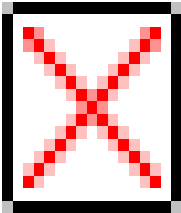


GST in a stressed environment - Need for empathy

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By R Sridhar, Consulting Editor, TIOL



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pandemic gripping the nation is getting stronger by the day. With rising numbers of affliction and casualties, the planned unlocking of the economy and restoration of normalcy is getting delayed. In this background, a very depleted Trade and Commerce impacting 2H of CY 2020 plus the 1Q of CY 2021 is adding to the uncertainty. While the packages released till date by GOI provide succour for liquidity, moratorium on loans etc, a few hand holding actions are required to assist in viability also. It is axiomatic that viability of business is the prerogative of the capital provider but in times like this, a gentle hand holding through fiscal assistance, will only propel the economy back to life.

Recent GST Council Meeting 12 June 2020

It is true that the coffers of the sovereign are precariously positioned and expectations of all suggestions of Chambers of Commerce, Associations, Industry Bodies were balanced on the outcome of certain policy changes. The final press release has not addressed many fundamental issues such as -

- a) Stock write off in pandemic and impact on ITC
- b) Status of CSR expenditure and ITC
- c) Payment to Suppliers /Service Providers within time limits laid down in Section 16.
- d) Larger canvas for allowing Special Discounts and Off Invoice Discounts in the era of pandemic
- e) Specific fiscal measures for sectors seriously impacted such as Aviation, Tourism, Hospitality (including Hotels /Restaurants) and Service Providers in Tourism sector

The purpose of this article is not to represent that all measures could have been taken up together but at least a representative sample could have been attempted and the entire suggestions given could have been passed over to the Law Committee or any other Committee of Officers for their consideration so that the Council could take it up in its ensuing meetings. With the introduction of section 168A, in the CGST Act the Trade at large hoped for favourable amendments to deal with force majeure of COVID 19 pandemic which unfortunately has not been optimally used. In all fairness to both sides, i. e. the Government /GST Council and the T&I, this opportunity which for reasons best known to the Revenue, was foregone.

Policy Issues - GST Council to invite Trade and Industry Associations for their views

Transition Credit

It is imperative for the Council to understand that despite the passage of 3 years since the implementation of the law, there are still transition issues affecting the industry and various High Courts are passing orders which takes the overall atmosphere of taxpayer and tax administrator relationship into uncharted waters. Despite repeated Court orders and its own Circulars covering both Technical and Non-Technical issues

there appears a significant reluctance on the part of the Tax Administrator and the Council to address the issue in a manner that the entire family of taxpayers are taken along. The entire database of litigation on this single subject will take days to summarize with pros and cons. In summary, the Trade and Industry could have been assisted more both on Technical and Non-Technical issues.

It will be appropriate to allude to the comments made by the Hon High Court of Delhi in the recent decision of SKH Sheet Metal Components case - [2020-TIOL-1031-HC-DEL-GST](#)

"28. The stand taken today runs counter to the assurance given before Bombay High Court and is also not borne out, from the record. It has been argued that the discrepancy in the figures has crept in because of human error and there is no provision in the Act or the rules that can be relied upon by the Petitioner to reclaim the shortfall. The restriction that prevents the Petitioner from taking the entire credit by revising the return, based on the footing of a 'human error' and not 'technical difficulty on common portal' is thus wholly unreasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. One-line, non-speaking order relied upon to justify the rejection cannot be countenanced. Viewed from another angle, one can construe Petitioner's difficulty as technical in nature, as the short credit is reflected as blocked credit on the portal, with no provision to rectify the same electronically. In absence of any clause defining 'technical difficulty on common portal', as discussed above, Petitioner's case would even be covered by Rule 117 (1A) of the CGST Rules. GST laws required taxpayers to embrace transformative new ways. The use of technology can be daunting for many taxpayers who hitherto before, were largely dependent on conventional manual filings of returns. In order to overcome the resistance to change and encourage transformation and remodelling of the entire accounting structure at taxpayers' end, the electronic mode should be user friendly. Sadly, the Respondents have not helped the situation, despite all the good intentions they may have. They have further compounded the problems for the taxpayers by being adamant about their stand and exhibited no flexibility in approach. The exactness required in compliance of tax provisions should not be construed so rigidly that permissible flexibility is completely disregarded. In effect, the ITC has been expropriated without any lawful sanction. The ITC that was shown in the returns under the existing laws were taxes that stood paid to the respective Governments for goods or services and were available for adjustment or utilization in accordance with law. Now, on account of a clerical mistake the said taxes paid are being appropriated, without cause, putting the Petitioner in serious jeopardy by subjecting it to further taxation under GST without the benefit of ITC. The case before us demonstrates how the tax department has miserably fallen short of the expectation. It is regrettable that Respondents have failed to address the basic and fundamental problem faced by the Petitioner that occurred while filing a Form, seemingly on account of a bona fide or inadvertent mistake. Instead of offering a restitutive solution they have stonewalled all the attempts made by the Petitioner. The injustice and prejudice caused to the Petitioner is profound and its disillusionment and despair is evident. Therefore, we cannot uphold the stand of the respondent which is founded on some illogical understanding of the Rules. We have time and again made adverse remarks on the procedural working of the GST system in several decisions. We may just add that we do not derive any pleasure when we make such observations, as comments of the Court affect the reputation of the administration in the country. Such remarks are made only when we are constrained to do so. The case before us is one where there is a complete lack of understanding and fairness on the part of the Tax Department. The fact that Respondents have done nothing to solve the problem faced by the Petitioner, fuelled with the adamant stand before us, contributes to scepticism of GST technical infrastructure, which we feel should and can be easily avoided. Only if Respondents were to engage with the taxpayers with a genuine intention to solve the problems, confidence in the system can be built up and such matters would not reach courts."

It is therefore important that the GST Council convenes a special extraordinary session to address the transition issues wholesomely in the background of the fact that there is no definition of Technical difficulties as per Rule 117 (1A) in the Act or the Rules, so that a way forward beyond 1/10/2020 there will be no litigation on this count of carried forward credit.

Vested Right of ITC

It is observed and read that the Department of Revenue in many forums, still argues that ITC is not a vested right. It is strange that we call GST as a Value Added Tax of the highest order and in the same breath deny Input tax credits on some flimsy reason or the other. It will be not out of context to even point out that reversals under section 17(5) (h) of the CGST Act do not have machinery provisions till date, but reversals are insisted upon by the Revenue. It will be in the interest of the progress of the law that the GST Council and the Department of Revenue (Union and States) recognize the undeniable right of the assessee to take credit and all controls are at best only directory so that the value added tax characteristics are not diluted or marginalized.

Structural Reforms arising out of GST 3.0 -

Status of Compensation Cess

The structural reforms to GST law planned for GST includes the future of Compensation Cess. Considering that Committee of Ministers under a panel to be headed by Mr Sushil Modi, is to take up all issues concerning Cess, it is important to evaluate whether a set of products under the Schedule to Compensation Cess Act can possibly fund losses arising out of GST providing for 14 per cent growth over base year for all States. Secondly a possible addition of products to the Schedule under the residual entry will be at best catastrophic as the Industry and Trade are reeling under the impact of a pandemic. Considering the alternative options, it is imperative that the viable alternative of realignment of the strategy is called for. In case the Government of India were to resort to borrowings to fund the compensation cess, how will the borrowings be repaid in the light of lower collections. It is also important to evaluate whether Compensation Cess will become a permanent feature in the GST tax structure and also whether the growth percentage hard coded in the Compensation Cess Act can be revisited.

Amendments to the law.

Many suggestions were given to various sectoral committees on the implementation of GST and were acted upon. However, a fresh laundry list of remaining issues needs immediate attention and re-visiting. Important among them will be the creation of a National Advance Ruling Authority as the provisions of Section 101A - 101C of the CGST ACT have not been given effect to till date. Apart from the above, an evaluation of the following issues must be made -

- A - Time period given to issue Show Cause Notices under section 73 and 74 of the CGST Act
- B- Revisiting section 132 provisions mainly from the point of sub section (1) (a) to (1) (d)
- C- Re-evaluating efficacy of provisions of Rule 36 (4) read with Rule 86 A (1)(b)
- D - Expansion of ITC to include Capital Credits on account of Factory Buildings or physical infrastructure
- E - Classification disputes raised at various entry points to States to be exclusively dealt only by the Assessing Officer.
- F- Evaluating and reducing the monetary limits of pre-deposits set under sub section (6) of section 107 and sub section (8) section 112 in view of high litigation in India.
- G - Hardcoding in the law the compliance of all CBIC Circulars and Instructions to all anti evasion departments including the intelligence wings
- H -The GST law to recognize in the statute that payments under protest made during investigations, enquiries can only be treated as deposits in the course of litigation and hence are subject to rigours of refunds with interest and not subject to unjust enrichment rules.
- I - Amendments in law to the subject of post- sale discounts and impact on valuation.

While the above list of issues is not exhaustive but only are indicative of the situation on hand, an early setting up of a Committee to address the issues for GST 3.0 will assist in enhancing stakeholder confidence.

Council mandate to Revenue Departments - High Litigation at Courts

In the last 3 years of the GST regime, there have been a spate of Writ Petitions being filed by taxpayers across High Courts on various issues affecting the Trade at large. While the correct interpretation is handed down by the Courts, in many cases it has been observed that a helping hand could have avoided the litigation. It will be worthwhile for the Council to engage an expert committee to study the reason for the high

litigation at Courts at the infancy stage of the law and whether the taxpayers are pushed to the brink of litigation without possible solutions. It is desirable that this Committee be represented by an equal number of officers (State and Centre) and also representatives (Tax leaders) from various Institutions, Financial Press and T&I. The Council should know the reasons for the piling up of litigation and should endeavour to reduce the pace of litigation so that the objective of a Good and Simple Tax is achieved.

Conclusion

As we move into the fourth year of GST, a concerted effort is required to tug the T&I to area of safety so that the wheels of growth are motivated to move faster. Restoring normalcy and lending a helping hand is emphatically required if the Trade and Industry have to survive the new norm of business. While fiscal policies evolve over time, the impending need is GST 3.0 so that a vibrant law advances both causes of Trade& Industry and the needs of the Sovereign through revenue generation.

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