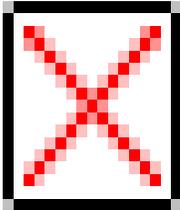


## Need to slow-walk GST Litigation

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**THE** CBIC recently instructed its field officers to recommend names of more standing counsels for timely appointment to contest the flurry of matters at the High Courts and Supreme Court. It is indeed sad to witness a stellar reform, path-breaking change for India called GST slipping into a lane of unwanted litigation. My column cites below a few reasons why matters reach the Courts always, first and secondly touches upon certain disclosures widely reported in the media and their impact.

### I. A flurry of SCNs/Investigations on ITC

It appears that the GOI and the Council regret the liberalized Input Tax credit regime in GST and hence find novel ways in halting the progression of Input Tax Credits and an integrated regime. While time and again TIOL has articulated need for strict action against defaulters who indulge in fraud, paper credits and invoice frauds, recent judgments of various High Courts on Section 83 and Rule 86A which have been raised in multiple forums have fallen on deaf ears and hence there is a tendency on the part of trade to rush to the protection of Courts.

No useful purpose is also served in Trade meetings as the Revenue hardly listens to the angst of taxpayers. After having implemented a Central Excise regime and VAT/ Sales Tax regime for decades, we are still unable to distinguish between firm action in accordance with law and impracticality combined with severity of action. It will be appropriate to read the judgment of [2021-TIOL-148-HC-AHM-GST](#) and see the views of the Gujarat High Court. In this regard TIOL has for long raised the impending need for publication of governance ratings in terms of Section 149 of the CGST Act and how an Oversight Committee should look into this urgently required repair. It is also certain that published ratings under section 149 will prevent entities from buying goods and services from entities who have been given poor governance rating and this may also contribute to lower ITC disputes. While such views have been expressed repeatedly, nothing concrete has happened on publication of ratings. It is the humble view of the entire Trade & Industry (T&I) that urgent amendments are required in section 83 and Rule 86A else the flurry of Writ Petitions will not decrease due to indiscriminate use of the confiscatory provisions.

It is not that the amendments to above provisions alone is panacea to prevent a rush of Writ Petitions being filed but concerted action should be taken by the GOI and Council to understand the Trade and Industry during these testing pandemic times. At best the above can only be described as *de minimis* .

### Binding Decisions of the Supreme Court/HC/Tribunals not followed, and law not applied

One of the reasons for the large litigation in GST within 3 years is the unwillingness of the Department of Revenue to apply the precedents laid down in the erstwhile regime and apply it to GST situations. A classic example in GST is the vexed issue of post-sale expenses and treatment of discounts/incentives on post sale as a service rendered. The Tribunal in a recent case of the Auto Industry (5 October 2020) under the negative list regime have held the view that the specific post sale expenses/incentives cannot be treated as a Service rendered by the Distributor to the manufacturer, in the decision reported under citation [2020-TIOL-1676-CESTAT-DEL](#) . It is indeed true that many such reported decisions are not applied under the GST regime leading to a spate of reliefs sought by taxpayers. It is distressing to note that in this decision also the Hon Tribunal has reminded the Department of the binding nature of higher forums orders which are being disobeyed.

We had pointed in our columns in March 2020 on the urgency for NAAFAR and the various attendant circumstances. It was indeed heartening to note through the Press Reports in Economic Times on June 22, 2020 that the GOI is seriously considering the constitution of this authority and even allowing all taxpayers to approach the Centralized authority and not just those parties that have got conflicting orders in different jurisdictions in a particular case. However, no further information is available in public domain on the status of the creation of NAAFAR. It is indeed true that with this authority many Writs being filed will reduce as the taxpayers will have faith in approaching the above authority to resolve all issues in an unbiased manner which is missing with AAR and AAAR currently.

## **II Publishing names of offenders - Hurried approach before culmination of adjudication**

We have seen in the last quarter many trade names being published in the papers on account of some actions on ITC, Valuation and related issues. What will be the stand of Trade and Industry, if they succeed /win these matters at the CESTAT or GST Tribunal level which may take another 5 years at least, on publishing their side of the story. While only time will tell the outcome, the Trade and Industry have every right in law to give their views in the Press if they succeed. It is with great regret, that the damage which is done to image / value of the entity, credibility, name of individual etc because of the adverse publicity cannot be compensated or undone entirely on the publication of the converse news, if and when it occurs. What one, therefore, stares at is the innocuous Press Reports that, according to its sources certain entity X, Y have been investigated on ITC etc.

Let us examine some of these provisions under the erstwhile law and the current law.

Under the Customs Act vide Section 135B a Court can publish the names of offenders and recover the costs of such publication from the offenders. This is very well founded as the same happens only after a conviction for contravention and the same is under the watchful eyes of the Court. It is pertinent that a Circular dated 23 October 2015 vide reference [Circular No. 27/2015-Customs](#), even articulated vide para 8 of the Circular the following -

### ***"8. Publication of names of persons convicted under Customs Act, 1962***

***Section 135-B of the Customs Act, 1962, grants the power to publish name/place of business etc. of persons convicted under the Act by a Court of law. It is observed that this power is being exercised very sparingly. In all cases in respect of all persons, who are convicted under the Customs Act, 1962 the department should make a prayer to the Court to invoke this section."***

It is also pertinent to advert that vide Section 154B in the Customs Act, a power is granted to the Central Government to publish names of persons in relation to proceedings or prosecution under the Act. While this provision appears to give power to the Central Government to publish names even when proceedings are in progress, it is indeed rarely invoked. It is also pertinent that under Section 156 of the Customs Act read with Rules in this regard there is a power to publish information in respect of offenders who have been convicted and the Rules are detailed with circumstances for publishing them. On a comparison with erstwhile enactments like section 37E of the Central Excise Act, 73D of Finance Act 1994, and Section 287 of the Income Tax Act, we find similar powers are there to publish information when proceedings are underway. Needless to add, that in the CGST Act, under section 159 similar powers are there for GOI. However, in all the codes of law referred above, it is important that circumstances exist and the requirement to publish the names must have some public interest to be achieved at the appropriate time and not merely jumping the gun.

With equal justice to the taxpayers, it is pertinent that the Central Government should permit disclosure of the entire case when higher judicial forums like the CESTAT and High Courts and Supreme Court hold that the entity or individual concerned has been exonerated of the offences alleged previously. This reporting should be specific and not combined with overall publication of tax cases which happen regularly through websites of the Court, Tribunals and Fiscal Press at large.

### **Prayer to GOI**

It would be in the fitness of things, if the GOI in association with States and GST Council did a honest cause search as to why the T&I are apparently dis-satisfied with current state of affairs and what major repair needs to be undertaken. In the interest of fairness and impartiality, this should be done by a Committee consisting of external experts and the Members of the Indian Revenue Service together jointly, lest we have another round of self-serving blame game.

**[The views expressed are strictly personal.]**

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