an expression has been borrowed from the Central Excise Act but it seems the Revenue has overlooked the legion of court decisions where the word '**intent**' is a far difficult condition to be established before a confiscation order is passed. Mere failure to pay tax does not necessarily prove a *mala fide* intent to evade tax. There can be several reasons for such failures, many *bona fide,* and any order to confiscate goods or transport would not be legally sustainable. In such a background, I am sure that the Gujarat SGST would be keen to see an amendment in the Act and if it is to be done, the Law Committee needs to discuss it at length and include the same in the forthcoming Finance Bill.

Another Gujarat High Court decision[3] which is substantive in nature is about Section 83, relating to the provisional attachment. It is common knowledge that the Revenue has been invoking powers under Section 83 as liberally as it can along with Sections 67 and 73. The High Court has made it clear that merely because some actions are taken u/s 67, it would not be sufficient to arrive at the satisfaction that it is necessary to provisionally attach the property for protecting revenue interests. Such powers have been specifically conferred upon the Commissioner to form such an opinion. The Commissioner alone in the case of SGST Acts can form a subjective satisfaction unlike the CGST Act, where such powers can also be exercised by '*proper officer not below the rank of Joint Commissioner*'. Since all cases booked by the State authorities and now pending before writ courts may not stand judicial scrutiny, Gujarat is learnt to be more keen on amendments.

2. 2019-TIOL-2950-HC-AHM-GST.
3. 2020-TIOL-115-HC-AHM-GST.

In the light of all such developments, the two key recommendations I would like to submit for consideration are: Firstly, the Law Committee should take its own time and review the GST Act thoroughly and then propose a comprehensive amendment bill rather than making amendments in a piece-meal fashion. The Judiciary will do its job by giving interpretations to the substantive sections of the Act and it would continue for decades to come just like the Central Excise Act, where even the basic expression, 'manufacture', could not be settled even at the time India embraced GST. But the basic characteristics of a technical term must be settled before they undergo a change with the changing times, driven by technology. Secondly, the **key to success remains easy compliance rules and aggressive facilitation measures.** Higher revenue collection is positively linked to an easy compliance environment if one goes by the experiences recorded by Middle-Eastern economies which have also introduced GST/VAT recently. Let us hope that our policymakers' complicated approach does not fail the easy and simple tax system the GST is!

COVID-19 Roiling GST:
The Willies for the Fiscus

Introduction

At a time when the Indian economy was veering toward a protracted slowdown and the GST monthly revenue collections were stubbornly subdued, the global hurricane of COVID-19 swept through India like many other countries in Europe, North America, and South America. It was the beginning of a nightmare to be experienced with open eyes and it was preceded by a strong storm of fear-mongering which had infected not only the lesser mortals but also the Governments across the world. It was a case of groping in the dark as nothing was known about the pathogen except the fact that it originated in the Chinese city of Wuhan. Just prior to its formal arrival in India, the tax administration was hunkering down to mobilise extra revenue in the month of March 2020—the closing month for the financial year. Even before the Revenue sleuths could pull up their socks, the merchant of death from Wuhan knocked at virtually all the airports of India. Although the WHO was still studying the transmissibility of the virus, on the advice of a task force, the Government of India was better prepared not in terms of better healthcare infrastructure but in terms of what to do if at all hit by the tornado! A decision was taken behind the closed door in the Prime Minister's office and a call for *Janata* Curfew (voluntary confinement) for a day was given wider publicity. Even before the thudding and banging noise of utensils could stop reverberating in the four corners, a formal lockdown was notified under the Disaster Management Act, 2005.

Thus begins the unspooling of a string of disasters for the international trade, manufacturing, agriculture, and retail sectors. Everything ground to a permanent halt as if life had come to a standstill. People were advised to go for self-imposed house arrest. Police began issuing passes only to corona warriors who could assist in containing the non-containable virus. With the daily caseload soaring, the human faces on the streets became scarce and scant! Footfalls to shopping malls and markets nosedived. Brick-and-mortar shops were allowed to open for limited hours only to deliver essential goods. The Earth figuratively stopped spinning on its axis and staring at the much-talked-about 'black hole' became the most engrossing, perhaps pathologically, pastime for a large swathe of the population in India. Both the fundamental pillars of the economy—the demand and the supply curves—positioned themselves somewhat athwart! Once the economic activities paused and the offices downed their shutters, the tax payment turned into a flat line. No revenue when the crisis was deepening and it was needed the most! Though after a few months of lockdown, the Government began encouraging the factories and markets to reopen but with no working capital left, the engine of manufacturing and exports could not be ignited immediately. Many suggestions flew into the basket of both the Revenue Boards to grant relief not only in terms of postponement of due dates, but also tax concessions as many rich economies had resorted to.

After the WHO notified it as a global pandemic and the G20 leaders failed to find a solution or even a sliver of common areas for greater cooperation, most leaders began to take relief measures on their own. The Modi Government also loosened its purse and organised a fiscal *langar* to cushion the surviving business entities. As many as 40 per cent of small units had perished and a large number of MSMEs were parked in the ICU! Through an ordinance, the new Section 168A was inserted in the CGST Act, 2017 to define the expression *force majeure* through an ordinance. Such an expression never existed in any tax code before and to make it comprehensive, the lawmakers brought even man-made disasters under its sweep so that the Government does not go begging for the necessary powers to provide relief to the asphyxiating sectors in the economy. This was done after extensively studying the provision relating to the Removal of Difficulties under Section 172. The GIC afterwards announced a bouquet of procedural reliefs and some tangible concessions in terms of waiver of interest, penalty, and late fee for filing delayed returns. Then came the second wave of the COVID tide and India proved a sitting suck ans was caught in its vortex. Its health infrastructure turned upside down. It ran out of body bags and space in cemeteries and mortuaries. Sporadic lockdowns and other restrictions further bruised the already-injured discs of the backbone of the economy. The situation called for a liberally-designed economic stimulus package but the fiscal health was so precarious for both the Centre and the States that not much except deferment of loan repayment and easy credit could be promised.

The drought of economic activities predictably coerced the GST Council to spill over into a protracted fiscal chaos! Compensation of States, owing to an anaemic revenue mop-up, turned into a zombie crisis! States began to fight like a terrier for every penny and the issue did not wither on the vine! The Centre initially played truant and reluctant but after the PMO stepped in, a solution was thrashed out in terms of borrowing from the RBI at a nominal interest rate and the same is to be repaid by extending the Compensation Cess period till 31 March 2026. Meanwhile, the Council decided to sail with the GIC proposal to block ITC under Rule 86A and Rule 36(4). Hurried measures like e-invoicing were taken to curb the growing incidence of fake invoices and persistent revenue leakage. A string of raids and attachment of bank accounts began hogging headlines. GSTN data analytics helped the sleuths in zeroing in on the criminal minds of the trade and dozens of arrests were made and recovery was affected. With the leaking taps being puttied and fake invoices faucets being turned against and the economy bouncing back on both its feet, the monthly revenue collections began mounting in the current fiscal. Though COVID is only down and not yet out, the GST revenue has regained its health and the wrinkles on the foreheads of the GST Council members have indeed 'evaporated'!

Chapter 1 details the extraordinary efforts of the Revenue to mop up extra revenue against the tumbling economic statistics of industrial production and exports; the arrival of the COVID-19 curveball flummoxing the political and health leadership in

India; the merchant of death spreads its wings and begins gobbling up lives and livelihoods; lockdowns freezing footfalls of consumers and triggering downing of shutters of offices and factories; the services sector players like travel and restaurants writhing in pain for survival; working capital of the MSMEs becomes scarce; and the Revenue Boards showing desperation to gather taxes dues but the taxpayers on the lookout for relief from the Government.

Chapter 2 narrates how the coronavirus demonstrates its ferocity like an apocalypse; lockdown being enforced with an iron hand in India; the GIC extending the due dates for filing returns and granting a waiver of penalty, interest, and late fee; insertion of a new Section 168A in the CGST Act, 2017 to deal with the force majeure situations, including man-made disasters like industrial fire and war; and some more fiscal reliefs to assuage the pain of the taxpayers.

Chapter 3 talks about my recommendations to the GST Council on how to stymie the rapid-fire death of MSMEs; timely announcement of fiscal measures not only for the Centre but also for the States; deferment of GST payments for at least three months; no interest to be charged on net cash liability; permit ITC on goods donated for CSR during COVID-19; allow ITC on immovable goods if a new unit is set up; go slow on enforcement of preventive measures; and take exceptional steps as the COVID time was exceptional.

Chapter 4 provides a peep into how COVID-19 walloped the revenue efforts and the dried up the compensation kitty and nudged the States to lock horns with the Centre for the immediate release of compensation promised by the late Mr Arun Jaitley; the need for harmonious working relations between both the governmental wheels of the economy to steward the country out of the black swan event; why the GST Council decided to block ITC under the new rules in place of being liberal about the credit; the rationale behind the introduction of B2B e-invoicing in the middle of the pandemic; the challenges before ERP-based MNCs whose head offices remained closed due to lockdowns; and why export invoices and self-invoices should be exempted from the new provision!

1

Macabre COVID-19: Should the GST Council Brace itself for a Relief Package?*

For the Revenue, the month of March is a make-or-break period. It is conventionally the last chance to catch up with zonal shortfalls in tax collections! The issue has seemingly assumed greater importance this fiscal because huge deficits have been lurking in the backroom calculations in the North Block. Secondly, the Union Finance Minister has clearly put her bet on *Vivad se Vishwas* Scheme to garner tangibly substantive revenue before 31 March! Similarly, for the GST, the hardworking Revenue Secretary has apparently pierced through the thick walls of intricacies relating to revenue mobilisation and is keen to garner close to ₹1,25,000 crores in the current month! Accordingly, he had prodded the revenue satraps to 'oil' the collection machinery well in advance! All these painstaking measures were planned notwithstanding the unmistakable signs of tumbling economic statistics on all fronts! Bravo! At least, for hoping against hope! Not leaving any stone unturned! Doing whatever is at his disposal!

Then arrives at the Indian shores the 'death merchant' from Wuhan, China—the Coronavirus (COVID-19). In less than two weeks, it has caused extraordinary damage to the recovery prospects of the Indian economy. Apart from disrupting the global supply chain, it has seriously dented even the Indian manufacturing sector and its already-limping exports. Though the Commerce Minister was bold enough to say with aplomb that India is largely insulated from the ghastly impact of COVID-19, it is indeed too early to dismiss it. The Customs has already been recording negative growth in imports (dipping IGST collections are irrefutable proof) for the past few months. It may get exacerbated as China has, in recent years, laddered to the top of the tally of key exporting partners for India. A good number of Multinational Enterprises (MNEs) which operate in India, predominantly depend on supply of critical components from China as part of their global supply chain arrangements!

If we leave aside the woes of the supply chain and the manufacturing sector, for some time at least, COVID-19 has assaulted us where it hurts the most! The retail demand curve! A quick visit to the usually bustling markets and glamorous malls,

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* TIOL – COB (WEB) – 702, 12 March 2020.

which normally find it difficult to cope with evening footfalls, may portray a hugely gloomy picture. Retailers can be seen unpacking their wares and then packing them in a familiar rhythm, characteristic of the Keynesian economic philosophy! As advised by the Ministry of Health, people have fortunately paid heed, perhaps for the first time in India, to detailed guidelines on how to keep oneself protected from contagion. So far as urban India goes, in most of the cities which have reported positive cases of Coronavirus, inhabitants have preferred to remain indoors! A good number of organisations from identifiable sectors have given the option to work from home to their employees in a frisson of fear! Since travelling and socialisation also figure prominently on the 'Don'ts List', sectors connected with these activities, such as airlines, transport, restaurants, etc., are on an irreversible path of a macabre dent to their sales turnover!

So far as the conflagration of the pestilence goes, India has woken up a bit late like many other countries but has done exceedingly well to its credit in containing it. Less than three-digit suspected cases are no mean achievement! Full credit goes to the duo of the Prime Minister and the Health Minister, who have been working tirelessly. They have managed to sensitise the State Machineries and also carved out forty-six facilities for its testing. India has done equally well in taking care of its stranded citizens in Wuhan, Japan, and Iran. But the time has certainly not come to rest on these laurels! This is just the beginning of the battle and a war is in the offing. As a nation, we cannot afford lapses, as there is enough tell-tale evidence on COVID-19's macabre effect on human lives!

Let us presume that India, as a country, effectively manages to block the entry of COVID-19 at its entry points (except for a few dozen stray cases). Even then, we cannot wish away the blow being rendered to the economy in various ways. Even if we ignore the spinning and gyrating behaviours of the stock markets, the mortal blow to our exports, our consumers' demand, the manufacturing, and the diversion of funds to the health sector are bound to further exacerbate the prevailing recessionary trends. We are a vital part of the global economy. When as many as 105 countries are presently in the grip of this deadly virus, how can we expect ourselves not to be dented by the disease-induced slowdown in the global economy? One immediate impact would be the tight squeeze on the working capital in the economy. This can be inferred from the overnight decision of the Federal Reserve to reduce the interest rate by 0.5 per cent. Going by the wildfire-like spread of the disease, one may expect another cut in the interest rates by the Federal Reserve very soon! The RBI may take a cue from it and also from the Bank of England, which cut the interest rate for the first time since 2016, yesterday, to mollify the blow of the Coronavirus. But going by the jitters-loaded business sentiments in India, it may not help much! The working capital problem, globally speaking, hurts MSMEs more. Even in India, MSMEs account for a greater share of exports. Even if they manage to ship their consignments, they may see delays in receiving their export proceeds. Another connected problem with the present swirling economic crisis is the

possible deflationary phenomenon which may surface if the fear of COVID-19 lingers for months and the consumer demand suffers a more serious mortal blow!

Though it is too early to assess the impact of the pestilence on the global economy, some of the multilateral agencies have come out with their initial estimates. The ADB says that COVID-19 may eat up the global GDP by 0.1-0.4 per cent with financial losses swelling up to a maximum of USD 350 billion. China and other emerging Asian economies would be hit grievously. Indian tourism may suffer a dip in revenue—USD 250 million in the worst scenario. The IMF has already carved out a war chest of USD 50 billion in its rapid-disbursing emergency kitty. The World Bank has advised countries to brace for the serious impact of this global health crisis. Some of the countries have begun to provide tax reliefs and subsidies to the most vulnerable segments of the economy. Many countries are deliberating to offer relief in pay-roll tax and cash subsidies to small firms which may not survive the death blow of this outbreak as their financial health, on account of the prevailing recession, has already been hollowed out!

In this background, what should the GST Council, which is meeting this coming Saturday (14 March) in New Delhi, do to help the economy? I am confident that there is no agenda item in relation to the impact of the lurking health disaster which may cost billions to India. I personally feel that since the most unnerving aspect of this COVID-19 outbreak is the uncertainty, neither politicians nor medical experts know how long it will last and how many victims may satiate its appetite. It is important for the GST Council to rise above the ructions relating to compensation and finalise a possible GST Relief Package for the economy if the COVID-19 contagion becomes far messier than one may predict today. Such a package is not going to be out of fashion for India. The U.K. had its budget day yesterday and its Chancellor has come out with a stimulus package worth USD 39 billion to beat the impact of COVID-19. The European Central Bank is meeting today and it may follow suit with the Fed-rate cut.

Ideally, even for the *Vivad se Vishwas* Scheme, back-breaking pressure on potential cases should be softened as the economy is heading for a much more serious cash crunch in the coming months. Secondly, some of the MNCs may not be able to have their foreign parents on the same page as most of the elite economies are experiencing a partial or complete lockdown phenomenon. Even if head offices of some of them may be open, the decision-makers may be seized of measures to be taken to deal with COVID-19 rather than a dispute resolution scheme in India.

In the interest of the economy, both the Revenue Boards need to go slow on the taxpayers except against tax cheats and also corrections in distortions like inverted duty structure so that the industry could cope with the uncertainties arising from the pandemic, officially declared by the WHO last night. Even for the Central and State Governments, Coronavirus offers perhaps the toughest time in recent history as its contagion can be much faster and macabre than some of the known pandemics in human history. Not long ago, between 1918 and 1920, the Spanish Flu infected over

500 million people and close to 100 million deaths were reported! Even Smallpox accounted for close to 500 million deaths in the twentieth century. The global medical history cannot forget the devastating pandemic of the Black Death, which killed close to 200 million people in the fourteenth century. If one looks for a more macabre impact of pandemics, the infamous Plague breezed through the Roman Empire in the sixth century and killed close to 50 million people—almost half of the world's population at that time.

So, the message from the history of pandemics is that every country needs to prepare itself to cope with the prevention of such outbreaks which not only kill people but also devastate the economy. Though the modern medical infrastructure is capable of handling such outbreaks more effectively, losing thousands of precious lives within a few racing weeks like many countries such as Iran, South Korea, Italy, the U.S.A., and Spain, may prove to be politically unnerving. To deal with its predicament, one may entail war-like preparations and a chest of resources! Let us hope that India manages to contain this deadly merchant of death right at the doorstep!

2

Lockdown: Down with Hunger—Need for Langar, Fiscal too![*]

President Trump, in his inimitable style and with an unmistakable tinge of scorn, calls it a 'Chinese Virus'! COVID-19 has spread its 'satanic' wings, leaving virtually no coordinates untouched on the global map, at a petrifying pace! It has struck the U.S.A. and Europe with such bone-chilling ferocity that humanity appears to be pitiably looking for a shelter to save itself from extinction like many of the Biblical creatures! Going by the soaring graph of death toll (47,300 so far) and the active cases (galloping to a million!), it may seem that mankind is debatably heading for an apocalypse!

Even as the rich, not-so-rich, aspiring-to-be-rich, and poor countries find themselves seated cheek by jowl in the same boat severely rocked by the pandemic, the mega geopolitical powers have literally been squabbling over the issue to label the outbreak as 'Wuhan Virus'—a descriptor China views as rude, offensive, and a sinister design to erode its image in the eyes of the comity of nations. Though the G-20 leaders did labour hard to present a different optic of global solidarity against the common enemy, post-summit, through video conferencing, nothing concrete has come out for the beleaguered pandemic-hit nations either to deal with the life-gobbling unstoppable virus or to rescue the crumbling global economy!

Since COVID-19 has no skills to make a distinction between a powerful and a not-so-powerful country, it set its eyes on the rich nations as its first choice for the wildfire spread and the administrative and also the political response across the spectrum has been uniform, of course after the characteristic and 'momentary'—lockdown, partially or fully! Socio-economic consequences of a lockdown are seen to be almost uniform across the world. New Yorkers have been reported to be rashly motoring away from the most intense hotspot of the pandemic to any State which may promise them some succour and the administrative response from the neighbouring States of New York has been no different from what we see in India—cops were ordered to stop and seize vehicles with New York number plates!

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* TIOL – COB (WEB) – 705, 2 April 2020.

Let me now move back from the Northern Hemisphere to India. The Indian Prime Minister, Mr Narendra Modi—one of the first global leaders to do honest soul-searching and self-assessment of his strengths, and realistically and intelligently accepting the virtue of the time-tested lockdown as an efficacious buffer to break the chain of transmission of the virus—first appealed for self-isolation for a day: the *Janta* Curfew. Having noticed the success of his appeal for a day, he felt hugely emboldened to go for a protracted three-week lockdown and after a week of it, one may feel compelled to conclude that it is indeed bearing desirable fruits in containing the uncontrolled spread of the virus!

However, in hindsight, it seems that the key advisers of Mr Modi deprived him of the basics of all mega decisions which involve action and compliance on part of the public at large, i.e., notice prior to enforcement. Even though the lockdown is a measure taken in the interests of the public, giving notice is not only a part of the natural justice but also a vital ingredient for greater success and an anodyne to possible chaos which ensued within forty-eight hours of the announcement. Had the Prime Minister given seventy-two hours' notice and announced arrangements for the return of the millions in transit and also the migrant labourers, the huge scale of pain which was caused to the poor and have-nots could have been stymied. The grim sight of migrant labourers snaking through the highways on foot or cycles, bearing the overload of families of three or four, which evoked widespread criticism of the Government's action taken with good intent, could have been avoided. What touched the heart of the millions of locked-down households watching TV at home was the plight of the poor and their small children going without food but supporting the village-tethering decisions of their parents who decided to walk back hundreds of kilometres to their States!

Such a painful consequence of the lockdown could perhaps have been managed better, if not avoided totally, if the Central Government would have moved quickly, even if they had overlooked their existence at the inception, and lined up a few dozens of idle trains to ferry them to their villages. Asking State Governments to arrange buses and literally dumping them in large numbers when the central message of the lockdown was 'social distancing', did some mortal damage to the larger goal the Prime Minister had set out for the nation to achieve! What added salt to the wounds were some of the freaky incidents, like dousing them with disinfectants and thousands going without food! I am shocked at how key planners in the Central Government could afford such apathy to the teeming millions who were given the first blow of bad luck when their employers did not pay their dues and secondly, told them brusquely—'You are no longer wanted'! Nothing could be a bigger misfortune for a poor man/woman than to lose his/her job! Given the fact that India ranks 102 out of 117 countries in the Global Hunger Index, 2019 and we have over 150 million migrant labourers who can barely afford two times' meals, COVID-19 is indeed, by all standards, a much kinder killer than acute hunger!

Let me now move from hunger to the fiscal '*langar*' announced by the Union Finance Minister to provide some relief during the lockdown period. By extending the statutory due dates for filing returns or revised returns under various direct and indirect tax laws, the Government has provided timely succour to the economy, and it is indeed praiseworthy. To give effect to various extensions of due dates, the Government has acquired the necessary legal authority through an Ordinance issued on 31 March. The most glaringly noticeable amendment is Chapter VII—the insertion of a new Section 168A in the CGST Act, 2017 and the Explanation about the expression *force majeure*.

The term *force majeure*, a concept in French civil law, is of Napoleonic lineage. It is in direct conflict with the concept of '*pacta sunt servanda'* (contracts/agreements must be honoured). It is widely followed in the common law system in the U.K. and the U.S.A. in the context of contract and insurance laws. It has been introduced, for the first time, in the Indian tax laws. Interestingly, it has been extended to not only 'acts of god' or natural calamities but also man-made calamities like war.

What certainly warrants a debate here is: Where was the need for a new Section with a non-obstante clause? Is it that there are no provisions in the CGST Act to deal with any adverse situation arising out of the present lockdown? What about Section 148 which talks about a special procedure for certain processes? It reads as follows*:*

> *The Government may, on the recommendations of the Council, and subject to such conditions and safeguards as may be prescribed, notify certain classes of registered persons, and the special procedures to be followed by such persons including those with regard to registration, furnishing of return, payment of tax and administration of such persons.*

Probably, it is to be used only for certain classes of registered persons and here is a situation where relief was to be granted to all assessees! Then comes Section 172: Removal of Difficulties. Given the limitation of words used in this Section I guess, it was construed as not adequate to grant relief under an extraordinary situation like COVID-19!

But then comes the larger question: How many months would States take to insert a parallel provision in their SGST Acts? Unless they insert a similar provision, would the Centre not be able to implement or notify the extensions? Section 50 amendment may be viewed as a live case in hand!

A quick read of Section 168A also reveals that all such reliefs, already announced by the Union Finance Minister, should be done only on the recommendation of the GST Council. Since no Council meeting was called after 14 March, it was probably discussed through video-conferencing with some of the State Finance Ministers. For such an extraordinary situation only, Article 279A of the Constitution talks about appointment of a Vice-Chairman—one of the State Finance Ministers may be nominated or elected. Had there been a Vice-Chairman, the Chairman may have quickly constituted a committee with the Member Secretary as one of the Members

and could then have proceeded with such decisions. Such niceties are important to eliminate chances of any accusing fingers being raised later and also in the interests of strained 'cooperative federalism'!

Anyway, let us welcome the bouquet of procedural reliefs and also partly substantive concessions in terms of reduction in the interest rate and waiver of penalty and late fee but I am sure, a much more substantive fiscal relief, notwithstanding the lack of fiscal policy freedom of the Government, has to be designed in the coming months to revive the economy and rescue it from the deepening recessionary crisis. I would like to suggest all such possible measures that the Union Finance Minister may like to consider for kickstarting the sinking economy, in my next column!

3

The COVID-19-Battered Economy: Will the GST Council Open the Faucet of Fiscal Relief?*

Microbes are known for their scant respect for geographical borders! Going by the aggressive surge of more than 1,00,000 new cases per day, festooned with a soaring death curve on the global level, the COVID-19 pandemic remains far from any crest! In the last seven days, the global tally has swollen by close to 9,00,000! Clearly, the outbreaks are too overwhelming for healthcare systems worldwide! The contagion canvas is too horrid, particularly for the poor countries which have now begun to account for three-quarters of the daily number: fewer hospitals and trained doctors and nurses; scarce testing kits; resources on 'ventilators' to purchase ventilators, PPEs, and masks! The script is almost ready for running out of body bags and abandoning the dead on the streets like Ecuador! But affluent countries may do much to assist. A few can simply cater supplies such as testing kits and PPEs. Others can rise above their 'wolf diplomacy' and provide necessary financial help to combat the otherwise almost invincible virus!

Against this terrifying backdrop, the most trustworthy global health agency, the World Health Organisation (WHO) seems to be going through a pejorative cycle of Götterdämmerung! The global body has, in recent months, issued several statements in a perfunctory spirit and later walked back! Let us consider what it said early this week: Asymptomatic COVID-19 patients largely do not infect others! This was interpreted worldwide as a hint to keep masks at an arm's length! When its assertion was pilloried by critics, it fumbled and quickly retracted and stated that a lot remains unknown about the asymptomatic spread. It also noted that some studies have suggested that as high as 41 per cent of transmission may be attributed to asymptomatic patients!

Two more such public fumbles may be traced back to the WHO when it had stated that COVID-19 is not spread from human to human! It was early in March. After a few weeks, it again goofed up when it said that positive cases do not get protective antibodies! All such public utterances have come to be seen as nothing less than seppuku by such a trusted global body. A series of fumbles have certainly lowered its gravitas at a time when the international communities, particularly poor countries, rely on its pandemic-related advisories. India, being the Chairman of the WHO Executive

* TIOL – COB (WEB) – 715, 11 June 2020.

Board, does need to heed all such *faux pas* and may drum up views for the removal of its top brass in the coming months! Such a move would also cement the cracks pointed out by the Trump Administration and arrest its decay. At this juncture, there is no choice and the global community needs to strengthen the WHO, *faute de mieux.*

Back home in India, the unlocking process was rolled out at a time when the virus had begun to spread at a worrying rate in a number of States. The daily number of positive cases has skyrocketed to the numbers being reported by the countries which are almost through with their peak surge. Ideally, India should have continued with the lockdown for at least six more weeks to swim through the projected flare-up but the calamitous economic cost has forced it to confront a raft of political and health risks. The Central and State Governments are certainly in the know of the horrific projections for the coming weeks and also the woeful inadequacy of the public health infrastructure. But this is also true that our Governments have run out of necessary wherewithal and the economy has gotten unrecognisably battered!

Caught between the devil and the deep sea, India has taken a plunge towards the classical theory of 'Herd Immunity'! The number of positive cases is certainly more than what is being reported as too many new cases are being spurned for lack of beds. Looking at massive crowds moving like ice floes on streets, the Indian tally may leave behind, by miles, even the U.S.A.; and the unmistakable indicators are what Delhi's Chief Minister's said the other day: COVID-19 beds are being black-marketed at a premium in private hospitals! If this is the state of affairs in early June, how scary the scenario is going to be in the coming weeks may be beyond imagination for many!

The Modi Government has apparently taken such a risk to rescue the economy from falling down the cliff! Such a decision may be supported by wider constituencies but it would be fruitful only if some overt fiscal measures are taken to prevent the rapid perishing of MSMEs—about 40 per cent are almost asphyxiated! Neither the Central nor the State Governments have opened their fiscal faucets so far! Perhaps, a beginning may be in the offing for the unleashing of the fiscal stimulus as the GST Council is scheduled to meet on Friday through video conferencing. Though it is learnt that there are not many substantive agenda items and it is being largely organised to comply with the Business Rules of the Council—mandatory quarterly meetings—I sincerely hope that the State Finance Ministers would not forfeit yet another opportunity to convince the Centre to grant some tax rate benefits, particularly to seriously-thrashed sectors like tourism, aviation, restaurants, construction, medical devices, and many more. The minimum one expects from the Council is as follows:

- Defer GST payment for three months.
    - The GST (net payable in cash) may be permitted to be deferred for three months.

- No interest should be charged on net cash (gross liability minus ITC) for three months.
- After three months, the Government may start getting regular revenue in cash as the taxes of the three months prior shall become payable and thus, the entire cycle is only deferred.
- Many customers have defaulted or postponed bill payments due to business closures or general breakdown in corporate payment cycles, job losses, etc. Therefore, in such instances, the GST should be levied on actual payments received from customers and not on invoices raised so that the suppliers do not have to pay GST on delayed payments or defaults which are on the rise during the pandemic.

- Allow ITC on goods donated as part of CSR during COVID-19
  - Donations made by businesses in view of the pandemic should not require reversal of ITC paid on supply of such items.
  - As per Section 17(5)(h) of CGST Act 2017, input tax credit shall not be available on the goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;
- Avoid GST on salary of hired manpower
  - The Ministry of Corporate Affairs has clarified that Payment of salary or wages in normal circumstances is a contractual and statutory obligation of the company. Similarly, payment of salary or wages to employees and workers, even during the lockdown period, is a moral obligation of the employers, as they have no alternate source of employment or livelihood during this period.
  - Several industries take a large part of their manpower on a contract basis through manpower supply agencies. This manpower is not on the payroll of this industry. As on date, the industry pays GST towards such service to the Agency. The industry ends up paying GST @ 18 per cent on the value of service which includes (a) wages or salary; (b) statutorily mandated benefits such as PF, ESIS, etc.; and (c) the commission or service charges to the Agency.
- Permit ITC on immovable goods if a new unit is set up.
  - In the last few years, the companies around the world which have made China their factory have either shifted out of the country or are mulling over the idea. The outbreak of Coronavirus from China will only accelerate the flight of the companies to India and other Southeast-Asian nations. India should become a preferred manufacturing alternative to China and then attract a set-up of new manufacturing facilities.
  - Section 17(5)(d) specifically disallows credit in respect of the construction of an immovable property on his own account including when such goods or services are used in the course of furtherance of business.
  - Allow the credit for setting up of the factory.

  - Keep Section 17 (5)(d) of the CGST Act, which denies ITC related to the construction of immovable property in abeyance for one year.

- Go slow on enforcement—all preventive measures notified in the last six months should be put on hold
  - Blocked credit under Rule 86A may be released, it gives a lot of liquidity.
  - E-Way bills may be waived during the recovery of the economy during the COVID period.
  - No GST audit for one year.
  - Do not ask for the value of like goods at the time of export.

I strongly believe that even if the Council gives its nod for 50 per cent of these suggestions, it would go a long way in reinforcing the trust of the businesses in the seriousness of the Governments to revive the economy. Exceptional time needs exceptional action, and COVID-19 has created such an exceptional pitfall from which only a powerful 'recovery van' can pull the economy out!

4

GST: Breezily E-Invoicing Amidst COVID-19—Voicing the Concerns Crawling Lately![*]

The chemistry of fiscal legacies is not only generally complex but also tends to move farther from the nucleus of 'heavier promises' with each 'passing generation' of political leadership! The resolve behind any political commitment given in the past gets slimmer, tenuous, and brittle with each passing year! This is what appears to be the case with the singeing potboiler of GST Compensation! Strangely, the political leadership remains the same but Mr Arun Jaitley's legacy has turned out to be too burdensome and slapdash in nature! The reigning caucus in the North Block appears to be swirling away like light-weight electrons from the nucleus of coffer-hollowing promises made by Mr Jaitley! The Finance Secretary may view the issue as an annoying gnat buzzing at his leadership as many States have disdainfully rejected both the options tailored by him. States have also accused the Centre of embracing short-termism in the face of anaemic revenue collections. Given the collective resolve of the States to fight like a terrier for every penny, the issue is unlikely to wither on the vine!

A genuine and long-term solution would be one where the mirror of the spirit of cooperative federalism does not get smeared with distrust! GST is certainly not the only thread which runs between the Centre and the States! There are numerous turfs and welfare subjects on which both need to work in harmony for providing efficient stewardship to the nation, and I believe that it would be the best birthday return gift from Prime Minister Narendra Modi, who turns seventy today! On the compensation issue, the barrel-chested Prime Minister needs to prove that history does not only repeat itself but also does not often rhyme! He also needs to remember that the sparring issue also serves as a trial balloon for his non-partisan leadership during the COVID-19 battling times!

Since the compensation issue is likely to trigger some shades of fireworks and filibustering in the Parliament, the 42nd meeting of the GST Council was, at the eleventh hour, shifted to 5 October. Though, going by the number of meetings being

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* TIOL – COB (WEB) – 729, 17 September 2020.

held by the GST Law Committee, which may recommend new GSTR-9 and GSTR-9C formats for its approval along with some sundry issues, the compensation issue may dominate the proceedings once again. But a few reconciliatory overtures prior to the meeting may leave roomier space for other pressing issues to be decided. Any attempt to cow the opposition may lead to unpleasant fault lines within the Council and it would be seismic in its repercussions in the long-term for the mid-course corrections in the GST design! A meaningful pathway to a peaceful solution is going to be the real test of the political metal of the Central leadership.

Meanwhile, palpitations of the Revenue Secretary are on the rise as he continues to receive revenue data indicating the ever-widening gulf between the BE and the actual collections. He had called for an urgent virtual meeting with all the State and Central revenue satraps yesterday afternoon. At his meeting, after showcasing hand-wringing over the compensation issue, he reviewed the revenue trend—as compared to 2019, the collections in the first five months are in dire straits with minus over 30 per cent growth! What worries him more is that the shrinking collections are unlikely to be a trend *du jour*! So, he clearly exhorted that if suppliers have not uploaded invoices for the period February to September, Rule 36(4) is to be invoked remorselessly to restrict ITC to 10 per cent and an extensive verification drive is to be launched. He also advised the officers to keep legwork ready for enforcing Rule 86A in case of defaults. For Aadhaar authentication, he called for physical verification within twenty-one days. Though such administrative steps are certainly within the ambit of their authorities, indiscriminate application and action taken at a glacial pace may neuter many other efforts of the Government to bring the economy back on the rail!

Let us now move to a *fait accompli* e-invoicing for taxpayers having annual turnovers of over ₹ 500 crores. It is going to be mandatory for only B2B invoices from 1 October. The underpinning rationale is to curb the growing and unbridled commerce in fake invoices. If we put it aside, there are many other advantages of such a change, such as auto-population of invoices in GST returns; auto-generation of e-Way Bills; and standardisation and trimming of payment cycles. Undoubtedly, it would improve business efficiency in the long run! Though the NIC had provided the sandbox for testing a few months back, I am not sure whether large taxpayers are equally prepared for a new regime amidst the surging contagion of Coronavirus.

It is a fact that though a good number of businesses have upped their shutters to resume their business operations, the number of employees reporting for on-floor duty is still much less. Once the normal processes are disrupted, it entails a longer time to regain the same level of operational efficiency. If any IT-driven changes are to be made in the ERP, it would require more coordinated and painstaking efforts. In addition, MNCs generally need to harmonise all such changes with their global processes and also take a nod from their headquarters which, in hundreds of cases, are not yet fully operational. Against this grim backdrop, it is learnt that a good number of taxpayers are planning for what we have seen during Central Excise days—two sets of invoices. One will be an e-invoice with a QR code and another

will be a commercial invoice for internal record keeping. This is nothing but a shortcut being planned in the face of not being fully prepared for the change and such a practice would not augur well for a uniform invoicing ecosystem in the economy.

What seems to have added more pain to the cup of woes for a large number of assessees is the recent clarification through FAQ that if a taxpayer's turnover peaked at ₹ 500 crores at any time in the past three financial years, registration for e-invoicing shall be mandatory. What seems to have aggrieved many is the clarification that the 'aggregate turnover' would put in the bucket not only taxable supplies but also exempted supplies, exports and inter-unit transfers between distinct persons. Such a sweeping clarification would certainly rope in a good number of taxpayers who had earlier thought that they would not be required to board the e-invoicing bus from 1 October and were sitting pretty ill-prepared!

Ideally, in the middle of the pandemic, the policymakers should avoid infusing new processes which may disrupt the already-disrupted business operations in the economy as it may adversely impact the revenue collections. Secondly, if a lenient view is taken that let the prepared ones join the Scheme and those who need more time may join by 1 April 2021, it would provide much-needed succour. Thirdly, what may provide further relief is a small tweaking of the notification, which may make it mandatory only for taxable supplies and excludes other types of supplies. This would certainly be wiser as the policymakers also know for sure that fake invoice is a malaise more widely prevalent in the ₹ 100 crores to ₹ 500 crores turnover segment rather than large taxpayers, who are generally martinetish and have to have a deep-seated internal scrutiny system in place. Trousering ITC based on fake invoices is generally not found among very large and organised taxpayers unless one is keen to be reduced to a chump status!

So far as our exports are concerned, it is already going through a rough patch. Compelling them to go for e-invoicing may upset their rhythm-under-repair. The key objective of e-invoicing is to focus on B2B invoices upon which ITC is taken. The export invoices are from registered taxpayers to foreign suppliers. The focus should be on ITC taken by the exporter on input invoices which should compulsorily be under e-invoicing. Hence, there is no necessity to cover exports under e-invoicing. There should not be any additional and 1 compliance on the exporter, such as to take IRN on the export invoice from IRP.

Similarly, self-invoices u/s 31(3)(f) may be exempted from raising e-invoices under the RCM. Such an amendment in the Notification may grant relief to educational institutions, hospitals, and many others who are finding such a requirement too galling! A provision to amend an e-invoice generated is certainly needed to cope with the prevailing business practices. The clock for cancellation of e-invoices is also required to run beyond twenty-four hours to facilitate the businesses. The NIC is also required to provide reconciliation tools for e-invoice and e-Way Bills. I sincerely hope that all such changes would go a long way in undergirding the new system and help it stabilise soon, rather than put the assessees

again in the ocean of throes arising from initial anomalies in the IT-driven system. Once bitten twice shy should be the guiding principle for the Government, which has been confronting a barrage of GSTN-related grievances even after three years. Let us hope that it is either postponed to a safer date in the next fiscal or if the NIC is too swaggered and feisty about its preparations, it should be implemented by amending the coverage of the assessee-base!

Conclusion

Conclusion

If we go by the popular gospel—tax reform is always the bridesmaid and never the bride—the GST may be a destination-based tax but its caravan has no 'destination'! It simply needs to chug on, and the curve of history is required to chase the shadows of events emanating from the undulating rhythm of the political economy! For the Indian GST, the last five years was unarguably a racy period of belabouring and the pages of its history referring to halcyon days will have to go blank! Every slice of its journey thus far had fulsome elements of the backwash resulting from its hasty and underprepared implementation. Thankfully, the tumultuous era of compensation got over on 30 June 2022 and its key drivers can now not only heave a sigh of big relief but also muse over future political manoeuvring to quarantine the artificially-injected distortions in its basic design. The next five years are going to be critically pivotal for the GST Council to take strides towards realising its elusive maximum efficiency!

In fact, a step in this direction was taken at the GST Council's 47th meeting in Chandigarh. Based on the recommendations of the Group of Ministers (GoM), the Council decided to slash the number of exemptions which necessarily eat into the efficiency of the GST system. I am certain that a thoughtful beginning made would not pause unless it inches close to embracing maximum possible efficiency. However, there are many more instrumentalities which continue to cry for the attention of the Council and they are equally important to enhance the efficiency quotient. Fewer tax rates are one of them. India presently falls in the unenviable bucket of countries which have four or more rates! They are—Italy, Luxembourg, Ghana, and Pakistan. Most economies have opted for two rates and only a few for three rates. Secondly, it has the highest tax rate after Chile. Thirdly, it also makes the cardinal error of distinguishing supplies based on price, brand, end-use, location of supply, status of supplier, distribution channel, whether ITC has been taken or not, and many other factors. A good example is the transport sector. Another example is that the land-leasing of industrial parks by government agencies is taxed at 5 per cent but at 18 per cent if done by others. Secondly, no ITC is available. All such variables not only complicate the design but also throw compliance gauntlets for the taxpayers. To be precise, they nudge even compliant taxpayers to attempt indulgence in tax avoidance or even evasion!

As I have repeatedly been drumming the point that ITC is the 'living soul' of the GST system, the Council needs to strive hard to unshackle the 'chained' ITC which ignites cascading of taxes, injects distortions in the design, and scuppers the wheel of efficiency. *Voila*, wheelbarrows clamped! Though a 100 per cent ITC would always hem the perimeter of utopianism, a liberal inputs credit regime should be one of the efficiency markers for the Council's future decisions! Another tool which deserves greater attention for augmenting the efficiency quotient of the GST is the tech-driven

system of compliance. Though the initial years were horrifically glitched, it has, of late, stabilised and also harmoniously aligned with the expectations of the taxpayers as well as the 'scribblers and doodlers' of the business processes! In the coming years, with the injection of more capital, its prowess would certainly be enhanced to cater to the widening tax base and also be, of modern tax administration, such as quick actionable business intelligence and advanced analytics. With the use of Artificial Intelligence and Machine Learning, the GSTN data is going to be the most vital and precise input for future changes to be made not only in the GST laws but also in key policies of the Central and State Governments!

A large swathe of Indian policy-makers and also the ruling political class tends to judge GST by its collection-efficiency (C-efficiency) ratio which is also monikered as the VAT Revenue Ratio (VRR)—the ratio of actual revenue realisation to potential revenue. A lower ratio only means the presence of higher distortions! Let's peer through the global canvas of VRR—0.95 for New Zealand; 0.72 for Japan; 0.56 for the EU; and 0.49 for Canada. India is widely projected to be close to 0.41. India needs to eye not less than 0.6 in the next five years and it is indeed achievable if the GST Council manages to recalibrate the tax slabs; trim the list of exemptions; go for a single tax rate for goods under a particular head; and overlook the economic profile of end-users, such as footwear, garments, etc. Besides technical and tax rate harmonisation, India also needs to toil hard for simplifying the business processes. While designing or reforming the existing suite of procedures, hubristic meddling is to be avoided by keeping in mind the cascading compliance woes. The toxic lure of gathering extra information needs to be kept at an arm's length to improve the ease of compliance and the overall ease of doing business! All such procedures, which extend an invitation for rule-bending, ought to be pondered over twice!

While paying urgent heed to the hues of political messaging, some of the claimant issues are the unification of multiple exemption thresholds; a new regime for the real estate sector with the ITC facility, and extending the perimeter of GST to at least ATF and natural gas. The multiplicity of exemption thresholds for goods, services, and composition schemes tends to eat away the efficiency of the system. Once the monthly revenue collections surge beyond rupees two trillion, the Council may afford the comfort of unifying varied thresholds. So far as the real estate sector goes, India needs to recognise its potential to contribute richly to the GDP and a few fiscal sops with an easy compliance matrix may goose it to become more organised and structured. Allowing ITC with holes firmly puttied would go a long way in enticing economic activities in this sector, which accounts for close to 9 per cent of the GDP. Once India's VRR leapfrogs beyond 0.5, the States would have no reason to shed tears and may support the idea of bringing ATF and natural gas under the GST radar. Given the fact that the States collect close to ₹3,00,000 crores in revenue from petrol and diesel, I do not see them agreeing to any proposal to bring them under the ambit of the GST in the next five years!

India has adopted Dual-GST like many other federal countries. What may soar up the overall efficiency of the new system is the effort to inject *esprit de corps* into the tax administration. At present, cross-jurisdiction, in spite of the allocation of taxpayers between the two stakeholders, often results in avoidable heartburn and distress to the taxpayers. With greater use of bots and automation of the system, both the Centre and the States need to reduce the size of their manpower so that the productivity index goes up! One long-term solution could be early planning for a GST Federal Service. With the Council in the catbird seat, it can initiate a comprehensive study on the merger of State VAT Services with the CBIC and create a uniform GST Federal Service to be staffed by the UPSC. A single service would go a long way in unspooling uniform best practices for assessment, audit, prevention, and recovery. I do recall that even the late Arun Jaitley had once expressed his loud thinking on this subject in one of his articles. What may further aid the administration is the greater use of modern technology. For instance, drones can be used for monitoring transport carriers racing on highways without e-Way bills or local sleuths unnecessarily impeding the run of such transport with e-Way Bill for egregious reasons!

Before I conclude here, I would like to air my wish that since the VAT or the GST are pass-through taxes and are ultimately paid by the consumers, calling it a value-added tax is indeed a misleading entrepreneurial-sounding moniker. Ideally, when the tax is to be paid by the consumers, it should be called, sans technical spices, a 'consumer tax' or 'consumption tax'. Though the VAT proponents call it a progressive tax, there is merit in the arguments of anti-tax lobbyists as well as those who see the VAT as a double tax—one pays for goods and services from already taxed income! However, since the institution of State needs more avenues for revenue, there is no wiggle room to overlook such a sumptuous turf to gather more revenue. And, true, the VAT has proven its revenue-gathering credentials by accounting for a good chunk of the overall revenue collections in all economies. For instance, the VAT accounted for 52 per cent of total revenue for the EU in 2020. In coming years, India would also be mopping up a similarly high percentage of its total revenue but it would be more desirable if direct tax collections could account for a larger swathe as indirect tax is characteristically a regressive form of taxation as it fails to discriminate positively between the poor and the rich. I sincerely hope that the Indian GST would acquire kinder and softer hues for the consumers in the next five years!