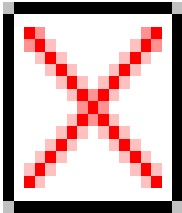


## GST in India - Reflections of 5 years

AUGUST 04, 2022

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RECENTLY

, when called upon to write on the completion of 5 years of Goods and Services Tax (GST) regime in India, the country's Finance Minister (FM), Ms. Nirmala Sitharaman had stated,  
***"GST has emerged strongly after facing turbulence from theÂ Covid-19Â global pandemic and its fallout. It is to the credit of the GST Council that the Centre and the states held each other's hand to not just face the crisis but to lift our economy onto the path of recovery. It is this working together that has made India stand out now as the fastest growing economy, as projected by many, this year and the next."***<sup>1</sup>

### Is India's GST a tax reform?

At the time of introducing the Constitution Amendment Bill on GST, in India's Parliament in 2015, it was touted as a revolutionary tax reform. Without a doubt, there have indeed been many positives in the past 5 years since the introduction of GST and there is no debate required over it. A few of them have been real stand outs such as - subsuming (merging) of multiple central and state levies into a single tax and fungibility of tax credits for utilisation, abolition of check posts at State borders, electronic waybills for tracking physical movement of goods, electronic filing of tax returns on the GSTN portal and electronic invoicing. GST has eliminated the tax arbitrage that existed between the states under the CST/VAT regime. This has led to manifold increase in the logistics supply chain efficiencies. But are these changes enough to hold India's GST to be a tax reform in well and true sense of the term?

One of the most important requirements for introducing tax reforms recently in many developing and transitional economies has been to evolve a tax system to meet the requirements of international competition. In an export-led open economy, the tax system should not only raise the necessary revenues to provide the social and physical infrastructure but also minimize distortions. <sup>2</sup>

India's approach to tax reform under GST laid emphasis on minimizing distortions in tax policy to keep the economy competitive. But minimizing distortions implies gradually reducing the share of GST in total indirect tax collections. Minimizing distortions also implies reducing marginal rates of GST. This also calls for reducing differentiation in tax rates to reduce unintended distortions in relative prices. To achieve this, the approach adopted broadening of the tax bases as one of the key focuses. A key indicator of reduction of distortions in a tax legislation is the low level of litigation one witnesses in the domestic tribunals or courts in that country. Let us take a look at all these aspects (GST Collections, Tax Rate Reduction and Reduction of GST Litigation) in some detail herein below with the help of developments, tax rate amendments, rulings and judgments notified in the public domain in the past 5 years.

### GST Collections

Any indirect tax burdens the poor much more as it is not levied merely on the basis of affordability of goods or services of a person. Hence, it is safe to assume that any tax reform on the Indirect Taxes front will aim to achieve gradual reduction of the tax burden in the medium to longer term.

If we look at the average ratio in tax collections in OECD countries, two thirds of total taxes are direct taxes. This was also informed to the then FM, Mr. Arun Jaitley during the debate in the lower house of the Parliament at the time of introduction of the GST bill. **3** The FM had then assured that the GST Council would be focusing on capping the GST collections.

It is pertinent to note that in the GST regime, the average monthly GST collections have increased from Rs 1.04 lakh crore in 2020-21 to Rs 1.24 lakh crore in 2021-22. In the first three months of 2022, the average collections are Rs 1.55 lakh crore. In her own words, India's current FM has stated that **"It is a reasonable and fair expectation that**

**this steady increasing trend will continue."** **4**

This statement virtually rules out any possibility of a gradual reduction in GST collections. Therefore, on this count alone, GST may not qualify as a Tax Reform.

## GST Rates

**In the pre-GST regime, on most items, the cumulative rates of indirect taxes levied by the Centre and the States in India were more than 31 percent. However, under the GST, the rates of over 400 goods and 80 services have been reduced. The highest 28 per cent rate is restricted to sin and luxury items. Out of a total of 230 items which were in the 28 per cent slab, close to 200 have been shifted to the lower slabs.** **5**

Here it is essential to understand that the 28 percent rate slab in GST was meant only for demerit or 'sin' goods such as aerated beverages. So the **'shifting of close to 200 items from the 28% slab'** was made mainly because those goods were not supposed to be put under that slab in the first place as none of them were 'de-merit' items.

This aspect becomes even more relevant when viewed in the context of the Parliamentary debate on the GST Bill, wherein the then FM had said the government would shun the approach of high tax rates and instead focus on smoother and investor-friendly tax policy to boost industrial activity and generate higher revenues. **"We are interested in creating a situation where...we revive that sentiment back,"** he had told the parliament.

**"My approach has been that we try and resolve disputes. We try and end arbitrariness. We try and give as much relief to the vulnerable as possible. On 80% of products, total Centre and State taxes go upto 27% now. We will rationalise this and reduce the tax rate"** , he had then stated.

It is pertinent to note that in one of his reports **6**

to the Government of India, the then Chief Economic Advisor (CEA) had recommended that the GST rate should be capped at

18 per cent and a separate higher rate can be considered for a few de-merit goods. This cap was prescribed on the basis of the rationale that, "the more you lower your tax rate, the more your GDP will grow, as the number of people who don't pay tax will lessen". Agreeing with this rationale, the Country's Prime Minister, Mr. Narendra Modi too had stated during the Parliamentary debate that, **"consumers and small businesses will gain tremendously. Small business will feel more secure with this. Small business is our strength".** **7**

Yet, recently, GST has been levied even on unbranded mass consumption items such as pulses, cereals like rice, wheat, and flour (Aata), and certain other items such as curd, lassi, puffed rice etc., at the rate of 5%, whether or not branded but packed in unit container ("pre-packaged and labelled"), with effect from July 18, 2022 **8**.

Another development of concern is that renting of residential houses, which was unconditionally exempted from GST till July 17, 2022, has been brought under the GST net in select cases. Giving a residential apartment on rent to any person holding GST registration will now attract an 18% GST **9**.

Furthermore, the input tax credit (ITC) of GST on this rent paid by recipients, though registered under GST, may be disputed by the GST Authorities as current provisions in the GST statute prohibit ITC of GST paid for any service for personal consumption.

However, residential property is most likely to be used for habitation of employees of the business enterprise, which is personal consumption.

Secondly, a tax reform is symbolised by very few rate slabs, ideally a two-rate structure. India's GST currently has 4 tax rates - 5%, 12%, 18% and 28%. And some specified goods and services are also zero or 'nil' rated. Add to this the cess ranging between 7% to 22% of GST charged on 'sin' or 'demerit' goods. Besides, a 3% GST is levied on Gold, a 0.25% GST on 'rough, uncut diamonds' and 1.5% GST on finished/polished diamonds and the hotch pot of rates is filled to the brim.

It has been recently reported in the media that the GST Council is already working on a 2 tier rate structure. However, that proposition doesn't look like taking flight without facing considerable turbulence on the ground in the coming months.

Thus, as far as the report card on rates is concerned, India's GST is yet to pass the test of very few tax rates, to qualify as a tax reform.

### Tax Litigation

Now, let us come to the final litmus test of steady decline of disputes after the introduction of the new levy. Typically, a levy will qualify as a tax reform, if disputes with Tax Authorities have reduced significantly over a 3 year horizon. Now, hold your breath - here are the statistics for tax disputes under GST for the first 3 years alone, **10**

categorised separately for matters in High Courts or the Supreme Court and those before the Advance Ruling Authorities or their Appellate Bodies:

| Category of Tax Dispute*                                   | HC  | SC | Total |
|------------------------------------------------------------|-----|----|-------|
| Transitional Credit                                        | 70  | 1  | 71    |
| ITC Freezing and release                                   | 288 | 6  | 294   |
| Interests Gross /Net, other reasons                        | 386 | 4  | 390   |
| Search, and Seizure,                                       | 175 | 3  | 178   |
| Arrest and Bail involving allegations of evasion           | 84  | 3  | 87    |
| Attachment of Bank Accounts pending investigation          | 66  | 1  | 67    |
| Actions on non-filers and unregistered persons             | 9   | 0  | 9     |
| Classification matters                                     | 46  | 0  | 46    |
| E way Bills /Seizure of goods                              | 175 | 2  | 177   |
| Cancellation of Registration, problems in registration etc | 242 | 1  | 243   |

\* The list includes not only final orders but also orders of remand, dismissal of Writ Petitions etc.

You can thus see that in the first 3 years itself the Courts had to hear over 1500 matters and another few thousand applications/writs/appeals could have been still pending to be heard at that point in time.

### Summary of cases before AAR and its Appellate Authority

| Categories of disputes                  | AAR | AAAR | Total |
|-----------------------------------------|-----|------|-------|
| Classification matters                  | 417 | 46   | 463   |
| Eligibility of items to tax as Services | 397 | 59   | 456   |
| ITC Eligibility /Reversal/others        | 172 | 36   | 208   |

Here again, you will find that nearly 1000 applicants approached the Authorities for Advance Rulings in the first 3 years of the levy. It is anyone's guess that these figures would have only gone northwards in the last couple of years, notwithstanding the brief interjection by the Covid-19 pandemic.

Also, since the only recourse against Appellate Advance Ruling Authority's order being a Writ Petition before the High Court, the burden of disputes on Courts is only burgeoning under GST with passage of time.

A feasible remedy could be constitution of GST Tribunals in every Indian State for efficacious and expeditious dispute settlement. However, even this aspect is mired in intriguing uncertainty, if one considers the fact that the Supreme Court of India has directed the GST Council to ensure parity in the number of Judicial Members with the Technical Members in such a way that the interest of both the Federal Government as well as the respective State is safeguarded. And this needs to be accomplished before January 1, 2023, which possibility appears more and more remote as days pass by. So, the Courts will not see any respite from GST disputes reaching their doorsteps at least for another couple of years or so.

Now, let us take a look at some of the typical disputes in GST (that shouldn't have reached the Courts in the first place if the GST Authorities had demonstrated more empathy for the taxpayers struggling with transition issues and could have adopted a trust based approach) and have been decided in favour of the tax payers -

### **1. Transitional Credits missed due to lapse of due date 11**

In a landmark decision that could free up ITC worth hundreds of millions of Indian Rupees that was stuck in dispute with the GST Authorities, the Supreme Court has allowed all affected taxpayers to claim accumulated ITC accrued in the pre-GST indirect tax regime within 60 days ending October 30, 2022. The GSTN portal has been directed by the Court to make available the utility to enable all registered persons to claim transitional credit. With this judgment alone, the Supreme Court disposed off a batch of 400 appeals. However, all such tax payers, who could be in thousands, who may not have petitioned the Courts, could also now avail of the benefit.

### **2. Apathy of the GST statute towards goods and services consumed by the weaker or challenged sections of the society 12**

India's Supreme Court recently termed the issue of levy of GST on the mobility devices for people with disability as a "serious matter" and wondered how the court can break "shackles of policy".

### **3. No GST is attracted on ocean freight on CIF basis, booked by overseas exporter 13**

Upholding the decision of the Gujarat High Court, against which, the Revenue was in appeal before it, the Apex Court concurred that chargeable section must be given a strict interpretation.

**"Article 265 of India's Constitution does not permit imposition of a levy by virtue of delegated legislation in the absence of express legislative provision. Thus, it is unconstitutional. Consequently, Revenue has erred in treating importers as recipient of services as the services are actually received by the foreign exporter. The Indian importers were not even liable to pay consideration to the foreign shipping lines and hence, cannot be held liable to pay tax on such services. A beneficiary of services cannot be said as a recipient of service. The mere fact that the transportation**

**of goods terminates in India, will not make such supply of transportation of goods as taking place in India."**

### **4. No GST on incidental charges recovered from customers along with electricity charges 14**

### **5. Services provided to parent company (separate legal entity) is export of services 15**

### **6. Interest cannot be levied on Gross liability before adjusting ITC 16**

### **7. Mere availment of ITC without utilization not liable for interest 17**

Summing up

We have seen from the foregoing paragraphs how India's GST fails to meet the 3 pronged requirement of a tax reform in terms of gradual reduction in tax collections over 5 years, gradual merging of multiple tax slabs to retain a maximum 2-3 tax rates and significant reduction in tax disputes at all levels over the 5 year period since the introduction of the levy. Does it mean that this new levy is regressive or fares worse than its predecessors?

No Way! By no means are we implying that. Of course, GST is one of the best things to have happened to India's fiscal environment in a long time. What we are only suggesting with tangible evidence for support is that India's GST could have been much more than what it is at present and in that sense the GST Council, the Constitutional body burdened with the thankless task of getting all things right on the levy, appears to have missed the bus, atleast for now. It is clearly evident that political compulsions have overridden economic considerations and have relegated the 5 year old levy merely as a new baby in the Value Added Tax family instead of being crowned as a harbinger of tax reforms.

**[The author is Executive Director, Bhuta Shah & Co. Chartered Accountants and the views expressed are strictly personal.]**

1 "GST: Five Years Stronger" - Nirmala Sitharaman, Indian Express, July 01, 2022 edition accessed at <https://indianexpress.com/article/opinion/columns/gst-five-years-stronger-8001468/>

2 "Tax Reforms in India - Achievements & Challenges" - M. Govinda Rao, Asia Pacific Development Journal, Vol 7, No. 2, December 2000

3 "As it happened - Lok Sabha Passes GST Bill" accessed at <https://www.thehindu.com/news/national/Live-Monsoon-Session-of-Parliament/article60527033.ece>

4 "GST: Five Years Stronger" - Nirmala Sitharaman, Indian Express, July 01, 2022 edition accessed at <https://indianexpress.com/article/opinion/columns/gst-five-years-stronger-8001468/>

5 "GST: Five Years Stronger" - Nirmala Sitharaman, Indian Express, July 01, 2022 edition accessed at <https://indianexpress.com/article/opinion/columns/gst-five-years-stronger-8001468/>

6 Report on the Revenue Neutral Rate and the structure of rate for Goods and Services Tax (GST) - Chief Economic Advisor to the Government of India; December 2005

7 "As it happened - Lok Sabha Passes GST Bill" accessed at <https://www.thehindu.com/news/national/Live-Monsoon-Session-of-Parliament/article60527033.ece>

8 Refer the Central Board of Indirect Taxes & Customs (CBIC) FAQ issued under F. No. 190354/172/2022-TRU dated July 17, 2022

9 Notification No [04/2022](#)

- Central Tax (Rate) dated July 13, 2022 has now carved out an exception to the exemption to rented residential properties by insertion of "except where the residential dwelling is rented to a registered person" in the original exemption notification. And Notification No. 05/2022 - Central Tax (Rate) dated July 13, 2022 has amended Notification 13/2017- Central Tax (Rate) dated June 28, 2017 to provide under a newly inserted Entry 5AA that services by way of renting of residential dwelling to a GST registered person for either residential or commercial purpose, shall be paid under Reverse Charge Mechanism (RCM) by the GST Registered person, the recipient of such services.

10 Source: [www.taxindiaonline.com](http://www.taxindiaonline.com)

11 Union of India Vs Filco Trade Centre Pvt.Ltd.; - [2022-TIOL-57-SC-GST](#)

12 Nipun Malhotra Vs. Union of India; WP (c) 725/2017

13 Union of India Vs. Mohit Minerals; - [2022-TIOL-49-SC-GST-LB](#)

14 Torrent Power Ltd. Vs. Union of India; - [2018-TIOL-2776-HC-AHM-GST](#)

15 Linde Engg Ind. Pvt. Ltd. Vs. Union of India; - [2020-TIOL-1285-HC-AHM-ST](#)

16 Refex Industries Ltd vs ACCGST & CE; - [2020-TIOL-382-HC-MAD-GST](#)

**17 Commercial Steel Engineering Corporation vs State of Bihar; - [2019-TIOL-1585-HC-PATNA-GST](#)**

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