

## 35th Meeting of the GST Council - Transition begins... Part-I

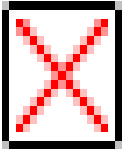
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*"Laws and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up, and set to true time."*

**[Henry Ward Beecher]**



**THE**

35th GST Council Meeting was the first Meeting of the Council after the swearing in of the new Government. It was also the first meeting chaired by the Finance Minister, Nirmala Sitharaman who has taken over the reins of the Finance Ministry from her illustrious predecessor Arun Jaitley who was also the former chairperson of the Council.

Undoubtedly, the Council had a loaded agenda on hands! True to expectations, the Council deliberated upon as many as 12 Agenda items, which also included some items of regular nature like confirmation of the Minutes of the 34th Meeting of the Council, deemed ratifications by the Council of the Notifications, Circulars and orders issued by the Central Government between March 12, 2019 and June 11, 2019, taking note of the decisions of GST implementation Committee, etc.

Whereas, the Council took the decisions on certain vital agenda items, it has referred a few matters involving the GST rate related changes to the Fitment Committee or the Group of Ministers (GOM), as the case may be.

The decisions taken or recommendations made by the Council were, after conclusion of the Meeting, announced through 3 (three) separate Press Releases covering:

- Issues other than Rate and law changes
- Rate related changes
- Law and procedure related changes.

The decisions/recommendations of the Council are briefly discussed below:

### **I. Decisions on the issues other than Rate and Law changes:**

**a. Setting up of State Benches of the GST Appellate Tribunal (GSTAT) - 'A baby step in a long and arduous journey ahead!**

### Council's decision:

The Council has taken a decision regarding location of the State and the Area Benches for the GSTAT for various States and Union Territories with legislature. It was also decided to have a common State Bench for the States of Sikkim, Nagaland, Manipur and Arunachal Pradesh.

### Comments:

Sub-section (1) of S.112 provides for the filing of an appeal by any person before the Appellate Tribunal if he is aggrieved by the following types of orders viz:

- i) Order passed by an Appellate Authority under S.107 of the CGST Act or the SGST Act or UTGST Act;
- ii) Order passed by a Revisionary Authority under S.108 of the CGST Act or the SGST Act or UTGST Act.

Sub-section (3) of S.112 deals with the right of the department to file an appeal before the Appellate Tribunal.

The provisions governing constitution of the GSTAT and Benches thereof are contained in S.109 of the CGST Act. S. 110 deals with **"President and Members of the Appellate Tribunal, their qualification, appointment, conditions of service, etc."**

It is, indeed, unfortunate that even though almost 2 years have elapsed since the introduction of the GST regime in the country, there is hardly any progress in the matter of setting up of the Benches of the GSTAT, appointment of the President and other Members of the Tribunal, setting up of the necessary infrastructure, etc.

What is, indeed, worrisome is the fact that even though GSTAT is nowhere on the horizon, the 'First Appellate Authority' i.e. the Commissioner (Appeals) or Additional/Joint Commissioner (Appeals), as the case may be, have already started disposing of the GST appeals filed before it! Such orders passed under S.107 are appealable before the GSTAT which does not even exist as on date, effectively leaving the aggrieved party i.e. the taxpayer or the Department, as the case may be, without any statutory remedy! In fact, it is understood that a Registry of a particular Bench of the CESTAT has already expressed its helplessness in accepting the GST Appeals, much to the dismay and consternation of the taxpayers. This forces the taxpayer to knock on the doors of the jurisdictional High Court. Isn't this a sheer waste of time and money of the taxpayer?

It must also be realized that once the Annual Returns along with Reconciliation statements are filed by the taxpayers by the extended due date of August 31, 2019, the scrutiny, assessment and Audit by the Department, at least, in selective cases, will commence in right earnest and in all probability, this is likely to open floodgates of litigation! Any delay in setting up of the GSTAT with its regional benches will lead to chaos, confusion and catastrophic consequences!

The High Courts have also frowned upon and expressed its displeasure over this inordinate delay in setting up of GSTAT by the Government.

In **Jai Baba Amarnath Industries vs. State of U.P. - 2018 (15) GSTL 484 (Allah.)**

, the High Court took note of the fact that the Appellate Tribunal was yet to be constituted by the GST Council and observed as under:

**"11. The contention of the Learned Counsel for the petitioner is that though Sections 109, 110, 111 and 112 of the Act provides the Constitution of appellate Tribunal and procedure before the appellate Tribunal etc. but till date no appellate Tribunal is constituted by the respondent State.**

**12. Learned Standing Counsel has contended that it is only the union to constitute the Appellate Tribunal and not alone the State of U.P.**

**13. This Court finds that in any case the constitution of the Tribunal is necessary and in this regard earlier also this Court has issued the directions for the constitution of the Tribunal.**

**14. Surprisingly even after completion of one year from the date of introduction of the GST no appellate Tribunal has been constituted.**

**15. Let the Principal Secretary (Tax and Institutional Registration) Civil Secretariat, Lucknow may file his personal affidavit by providing all details with regard to non establishment of the Tribunal till date and the steps taken by the respondent authorities."**

The vires of Ss.109 and 110 of the CGST Act and the corresponding provisions of the Tamil Nadu GST Act, 2017 is under challenge before the Madras High Court in the case of **V. Vasanthakumar vs. UOI - [2018-TIOL-2863-HC-MAD-GST](#)**

. It has been contended before the Hon'ble High Court that the provisions were violative of doctrine of separation of powers and independence of judiciary and also contrary to the principles laid down by the Supreme Court in the case of **UOI vs. R. Gandhi - [2010-TIOL-39-SC-MISC](#)** and **Kesavananda Bharati vs. State of Kerala (1973) 4 SCC 225**

. The High Court has issued the notice to the Respondent and Attorney General of India.

Likewise, the Delhi High Court has, by its Order dated May 2, 2019 passed in the matter of

**Bharatiya Vitta Salahakar Samiti & Anr. Vs. UOI - [2019-TIOL-1096-HC-DEL-GST](#)**

, directed the Central Government to not proceed with the appointment of members of the GSTAT without prior intimation, till the next date. In this case also, the Petitioners have challenged the vires of Ss 109 and 110 of the CGST Act and corresponding provisions of the **Delhi GST Act, 2017**

with respect to the constitution of the GSTAT and qualifications of its members. The contention of the Petitioner is that the provisions suffer from several serious infirmities which impede the role of the Appellate Tribunal as a judicial authority and which substitutes the role of the High Courts. The Petitioners have also challenged the Notification dated March 13, 2019, issued by the Central Government establishing the National Bench of the GSTAT at New Delhi. The matter is pending before the High Court as on date.

The imbroglia doesn't stop here! A petition has been filed in the Gujarat High Court challenging constitutional **vires**

of Section 109 of the CGST Act and the corresponding provision of the Gujarat GST Act, 2017 pertaining to the constitution of the Centre as well as State Appellate Tribunal. It was contended by the Petitioner that the CGST Act/GGST Act envisages constitution of such Tribunals comprising of one Judicial and two Technical Members. This would leave the Judicial Member in minority. These Tribunals would be called upon to decide important and complicated questions of interpretations of taxing statutes. The High Court has issued notice to the Attorney General taking note of the fact that the vires of the Central Legislation are under challenge.

**[ Pratik Satyanarayan Gattani vs. UOI - (2018) 93 taxmann.com 115 (Gujarat)].**

A similar challenge to the Constitutional vires of Section 109 of the CGST Act, amongst other statutory provisions, has been made before the Madras High Court by the Madras Bar Association. The Petitioners have also challenged the exclusion of the lawyers from being appointed as judges of the GSTAT. It is understood that exhaustive arguments have been advanced by both the sides which continued for days and the Respondents have been directed by the Court to file the Affidavit in the matter.

Amidst these Constitutional challenges to the very statutory provisions under which GSTAT can be set up and its members can be appointed, it is difficult to visualize how the decision of the Council to set up the State and Area Benches of the GSTAT will be implemented by the Central Government and even if implemented, as to what result it will yield. It is obvious that the decision of the Council is a knee-jerk reaction to the observations made and directions issued by the Allahabad High Court in the case of **Oudh Bar Association vs. Union of India - [2019-TIOL-1168-HC-ALL-GST](#)**.

The decision, whatever may be the cause, may, at best, be considered a 'baby step' in a long and arduous journey ahead!

There is no denial of the fact that the statutory provisions of Ss. 109 to 114 of the CGST Act governing '**Appellate Tribunal**' suffer from serious flaws and arbitrariness. It is, therefore, rather surprising that the Council has thought it fit to discuss the issue of location of the Benches of the GSTAT as if it was oblivious to the Constitutional challenges to the relevant statutory provisions pending before the various High Courts! Or it may be that the Council has not been appraised of the pendency of such Constitutional challenges before the High Courts and the wider ramifications of the outcome thereof!

The urgent need of the hour is that the Council must discuss the statutory provisions contained in Chapter XVIII of the CGST Act relating to '**Appeals and Revision**'

[Ss.107 to S.121], identify the flaws therein thread-bare and after taking a holistic and pragmatic view, recommend suitable changes therein so as to make the provisions less susceptible to the Constitutional challenges, as far as possible and also capable enough to play its vital role under the GST regime as is expected.

## b. Anti-profiteering Authority - Extension of tenure or tortureâ€?'

### Council's decision:

The Council has decided to extend the tenure of National Anti-Profiteering Authority (NAA) by 2 years.

### Comments:

The tenure of NAA was to expire in November, 2019 and its extension by at least, 2 years was on cards. As expected, the Council has extended the tenure of the NAA by 2 years.

However, the extension, to put it plainly, may be viewed more as a political message to the consumers at large -

**'we are here to protect you from the profiteering and exploitation'**

, than anything else! The provisions of S.171 of the CGST Act dealing with **'Anti-Profiteering Measure'**

read with Rule 126 of the CGST Rules, 2017 dealing with **'power of the Authority to determine the methodology and procedure'** are clueless and singularly incapable of achieving the perceived aim for which the same are enacted. No guidelines nor any methodology is prescribed for determining the 'profiteering amount' leading to arbitrariness and unreasonableness in the orders passed by the NAA.

Consequently, almost every such order of the NAA has been under challenge before the High Court. It may be pointed out here that consequent upon the amendment made to S.2(4) of the CGST Act defining the term **'Adjudicating authority'**

by the CGST (Amendment) Act, 2018 w.e.f. February 01, 2019, NAA is excluded from the scope of the term and hence, order passed by NAA shall not be appealable before the Appellate Authority. The aggrieved businesses have therefore no alternative but to rush to the High Courts. As the aggrieved businesses are already in High Courts, no tangible gain has accrued to the consumers despite the imposition of the hefty fines by NAA in many cases.

I, therefore, feel that a mere extension of the tenure of the NAA may not bring any concrete result! On the contrary, it may act as a constant **'hanging sword'** over the heads of the taxpayers rather than providing a **'protective cover'**

to the consumers! In the absence of the clear guidelines and robust methodology to determine the **'profiteering amount'**, the uncertainty about the applicability of the provision and the proceedings thereunder would only aggravate. The provision relating to **'Anti-profiteering Measure'**

in the statute has remained a half-hearted attempt and a symbiotic measure from its inception! No basis was laid for it nor any ground work appears to have been done relating thereto before GST regime was introduced.

Here, one may have a look at the **'Australian Experience'**

with 'Anti-profiteering measure'. Australia was the first country to enact these provisions when it introduced GST in the year 2000.

In Australia, GST implementation had a three-year transition period from July 1, 1999 to June 30, 2002. During this period, the pricing response to GST was overseen by the Australian Competition and Consumer Commission ('Commission') which was also entrusted the responsibility to act against businesses whose price changes were not in tandem with GST rate changes.

The Commission formulated the product-specific 'one dollar' methodology, where if a company makes a dollar worth saving on a product, then it was expected to translate into an immediate proportional reduction of 'one dollar' in the price of the same product. No corresponding changes were allowed to be added to the GST component of the price. Secondly, a pricing rule was also put in place which stated that no price increase should be more than 10%.

During the transition period, the Commission considered over 51,000 complaints, investigated approximately 7000 matters and obtained refunds of around \$21 million on behalf of approximately two million consumers. A dedicated GST-pricing call centre received over 1,80,000 GST-related calls in the three-year transition period, according to a report published by the Commission.

However, the objective of the Commission was solely to deter price changes, not control of price levels and profit margins. This stems from the understanding that in a market economy, the forces of competition and demand will determine the prices. Aside from this, many other variables like raw material costs, etc. would tend to influence the prices. The focus was, therefore, on curbing unjustifiable price changes. The price levels or profit margins were not under attack as long as it stayed within the 10% profit margin.

It may, however, be pointed out here that inspite of such elaborate ground-laying work and businesses being aware of what was 'in store' year in advance, the flood of litigation could not be avoided. India could meet the same - may be, worse - fate, given its more complex GST structure than peers and ambiguous 'Anti-profiteering provisions' that lack substance.

The ideals behind the anti-profiteering norms are certainly 'lofty' and stem from the concern for the welfare of the people. However, the subtle distinction between '**earning profit**' and '**profiteering**'

shall not be overlooked! 'Earning profit' is the *raison d'être* of the businesses and this entrepreneurial drive of businesses should not be curbed by excessive regulation, witch-hunting and strict watchdog tactics.

India must learn the lessons from the experiences of other GST/VAT jurisdictions. Simultaneously, the Council must overhaul the statutory provisions of S.171 of the CGST Act as well as Rules 126 and 127 of the CGST Rules, in particular. It must provide for comprehensive and appropriate guidelines and methodology with regard to the initiation of the Anti-profiteering proceedings and the determination of the 'profiteering amount'. If this is not done, the provisions would merely remain a '**paper tiger**' and a constant '**terror**' and '**torture**' for the businesses!

*"Legitimate profit is good. What's bad is profiteering."*

*[Shaffi Mather]*

*Indian Social Entrepreneur*

**To be continued...**

**(The views expressed are strictly personal)**

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