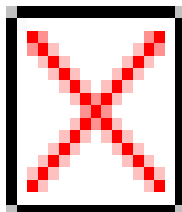


GST - Agenda for the second year - Part 35 - ROD Orders - Law-making by administration

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LEGISLATURE

is conscious of difficulties that may arise while implementing provisions of new law. The administration can issue notifications based on powers delegated to it but cannot add to any statute. Difficulties arise in implementing the Act and, therefore, legislative device of orders to remove such difficulties has been provided in CGST Act. This part contains brief discussion on the powers and extent of use of the same.

ROD Orders under earlier regime

In Service Tax regime, Section 95 of Finance Act, 1994 empowered the government to issue orders to remove difficulties 'in implementing or assessing value of any taxable service' as per the respective Finance Act(s). As implementation hassles were not expected to continue for long, such provision contained a period beyond which order cannot be issued using the same. Initially, two years were prescribed under such provision which later became one year. Being a nation where primary sector (agriculture) is always important, such power was used for the first time in the year 2002 to define the term 'agricultural produce' as services relating to the same were exempted. This power was otherwise used to correct typographical errors or provide for procedural relaxation and the instances were not more than four till the sun set on service tax in June, 2017.

ROD Orders under GST law

GST law is new. Implementation challenges are, therefore, natural and numerous. Section 172 of CGST Act empowers the government to make provisions by a general or special order as may be necessary for removing difficulty which arises in giving effect to any provisions. The condition is that such additional or new provision made shall not be inconsistent with other provisions contained in CGST Act or Rules. Therefore, 'new provisions can be made not inconsistent with existing provisions to remove difficulty in implementing such provisions'. Order using such power cannot be issued without the recommendations of the GST Council. Three years have been provided as the period upto which such powers can be exercised.

Compared to service tax regime where hardly four such orders were issued, so far ten orders ['Removal of Difficulty Order' or 'ROD Order'] have been issued in the 22 months of GST regime. Most of them have been issued to extend the time-limit for filing various returns. Any extension in statutory time-limit is welcome for the taxpayer but many times, such relaxation has been necessitated by online technical problems. To the extent, the portal is not able to cope with last day rush in filing returns and, therefore, it becomes unresponsive forcing taxpayers to overshoot the time-limit and be blessed with an extension, the orders issued under Section 172 may be perceived as exercise of powers for intended objective.

In the first year of GST, only one ROD order was issued in relation to composition scheme. The year 2018 saw four such orders and this year, in the first four months, five such orders have been issued. By the latest Order No. [5/2019](#)

dated 23-4-2019, one-time opportunity and additional time have been granted to apply for revocation of registration to those whose registration has been cancelled. This may appear to be benevolent for the trade but the same was necessitated by the fact of everything being prescribed online in GST regime. Notice for cancellation of registration was served through e-mail and by uploading the same in the GST portal. The conclusion is obvious - with majority not being part of 'digital India', these registrants were not aware of such notice and ultimately

they lost their registration through ex-parte orders. This ROD order highlights the logical fall-out of ignoring the ground realities while prescribing online mode for every compliance for both the taxpayers and the departmental officers.

Section 172 requires recommendations of the GST Council before ROD order is issued. One wonders how such requirement is fulfilled before issuance of such ROD orders. Most of these orders are issued when there is no Council meeting. There is no information in public domain whether the proposal to issue ROD orders are circulated among members of the GST Council and approval is obtained. We need to presume the same as without such approval by circulation, the ROD orders will be vulnerable to serious legal challenge. This is only academic as the orders being taxpayer friendly in most cases have the least possibility of being brought to the court to test their validity.

Law-making by executive and oversight by legislature

ROD order as a legal device has been in existence for quite some time under other laws. These are exceptional powers meant to be used for exceptional circumstances. If ten orders need to be issued within two years of implementation of GST, exception may take the colour of routine. In particular, when the tax administration is empowered to issue such orders to insert a substantive provision in the parent Act itself, these powers are expected to be sparingly used as the executive cannot involve itself in full-fledged legislation on regular basis. Amending the Act is within the exclusive domain of legislature. Separation of powers may not be as rigid or water-tight as American Constitution in the Indian context, nevertheless, the same has been considered a pious and fundamental principle. It may be argued that Section 172 mandates that every order made under this provision shall be laid before each House of the Parliament at the earliest opportunity and, therefore, the ROD orders are subject to scrutiny by legislature. But, the same is ex post facto and action taken based on ROD orders cannot be reversed if, hypothetically, Parliament disapproves such ROD order in a case. Therefore, legislative oversight is restricted in both scope and effect.

In service tax regime, when new services were brought into tax net through Budget / Finance Act, sub-sections were inserted in Section 95 of Finance Act, 1994 to empower the government to issue ROD orders. It can, therefore, be expected that after three years of GST, new sub-sections extending the period for exercising such powers will make an appearance in CGST Act in future. So long as the provision removes difficulty for the taxpayers and the officers without being put to use for removing drafting errors, there may not be any concern.

(â€¦To be continued)

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See [Part 34](#).

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