

Employer-Employee Services: GST Model Law really intends to tax Diwali & Christmas Gifts?

TIOL - COB(WEB) - 532
DECEMBER 15, 2016

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THE Ministry of Finance yesterday put out a [Press Release](#)

detailing the list of achievements scored so far by the GST Council. In fact, the Release was headlined as 'Report Card on GST Implementation'. I am in full agreement with the letter and spirit of this Press Release. In a short span of 90 days the GST Council has indeed taken long strides in sorting out a series of contentious issues which were so relevant for fleshing out the skeletons of the Indian-variety of GST laws. But when the Council failed to reach a consensus on the last leg of three critical issues last Sunday, the general reaction from the media and experts was so flippant that some of them not only dismissed off the possible roll-out of the GST in the coming months but also colourfully painted the spectre of no-indirect tax scenario

after September 15, 2017, and how the Indian Constitution would be required to be amended again or for the *status quo ante* or one may need to go to the President of India to exercise his powers under Section 20 of the 101st Constitution Amendment Act for removal of difficulty. Such speculation is not only unripe but also tends to undermine the halo of cooperative federalism the GST Council has witnessed so far. It is true that there are some Finance Ministers who have put the GST on the backburner and feel more agitated and prefer talking about some other policy or political issues. They are evidently mixing up two different issues, to say the least, without looking at the merit of those issues. But such 'noise' is undoubtedly an integral part of pluralistic aspect of our polity.

Merely because there is some criticism from certain quarters of the polity it does not mean that the Union of India has failed and the GST Council as a mini-parliament has loosened its grip over the pending issues.

Factually speaking, there are only four key issues pending for the approval of the GST Council. The *numero uno*

issue is of course the finalisation of the GST Model Laws. As per the Union Finance Minister's statement, the Council has debated and finalised up to Section 99 (Chapter XX). Since not many of the remaining sections warrant very serious and lengthy debates, they would certainly be cleared at its next scheduled meeting on December 22 & 23. The other three issues are - Cross empowerment under the CGST and SGST; dual control under IGST and the ticklish issue of jurisdiction over the territorial waters. Let me visit each of these four areas for better understanding of the issues and their possible solutions.

The most critical out of the four issues is the Model Law. The version 2 of the Model Law should ideally have been the **first version** to which the trade and industry should have been given time to react to. Since the GST Council time-table does not have much breathing time to allow the industry to react to the second version, if there are going to be serious flaws in the making of the law, it would take years to correct them. That is fine that India is not aiming at a perfect GST but does it mean that we should go ahead with the **worst of the imperfections** !! There are indeed many areas in the Model Law which need a close look and studied analysis. For instance, the definition of 'SUPPLY' has rightly excluded securities from the ambit of goods but has ended up including **'actionable claims'**

without much thought perhaps. Why do I say without much thought? My reason is - Actionable claim is an expression of widest possible sweep in legal jurisprudence. Whether the Govt really intends to tax all actionable claims? If that is the intent, then the Govt would end up levying GST even on **'Mehar' received by the bride during her Nikah**

(marriage)!! If not, then the technical committee should prepare a list of **specified actionable claims** which are to be taxed as supply of goods. Probably, the intention of the Govt is to tax lotteries.

Let me draw the attention of the GST Council and the technical committee members to 'Employer-Employee Services'. Clause 2(84)(c) defines them as Related Persons. As per Schedule 1 of the Model GST Laws where certain supplies are going to be taxed even without consideration, all services of employer to employee even without consideration would be liable to GST. Let's take one simple and common example. When an employee puts in his/her papers, there is a concept of notice period which varies from 30 days to 90 days. The common practice in the business is that the employer grants **part waiver**

or sometimes even full waiver of such a period. Is the service of waiver of notice period going to be liable to GST? It is common practice that an employer provides laptop, mobile and talk time to an employee or even creche or free meals or training etc, do our law makers really want to levy GST on that. Going by that logic,

~~even Christmas or Diwali gifts given to employees by employers are going to be taxable as supply between related parties but without consideration~~

!! Do our law makers really want employers to issue hundreds of invoices to innumerable employees? How exactly the valuation of such

supplies is going to be done? Are we going to introduce transfer pricing norms for selection of controlled and uncontrolled comparables? Are we going to import well-established methods of Transfer Pricing like CUP, RPM, TNMM etc for this? Then even after taxing output supplies, the model law promises **to deny** them input tax credits!! The entire design of the scheme looks weird and not based on sound legal jurisprudence. It clearly calls for a relook, perhaps.

Before I switch over to other key issues I would like to highlight one more sticky area in the model law. Although the Govt is yet to release the Valuation Rules (it is missing in Version 2) but Section 15 of the Model Law calls for

inclusion of interest or late fee for delayed payment of consideration

of any supply. It is a common phenomenon in virtually all the sectors of the economy where payments are not made on time by the recipients. In such cases, suppliers of goods or services charge some interest or a lump sum late fee. As per the proposed provision, such sum is includible in the value of supplies

. When the supplier itself does not know at the time of supply whether there is going to be any late fee or interest payment on the consideration how do our law makers expect them to include the unknown in the value of consideration? Such a provision empirically speaking renders the entire economy a defaulter! Secondly, when late fee or interest is only incidental to the consideration should it really be taxed? If yes, there is indeed a need to treat it as a **separate supply**

. Secondly, there is also a need to clarify whether the Govt intends to collect interest on such interest collected by the supplier as penalty from the recipient.

I would now like to visit the most sensitive and emotive issue of cross-empowerment. This issue runs through all the remaining issues of dual control, IGST and the territorial waters. The crux of the on-going battle lies in 'snatching of each other's powers'. It is a 'funny' battle of **two distinguishable unequals**

- 77000 vs 280000. The Central GST implementing agency, the CBEC, has 77000 personnel. All the State VAT authorities put together have 2.8 lakh employees. Since States have more number they want **more work**

rather more power or the larger share of the turf. But the Union of India is reluctant because it has two exclusive turfs - CGST and IGST, which constitute about 67% of the turf

. So, it thinks it should logically have more power and greater control. Now, the problem emanates from the stated objective of **ONE-Assessee-ONE-Authority** doctrine. The second issue is - who has better efficiency to administer the new law. Naturally, the balance tilts in favour of the one which has lesser number of hands

. As compared to less than one supporting hand for a Central Assessing Officer, the States have more than five hands supporting the State AOs. This means the efficiency does not favour the States. Secondly, the GST is going to be a totally IT-driven system, promoting the Prime Minister's **cashless society**

goal as well. Thirdly, the State VAT authorities have been administering small and medium taxpayers for decades but efficiency and systems were never put in place to widen the tax base, one of the ills of our erstwhile commercial tax system in the country. When VAT came, it was the conceptual efficiency that widened the tax base and credit certainly does not go to the administration.

So, what is the short-term solution? Is there any long-term solution also? In the short-run, the GST Council should go for the vertical split model as the Constitution vests equal powers in both the entities. So, legally speaking, none is required to lose one's legal claim. There can be an administrative understanding whereby certain number of assessees can be audited by the States and the Centre both. When the States are auditing they can audit the books for **all three - CGST, SGST and the IGST**

. Similarly, the Centre can be cross-empowered to do the same threesome.

And for the long-term solution, let's go for what Mr Drabu, the Finance Minister of J&K, has called for - An

All India GST Tax Administration Service, reporting to the GST Council.

Such a Service can be created on the model of other All India Services like IAS and IPS. It can be a dedicated cadre to serve and administer the GST laws at the Centre and the States. There would be uniformity in their service conditions and no compartmentalisation. After offering some voluntary retirement packages in the States, the remaining officials can be made a part of this service which can have Groups B & C employees as well. It would be an ideal direction to go in for future implementation of a possible model GST with one or two or three GST rates. The only glitch I see is that the present crop of IAS officers who put on the mantle of VAT Commissioners in the States may not like it.

And the **IAS Association is certainly going to oppose it**

tooth and nail. But, our political masters must do what is good for the nation and not one or two Services which have been created only to serve and not to rule the nation or to satisfy their territorial aspirations. Let's hope the GST Council is able to sort out all the pending issues at its next meeting and also discuss the possibility of creating an All India GST Service in two to three years time!

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