GST and Indirect Taxes Construed

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Abstract

The nation should have a tax system that looks like someone designed it on purpose.

-William Simon

Goods and Service Tax (GST) is an indirect tax levied on the supply of goods and services. It is a nationwide tax seeking to unify several indirect taxes and is based on the principle of 'One Nation One Tax'. The substitution of the Central Excise Duty of the Government of India by Central Value Added Tax (CENVAT) and sales tax deals assess arrangement of the State governments by the VAT denoted a noteworthy point of reference in the change procedure of circuitous charges in India. It tended to the falling impact under the past framework by giving set-off for assess paid on contributions too as expense paid on past buys and brought about a noteworthy disentanglement of the rate structure and widening of the assessment base. Be that as it may, both the CENVAT and the State VAT have certain inadequacy. In spite of the various activities by different departments at the Centre, the present tax assessment administration is set apart as awkward, convoluted and hostile. It is in this viewpoint, the Central government has depended on Dr. Vijay Kelkar, Chairman of thirteenth Finance Commission to propose a sound, logical and present day however brought together arrangement of tax collection tuned in to created countries frame the base behind the presentation of Goods and Service Tax (GST) in India.In spite of the fact that there are numerous obstacles to be crossed before the usage of GST the Central government repeated its responsibility towards the selection of a 'faultless' GST for the survival of the India's economy notwithstanding expanding international competition resulting to globalization and liberalization. This paper aims at a construed analysis between GST and previous form of indirect tax.

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Introduction

The 115th Constitutional Amendment Bill, 2011 was put before the Parliament by the Finance Minister on 22 March 2011. Article 246 A is sought to be introduced to state that notwithstanding anything contained in article 246 and 254, Parliament and, subject to Clause (2), the Legislature of every state, have power to make laws with respect to Goods and Services Tax imposed by the Union or by that State respectively; Clause 2 makes the parliament have exclusive power to make laws with respect to Goods and Service Tax where the supply of goods, or of services, or both takes place in the course of inter-state trade or commerce. Explanation states that the provisions of this article, shall, in respect of Goods and Services Tax referred to in Clause (5), of Article 279A, take effect from the date recommended by the Goods and Services Tax Council.

Goods and Service Tax (GST) is an indirect tax levied on the supply of goods and services. It is a nation-wide tax seeking to unify several indirect taxes and is based on the principle of "One Nation One Tax".

Article 366(12A) of the Constitution defines Goods and Service Tax as any tax on supply of goods, or services or both except taxes on supply of the alcoholic liquor for human consumption.

Taxes merged under Central GST:

1. Excise duty
2. Custom duty
3. Service tax
4. Central sales tax

Taxes merged under State GST:

1. Octroi and Entry tax
2. Purchase tax
3. Entertainment tax
4. VAT
5. Luxury tax
6. Taxes on lottery

GST rate structure:

1. Essential items including food = 0%

2. Common use items = 5%
3. Standard rate = 12%
4. Maximum Goods and all services standard rate = 18%
5. Luxury items and tobacco = 28%

GST is paid on purchase of goods and services and it is collected from customers on sale of goods and services. GST paid (Input GST) is set off against GST Collected (Output GST).

However, in certain cases GST paid cannot be set off against GST collected. In such cases, GST paid on purchase of goods and services is a cost for the purchaser. Following are the cases where GST paid on purchase of goods and service cannot be set off against GST collected:

1. Food and beverages Expenses
2. Payment for health insurance
3. Payment of Membership Fee of a Club, health and fitness centre
4. Repairs and maintenance of building
5. Purchase of vehicles
6. Free gift to staff
7. Payment for goods and services for personal use.

Following goods and services are exempt from levy of GST:

1. Payment of wages and salaries
2. Supply of services to government or to embassies of other countries.
3. Electricity and water bills
4. Educational services
5. Health services

Legislative provisions and judicial view of basic concepts

Art. 248- Subject to statute relating GST, parliament has power to make laws in respect of matters not enumerated in State list.

Art. 249- Power of parliament to legislate matters referred to in the state list in the national interest. GST is also specifically included among other matter.

Art. 250- Power of parliament to legislate during proclamation of emergency.

Art. 268- Duties on medicinal and toilet preparations levied by the Centre but collected by state would be taken out.

Art.268A- This article gives the Centre, the power to levy service tax. The same would be deleted.

Art. 269- This article provides for levy of tax on consignment of goods, by Union but the taxes shall be assigned to states. Proposal to provide for operation of this article subject to Clause 269A (proposed).

Art. 271- This article gives the Centre, the power to levy surcharge on certain duties and taxes.

Art.286- Power to levy tax on sale of goods outside a state or in the course of import is with the centre. Amendment provides for inclusion of supply of services also along with supply of goods.

Following are the new article that have been introduced and their scope: -

Art. 269A- GST on inter-state supply of goods or services shall be levied and collected by Centre and same shall be apportioned between the Union and States.

Supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-state trade or commerce.

(2) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-trade or commerce.

Art. 270(1A)- GST shall be levied and collected by the Government of India shall also be distributed between the Union and the States.

279A- Constitution of Goods and Services Tax Council.

Art. 366(2A) - "Services" means anything other than goods.

Art. 366(2B) - "State" with reference to articles 246A, 268, 269, 269A and article 279A includes a Union Territory with Legislature.

Art. 366(12) – goods includes all materials, commodities and articles.

Supply of goods and services – GST regime

The Circular also that supplies which are deemed to be sale of goods in terms of Article 366(29A) of the Constitution in the case of specified contracts will be excluded from the purview of services.

The Honourable Supreme Court has called the "dominant nature test" in the case of *Bharat Sanchar Nigam ltd. v. Union of India,*[3] the test requires:

…did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale (of goods) even if the contract could be disintegrated.

Credit mechanism under state GST

Credit relating to exports

3Bharat Sanchar Nigam ltd. *v.* Union of India, 2006 (2) S.T.R. 161 (S.C.), para 43.

The High court in *Sara leathers v. Commercial Tax Officer, Tambaram I Assessment Circle, Chennai*[4], High Court held that the dealer had in fact paid tax at 13.5% which could not be refuted by the seller. In the circumstances, given by the that the sale by the petitioner was zero rated and that petitioner was entitled to the benefit of refund of the input tax paid on the purchase of goods under the stated circumstances, the claim for refund of amount paid in terms of the assessment order had to be granted in to without any adjustment. The question of the seller coming forward before the authority concerned as regards the collection of tax or as to the proof of the passing on of the liability did not arise.

Refund of excess input credit remaining unutilised

The High Court in *K. Sadikali v. Commercial Tax Officer (VAT), Vth Circle, Kozhikode and others*[5], held that the dealer had produced bills with respect to purchases made by him, evidencing payment of input tax and copies of demand drafts evidencing payment of tax to various Forest Depots within the State.

Validity of rule restricting the input tax credit

In the case *Asian Peroxide Limited and another v. State of Andhra Pradesh and another*[6], the petitioner who was engaged in manufacture of cement challenged the amendment to VAT rules denying the input tax credit on purchase of coal, naphtha and natural gas, retrospectively w.e.f. introduction of the VAT Act and rules. In this connection, the court after cognizance of the provisions of VAT Act and Rules issued there under held that rule bringing coal, natural gas and naphtha under negative list is valid and is not excessive and unguided. State is within its power to introduce such a rule. However, the rule cannot be given retrospective operation as there is no valid reason presented by the State for introducing retrospectively.

4Sara leathers *v.* Commercial Tax Officer, Tambaram I Assessment Circle, Chennai, (2010) 30 V.S.T. 581 (Mad).

5K. Sadikali v. Commercial Tax Officer (VAT), Vth Circle, Kozhikode and others, (2010) 28 V.S.T. 82 (Ker).

6Asian Peroxide Limited and another v. State of Andhra Pradesh and another, (2011) 39 V.S.T. 529 (A.P.) HC.

To avail credit on purchase tax, the same must be remitted to Government first

In the case of *Concorde Hi-tech City (P) Limited v. State of Karnataka and another*[7], High court dealing with the issue of payment of tax by purchaser where the purchases are made from unregistered dealer, it was observed that if the goods purchased by a registered dealer from an unregistered dealer are absorbed in the final product sold by such registered dealer, he is entitled to collect sales tax from the ultimate purchaser and is also entitled to the benefit of set-off or deduction to that extent of purchase tax. However, he has to pay the purchase tax within the time prescribed and it is only on such payment, that he would be entitled for deduction thereof from the output tax. The law does not provide for book adjustment of these two taxes. The condition precedent for claiming deduction from the output tax is the payment of input tax on such purchase.

Promissory estoppels on not allowing credit on inputs relating to goods transferred outside state as stock transfer

In the case of *Varun Beverages Ltd. v. State of Haryana and others*[8], a dealer in the state of Haryana challenged the provisions of Haryana State VAT Act which did not allow credit on inputs relating to goods transferred outside state as stock transfer on the ground that white paper issued by the Empowered Committee of the State Finance Ministers prior to issue of VAT had promised credit to the extent of 4% on stock transfers also. It was held that the dealer was not entitled to input-tax credit under the provisions of the existing framework of law. If the contention of the dealer based on declaration in white paper were to be accepted, it would amount to giving a direction to act against the existing law or to enact law giving effect to the declaration. No direction can be issued either to act against the law or to enact the law, even if a promise to make a law has been given in a policy declaration.

7Concorde Hi-tech City (P) Limited v. State of Karnataka and another, (2011) 39 V.S.T. 52 (Kar.).

8Varun Beverages Ltd. v. State of Haryana and others, (2011) 41 V.S.T. 323 (P&H).

In the case of *Indian Oil Corporation Limited v. State of Punjab and another*[9], assesse is engaged in filing and supply of LPG to its customers, procured empty cylinders and availed input tax credit on such cylinders as packing materials or as capital goods. The credit was disputed by the department and held that the item 202 of the List appended to entry 58 of Schedule B to the Act covers all packing material. The entry has been illustrated by examples of the plastic containers, tin containers and the glass containers. LPG cylinders could not be considered as packing material in its hands. However, use of cylinder may be regarded as processing the taxable goods for sale in order to make the gas saleable. Accordingly, LPG cylinders in the hands of IOC and other corporations had to be treated as capital goods and assessable according to the rate of tax as per the provisions of the Act.

Decisions of European Court of Justice on VAT

1. **Admissibility of input deduction or refund on transaction which does not constitute transaction liable to VAT in any member state –** in the case of *The Commissioners of Her Majesty's Revenue and Customs v. RBS Deutschland Holdings GmbH*[10], the court observed that Article 17(3)(a) of the directive must be interpreted as meaning that a Member State cannot refuse to allow a taxable person to deduct input VAT paid on the acquisition of goods in that Member State, where those goods have been used for the purposes of leasing transactions carried out in another Member State, solely on the ground that the output transactions have not given rise to the payment of VAT in the second Member State.
2. **Purchase of car from unregistered dealer without VAT and payment of VAT ableexpenses on such car-** in the case of *Finanzant Burgdorf v. Hans-Georg Fischer*[11], Mr. Fischer who traded as a second-hand car dealer, bought a Bentley motor car from a private individual. He was therefore unable to deduct VAT from the purchase price. Mr. Fischer incurred expenses on repair of the said car and paid VAT on such repair works. In 1990 Mr. Fischer ceased his business and took

9 Indian Oil Corporation Limited v. State of Punjab and another, (2009) 24 V.S.T. 220 (P&H).

10 The Commissioners of Her Majesty's Revenue and Customs v. RBS Deutschland Holdings GmbH, In Case C 277/09.

11 Finanzant Burgdorf v. Hans-Georg Fischer, In Cases C-322/99 and 323/99.

the entire vehicle including the Bentley to the private assets.The court observed that it would run counter to the objective of equal treatment pursued by Art. 5(6) of the sixth directive if that provision is to be interpreted as meaning that, where goods are allocated for the private purposes of the taxable person, the goods and the parts which have been incorporated in them were to be taxed as a whole, even though no input VAT was deductible when the goods were initially acquired and only the input VAT on the Component parts acquired after purchase was deductible.

Adjudication

Adjudication is a method of dispute resolution wherein an adequately qualified person is appointed by a competent authority for the purpose of rendering a judgment/decision after having taken cognisance of the various facts and circumstances surrounding a particular case vis-à-vis the existing law. These decisions are usually binding on the parties.

The term 'adjudicating authority' has been defined under section 2(a) of the Central Excise Act, 1944 and Sec 2(1) of the Customs Act, 1962 to mean any authority competent to pass any order or decision under the Act, excluding the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, Commissioner of Central Excise (Appeals) or Appellate Tribunal by the Excise and Customs Acts. Therefore, appellate authorities are not adjudicating authorities nor are the CBEC.

Power of adjudication

Sections 11A, 73 and 28 of the Central Excise Act, 1944; Finance Act, 1994 and Customs Act, 1962 respectively stipulate the provisions regarding recovery of tax dues owed to the Government from the assesses. In terms of the central excise law relating to confiscation and penalty, section 33 gives the power of adjudication and Section 33A of the procedure for adjudication. Giving a hearing if the party desires and not giving more than 3 adjournments is part of Section 33A today. Corresponding provisions of Customs Act relating to confiscation and penalty is found in Section 122 and 122A.

Whether adjudicating authority is a quasi-judicial authority

From the provisions contained in Section 11A of Central Excise Act, 1944 as well as Section 73 of Finance Act, 1994 and Section 28 of the Customs Act, 1962, it is apparent that the

entire proceedings relating to demand of duties and taxes is in the nature of 'quasi-judicial proceedings'. It is relevant to note that there is no express provision declaring that 'adjudication proceedings' are quasi-judicial proceedings.

Hon'ble Supreme Court in *Orient Paper Mills Ltd v. Union of India*[12], has categorically held that adjudication, appeal and revision are quasi-judicial proceedings and the same would get vitiated if administrative considerations, namely departmental clarifications and Board Rulings influence the quasi-judicial authority.

In this context, it is relevant to note that Hon'ble Supreme Court in *Asst. Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd.*[13], held that the assessment of a tax on a person or property is of a quasi-judicial character, therefore, the rules of natural justice have to be followed and assessment is a quasi-judicial process involving due application of mind to the facts as well as to the requirements of law.

Principles for issuing show cause notice

The indirect tax legislations in Section 11A of the Central Excise Act, 1944, Section 73 of the Finance Act, 1994 and Section 28 of the Customs Act, 1962 make it mandatory to issue sow cause notices before adjudicating a matter. Therefore, it would be relevant to notice a few principles in that regard.

Whether an adjudicating authority could take decisions contrary to decided case laws of courts or Tribunal

Black's Law Dictionary defines 'precedent' as a 'rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding with similar cases.

The Doctrine of stare decisis which has its origin in the Latin maxim stare decisis et non quieta movere which means 'to stand by decisions and not disturb the undisturbed' implies that courts must generally abide by the established precedents of higher courts while deciding matters of a similar nature.

12 Orient Paper Mills Ltd v. Union of India, (1978) 2 E.L.T. J345 (S.C.).

13 Asst. Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd., (1978) 2 E.L.T. J416 (S.C.).

It must be noted that this principle does not apply to the Supreme Court itself especially when there are changing times as held by a seven Bench decision of the Supreme Court in *State of Gujarat v. Mirzapur Moti Qureshi*[14]. In this case, the Supreme Court departed from its earlier judgement which had held the field for long and held that cows which are no more productive also deserve a life and therefore total ban or prohibition on their slaughter is valid.

In the case of *Union of India v. Kamalakshi Finance Corporation Ltd*[15]it was held that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesses and chaos in administration of tax laws.

Whether adjudication orders can be challenged in writ courts?

It must be understood that adjudication orders cannot be challenged normally if the authority has the powers to pass such orders and there is adequate and efficacious alternate remedy under the statute. The Supreme Court in *M.S. Venkitanarayana Iyer v. Collector of C. Ex., Madras*[16], wherein it was held that the validity of an order made by a quasi-judicial authority under a statute which was intra vires and in the undoubted exercise of its jurisdiction cannot be questioned by a petition under Article 32 of Constitution of India.

However, where the order of the adjudicating authority has acted without jurisdiction or in gross violation of principles of natural justice, a writ remedy can be invoked as held by a three-member Bench of the Supreme Court in *CCE v. Sanawarmal Purohit*[17]. It must be understood that alternate remedy is a rule of convenience and not a rule of law.

Appeals

14State of Gujarat v. Mirzapur Moti Qureshi, A.I.R. 2006 S.C. 212.

15Union of India v. Kamalakshi Finance Corporation Ltd, (1991) 55 E.L.T. 433 (S.C.).

16M.S. Venkitanarayana Iyer v. Collector of C. Ex., Madras, (1999) 110 E.L.T. 208 (SC).

17CCE v. Sanawarmal Purohit, (1979) 4 E.L.T. J613 (S.C.).

Black law dictionary- Appeal means to resort to a superior court to review the decision of an inferior court or administrative agency.

Westbury C, in *AG v. Sillem*[18]stated that 'appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.

In the context of tax laws in India, the right to appeal is not automatic as the appeal mechanism is specifically built into the statute.

Right of appeal is not affected by repeal of old statute

Where a right of appeal accrues to a claimant under an earlier statute, hereinafter called the 'Old Act', on the institution of a claim application with the Tribunal after the repeal of the 'Old Act' by the 'New Act', the question was whether the said right of appeal under 'Old Act' gets affected by the repeal of 'Old Act' by the 'New Act'.

Who can file appeal?

The provisions relating to appeal under customs, Central Excise and Service Tax provide that 'any person aggrieved' by the decision or order passed by the adjudicating authority can file an appeal. Hence, only a 'person aggrieved' can file an appeal under indirect tax laws.

Conditions for filing an appeal

There may also arise cases where the right to appeal is conditioned, i.e., the right could be exercised only upon the appellant fulfilling certain prescribed conditions, e.g., on the payment of pre-deposit. The Appellate Authority can enforce such conditions even though no express right is vested with such authority in this regard.

In *Nand Lal & Anr. V. State of Haryana*[19], it was held that it was well settled by several precedents issued by the Supreme Court that the right of appeal is a creature of statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusionary. The challenge to section

18AG v. Sillem, 10 H.L.C. 704.

19Nand Lal & Anr. V. State of Haryana, A.I.R. 1980 S.C. 2097.

18(7) of the Haryana Ceiling on Land Holdings Act, 1972 was held must, therefore, fail. In this case, therefore, having regard to the quantum, it was held to be reasonable.

Condonation of delay in filing of appeal

Limitation for filing an appeal is essential for the administration of appellate proceedings. The law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings should be instituted for enforcement of rights which exist under substantive law of filing the appeal. On expiry of the period of limitation, the right to sue/appeal comes to an end and where a provision has been made for condonation of delay in filing of appeal, the courts, tribunals and authorities can condone the delay and admit the appeals.

Both the High Court and Supreme Court can condone delays without time limit in relation to such appeals. It should be noted that delay would be condoned if the party is able to show sufficient cause.

The decision of the Supreme Court in *CCE v. MM Rubber*[20], that appeals to Tribunal by the Board under section 35E of the Central Excises and Salt Act, 1944 should be done within 3 months of the date of the order and not its receipt would not apply to the recast section 35E which now specifically talks of receipt of order. Also the new procedure has a committee of commissioners constituted.

Appeal to the Supreme Court

Under Section 35L/130E of Excise and Customs legislation respectively, appeals can be filed against orders from the High Court and against Tribunal orders on issues relating to rate of duty or valuation matters.

Interest on refund

The term "interest" is a familiar term in law which is charged when there is delay in payment of taxes. The imposition of interest is prescribed in the statute.

20CCE v. MM Rubber, (1991) (55) E.L.T. 289 (S.C.).

In the case of *Jai Bhagwati Impex Pvt. Ltd. v UOI*[21], in the context of the petitioner who was a commercial establishment, the Bombay High Court held that the petitioner was deprived of its liquidity in trade, commerce and business. Such deprivation was bound to cause substantial prejudice to it. The Petitioner, therefore, was justified in claiming interest for delayed payments.

Grant of interest under writ jurisdiction

In the case of *Lalit Bhalchand Ravani v. UOI*[22], in the context of writ jurisdiction, it was held that when the refund is granted in exercise of powers under Article 226 of the Constitution of India, the order directing refund of amount with interest shall be in exercise of same powers. Hence, the High Court held that the submissions advanced by the learned Counsel for the petitioner to persuade us not to award interest for want of provision under the Act is misplaced and needs no consideration since the relief is being moulded and granted in exercise of our writ jurisdiction keeping in view that the interim relief was in the aid of final relief and refund was subject to the result of this petition.

Rate of interest on refunds

Presently, the rate of interest on refunds is 6%. When it was introduced on 29-05-1995, it was 15%. It was reduced to 9% on 11-05-2001, 8% on 13-05-2002 and 6% on 12-09-2003. It may be noted that interest on demands which was 13% was hiked to 18% in 2011. Therefore, government money gets 18% at the minimum while assessees' money gets 6%. In the context of the inflationary tendency now in vogue, it would be appropriate to have the interest on refunds at the same rate as that of demands. As much as the government discourages the industry from holding back money due to it, the same should be reciprocated by the government also.

Conclusion

21 Jai Bhagwati Impex Pvt. Ltd. v UOI, (2009) 13 S.T.R. 24 (Bom).

22 Lalit Bhalchand Ravani v. UOI, (2004) 177 E.L.T. 87 (Bom).

Indirect taxes, forming a major part of Government's Revenue, have always been in lime light. It has evolved to a complex structure and now is moving ahead to a GST regime. From the discussion it was concluded that the pre GST period resulted in chaos and gave birth to an unsystematic form of tax system. Various source such news articles and daily news updates in the past have shown how the previous tax system was inefficient and resulted in huge corruptions and scams. GST was introduced to curb all that out. It was taken from the European VAT system which has showed its efficiency back on the European Nations. GST though has caused trouble to the citizens of India like rise in prices of goods but if we can see the bigger picture GST is actually a solution to evasion of tax. Since only one platform has been set between the Government and the tax payer so the chances of scam are also low.

So last but not the least the concept of taxation is a wide concept and one can go on and on with the same for an indefinite period of time. The Concept of GST is a boon for the country and the long term benefit of it should be seen without questioning the present scenario.