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## 'Errors' in GST Notifications - Dr Adhia, do not let them snowball into huge embarrassment!

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By Shailendra Kumar, Editor

**FOR** the Revenue Secretary-led GST team, the two newly-found traits are Speed & Efficiency. And both these traits are complementary to each other. The Industry and trade have also welcomed them. But, this also puts extra onus on them to tread the path more circumspectly. What calls for an extra ounce of carefulness is that the initial notifications are relating to the various Sections of the Constitution (One Hundred & First Amendment) Act, 2016, giving effect to the various amendments to numerous Articles of the Constitution. A small error or oversight can create legal vacuum or constitutional crisis for the fiscal domain, having direct bearing on the health of the Consolidated Fund of India. In addition, they can trigger avoidable political embarrassment for the Prime Minister as there are too many smart and intelligent faces in the key Opposition Parties, keenly waiting for 'lollipop ammunition' to attack the government.

Let me now go straight to the latest notification giving effect to virtually the entire bunch of Sections of the Constitution Amendment Act. A speculation is rife on the social media and other IT-enabled platforms that the levy of Central Excise Duty is gone as the Department of Revenue has notified Section 17 relating to the Amendment of Seventh Schedule which contains various Entries relating to taxes, including the Central Excise Duty in the Union List. Before I make an attempt to find merits in the confusion going viral like **Chickengunya** in the National Capital, let me first attempt to look for the possible **INTENT** to issue the latest [notification dated September 16, 2016](#) at such a breakneck pace.

At the time of making a comprehensive presentation about the GST preparedness before the Prime Minister last week, it appears that the issue of non-cooperation from some of the States also came up for discussion. Even TIOL TUBE in its latest episode on "[GST RO\(W\)AD AHEAD](#)

" had deliberated on this aspect of the GST implementation. Since non-cooperation and non-ratification of the GST Bill by several States were seemingly perceived as a major source of uncertainties in the coming months, it was perhaps decided to 'ring-fence' the States within a time-frame of ONE YEAR as provided in Section 19

(Transitional Provisions) of the Constitution Amendment Act. Having got the mandate from the political master, the Revenue Headquarters quickly acted on the timely advice but clearly **tripped by ignoring the domain expertise available in the adjoining corridors of CBEC**. It must be realised that taxation is a technically complex subject and it takes a while to acquire expertise. Had they consulted the CBEC legal brains, the swelling current of speculation could have been avoided. In a rush, the Department of Revenue notified all the Sections (1 to 20; 12 was notified earlier) of the Amendment Act.

Let's now discuss the islands of confusion and possible errors and also possible solutions to overcome the situation agitating the mind of tax experts across the country. Let me take you to the relevant dates on which the different Sections were given effect to. As soon as the Presidential assent was obtained on [September 8, 2016](#)

, the North Block notified the provisions relating to the Constitution of the GST Council i.e [Section 12](#) of the Amendment Act. Such a decision was taken as the Article 279A provides for 60 days window for notifying the Council. It was done on [September 10, 2016](#)

. Quickly came the Cabinet approval for constitution of the GST Council and the North Block got the President to notify the same, formally, [constituting the GST Council](#).

So far so good! But then came yet another notification next day (September 16, 2016) giving effect to [Sections 1 to 11 and 13 to 20](#). All provisions were notified together. Now, the error which has come to be debated is - if Section 1 comes into effect on September 16 (this Section is an **enabler**

for the Govt to notify other Sections of the Act), how can the Govt notify Section 12 relating to the GST Council? The power to notify Section 12 emanates from Section 1(2) which reads as,

1. (1) *This Act may be called the Constitution (One Hundred and First Amendment) Act, 2016.*

(2) *It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.*

A logical consequence of this *faux pas* is that the constitution of the GST Council is being viewed as *non est*. If that is the situation, **what is the solution?**

A possible solution lies in the issuance of two fresh notifications - one to delete Section 1 from the Notification dated September 16, 2016 and clubbing the same with Section 12 notifying the GST Council. This way, the enabling section and the GST Council-related Section can **come into force the same day**

. A reverse (rescinding Sec 12 notification and clubbing it with the Notifications dated September 16, 2016) would be incorrect to do as the Cabinet approval for constitution of the GST Council was taken earlier and the relevant notification was issued on September 15, 2016.

Let's now go to the amendment of **Entry 84**

relating to the levy of Central Excise except for certain products. Section 17 makes it clear that the levy of Central Excise is to be imposed only on petroleum products, natural gas, ATF and tobacco products in the GST regime. Perhaps, there was no need to notify this Section so early. Some experts believe that this should have been notified after the GST legislation would have been passed by the Parliament and a particular date for introduction of GST would have been decided. Anyway, the fact of the matter is that

Section 17 stands notified and Entry 84 is gone for levy of Central excise on other goods

. So, the larger question is - how is the Centre going to collect Central Excise Duty till say March 31, 2017? One possible interpretation is that the Union of India can draw powers under the **RESIDUARY**

provisions under ENTRY 97 of the Union List of the Seventh Schedule where the power to levy Service Tax resides today notwithstanding a non-notified Entry 92C in the Constitution of India. In other words, Entry 97 which reads as -

**"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists"**

- empowers the Union of India to levy or collect Central Excise Duty even if a specific Entry 84 is gone. It is being speculated by many experts that since there is no bar in Entry 97 even if a specific Entry is gone, the taxation matters of Entry 84 get subsumed in Entry 97. But, does it not call for a separate legislation? Of course, this is a debatable issue on which many constitutional experts are required to break their heads for a harmonious interpretation.

I strongly feel that a solution to this issue can be found in the transitional provisions in Section 19 which reads as,

***"19. Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier."***

Although by giving a simple ONE reading one may come to the conclusion that this Section provides leeway only to the States but the expression used are **"... by a competent Legislature or other competent authority or ..."**

I think the Union of India may seek shelter under the expression **"other competent authority"**

to draw powers to collect Central Excise duty for ONE YEAR period. This also means that the Union and the States are now legally bound to roll out the GST latest by September 15, 2017 or there would be no power to collect either VAT or Luxury Tax or Central Excise Duty after September 15, 2017. It would not impact the Service Tax as it continues to enjoy the **hospitality of Entry 97**.

Yet another solution which, to my mind, is very simple and is very much a part of the Amendment Act is **SECTION 20**

- Powers of President to remove difficulties. Like in the case of Service Tax and also Income Tax (CBDT has acquired similar powers), the North Block needs to go back to the President, answer a few uncomfortable questions and convince him to issue a Notification to correct the anomalies giving rise to speculation, confusion and even a possible petition before the Supreme Court challenging the entire matrix of legal provisions.

Notwithstanding all the points raised in this column and also possible solutions discussed, my gut feeling is that the Ministry of Finance would not have issued these notifications without discussing them with the Ministry of Law. But, the fact that some of them are errors apparent, it also appears that the Law Ministry was not given adequate time to read them or never thought that all such confusions would be born out of giving

effect to these provisions. Whatever it is, it would be in the interest of the Government to quickly douse the fire of confusion by issuing fresh Notifications at the earliest - latest by tomorrow evening. I wish good luck to Dr Adhia's team for doing a good job out of the prevailing, if I can call it a mess, and retain the speed with efficiency and circumspection for accomplishing the task that lies ahead with some sane inputs from taxation specialists!!