



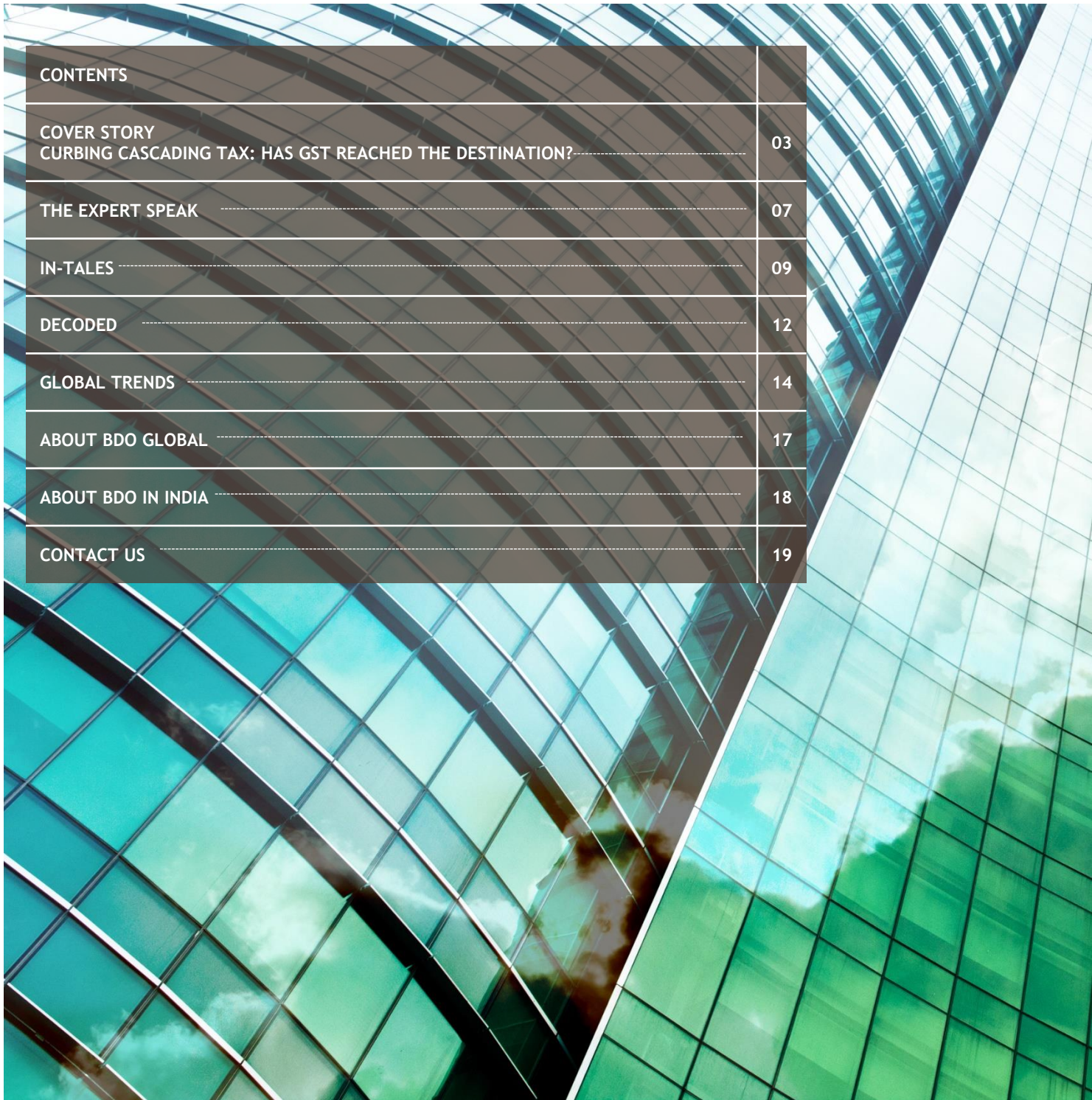
The **TAX** POST

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PREFACE

Ever since the introduction of GST, the revenue mop-up has shown a major spurt in the current financial year. Due to an increase in domestic demand and better tax compliance, the GST collection has recorded a 29% rise (INR 10.4tn) in the first seven months of the current fiscal, compared to the same period last year (INR 8.1tn).

Interestingly, there have been reports¹ that the Government is proposing to decriminalise the GST law and this proposal may be taken up in the next GST Council meeting. Once approved by the GST Council, the Finance Ministry may propose amendments to the GST law in the upcoming winter session of Parliament. Another interesting news² is the plan to introduce a dispute settlement scheme to offer a one-time opportunity to settle minor GST offences. These are a step in the right direction and will instill confidence in honest taxpayers.

Indian GST adopts the broad principles enshrined in global VAT, which was first introduced in European countries. A moot question that springs up often is: What are the key policy interventions and critical shifts that may be needed to transform GST to tax 'neutral' for businesses - one of the stated objectives of the reform? Every rupee of input tax turning 'cost', inevitably leads to 'tax cascading' and inflation. The Cover Story of this edition of 'The Tax Post' delves deep into some of the critical causes which continue to induce 'tax cascading'.

Despite enormous efforts to ideate, deliberate, formulate and implement GST, litigations under the new legislation are looming large. 'The Expert Speak' of the edition discusses the trend of litigations under the GST law so far and touches upon the root cause of mushrooming litigations. In one such litigation on the taxability of Online Gaming, a notice has been served on a taxpayer demanding GST of INR 210bn making it one of the most high-profile cases under the GST regime. The issues relating to the taxing of Online Games are discussed in detail in the section 'In Tales'.

'Decoded' bisects a recent Bombay High Court ruling, in which it is held that levy of interest and penalty is not feasible on demand for Countervailing Duty (CVD) and Special Additional Duty (SAD) payable on imports, in the absence of substantive provisions in the Customs Tariff Act. This is an important decision in favour of the taxpayer and likely to have major ramifications for the taxpayer. While this decision may not be the final word, we touch upon various aspects in this judgment. Our regular feature 'Global Trends' continues to bring news from other jurisdictions.

We trust this edition of 'The Tax Post' also would be an interesting read.



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¹ <https://economictimes.indiatimes.com/news/economy/policy/govt-may-remove-penal-offences-covered-under-ipc-from-gst-law/articleshow/95638119.cms>

² <https://economictimes.indiatimes.com/news/economy/policy/one-time-offer-to-settle-minor-gst-offences-in-works/articleshow/94951015.cms>

COVER STORY

CURBING CASCADING TAX: HAS GST REACHED THE DESTINATION?

It is said that one cannot change the direction of the wind but can adjust the sails to reach the destination; this leaves us with a probing introspection. Have we made adequate and timely policy interventions to reach the avowed objective of phasing-out cascading effect of taxation? The turbulent history of Indian indirect taxes indicates that there are last miles before we reach the cherished dream.

Kautilya's Arthashastra³, which according to some historians may have been written around 2000 years ago, refers to various forms of tax, both in cash and kind, viz. Customs Duty (sulka) consists of Import duty (pravesya), Export duty (nishkramya), Gate tolls (dwarabahirikadeya), Transaction Tax (vyaji), Share of production (bhaga), Tax (kara) in cash, Tax in kind (pratikara), Countervailing taxes (vaidharana), Road cess (vartani), Taxes paid in kind by villages (pindakara), etc. Modern indirect taxes trace their origin to Excise on tea and tobacco to the more widely applied turnover taxes of the 20th century. The modern equivalent is the Value-Added Tax (VAT) which in its different embodiments takes the form of the 'Good & Services Tax' (GST) in India. Indian GST also adopts the broad principles enshrined in the global VAT concept, which was first introduced in European Countries in the middle of the 20th Century.

VAT/GST - How does it work?

Whenever we, as consumers buy something in a store, we can see the GST added to the sales price on the bill. However, GST is not levied only on sales to final consumers alone, it is applied to all preceding transactions in the supply chain between businesses, reminiscent of a turnover tax. Without adjustment of the tax on the input side, this would cause cascading of taxes (payment of tax on tax), which creates major economic distortions. To avoid this, GST uses a crediting mechanism, whereby businesses have the right to the credit of GST paid on their business inputs against the GST collected on their sales (output GST). GST thus sticks only with the final consumers.

Consider an 18% GST and the example of the local grocery store selling toilet soap at a price of INR 100, inclusive of GST. The price net of GST is INR 85 and the grocery store charges INR 15 towards GST. The store might have bought the Soap from a factory at, say, a net price of INR 75. It then pays INR 88.50 to the factory, including INR 13.50 as GST. When the store remits the GST collected from the consumer to the local tax authority, it can use the INR 13.50 input GST as shown in its purchase invoice as a credit. This leaves the store with an obligation to remit only INR 1.50 to the tax authority. The factory will, in turn, remit INR 13.50 as GST.



³ 'Kautilya, The Arthashastra' by Penguin Classics (ISBN 978-0-140-44603-6)

This principle of charging and crediting stretches along the entire supply chain. Ultimately, the Government receives INR 15 from the Soap sale, but a small portion of this amount is remitted sequentially at each stage of the supply chain. All businesses (be it resellers or manufacturers) thus act as collection agents for the Government.

While this may seem slightly cumbersome but collecting tax along the supply chain is the key attraction of the GST - it fosters voluntary compliance as each business has the incentive to receive an invoice from a seller so that it can claim the GST credit on its purchases. This built-in self-enforcement mechanism reduces the risk of tax evasion.

GST is imposed on a destination basis, that is, where the consumer resides. This is done by using a border adjustment mechanism that includes imports but excludes exports from the GST base (by applying a zero rate on export sales). This ensures that all domestic consumption is taxed, regardless of whether goods and services are purchased in the domestic market or abroad. The GST credit-invoice mechanism however creates a need for tax administrations to provide refunds, especially to exporting businesses, which may have significant accumulated input tax credits. These refunds are often difficult to manage especially the processes that precede the eventual grant of refund and the impending delay. However, not paying them can create cash flow problems for businesses and deter investment.

Ideal design of GST:

The ideal GST system has a broad base comprised of final consumption and a single uniform rate of tax across the country, usually, the 'Revenue Neutral Rate' (RNR) arrived at by adopting the tax revenue generated or projected to be generated in the base year, which was around 12% when GST was proposed to be rolled-out in India. This would mean that consumers would not shift consumption to a lightly taxed geography. The only distortion is between goods and services purchased on the formal market and informal home-produced goods and services. Yet there is little that a redesign of VAT can do to mitigate this.

Objectives other than raising revenue are ill-served by GST concessions. For example, seeking to support poor households by exempting food from GST can cause a significant revenue fall. After all, the rich also purchase food - possibly much more of it. The poor could be supported more efficiently by a combination of progressive income tax or direct benefit transfers.

However, most VAT/GST is far from the textbook design. Countries often employ a variety of reduced rates, exemptions and special programs. Some are intended to make it simpler to administer the tax. For example, many countries use a minimum registration threshold based on turnover to exempt micro-businesses from VAT/GST and its associated cost of compliance and administration. Most exemptions and reduced rates are adopted to improve the distributional impact of VAT/GST, but they undermine the core objective of raising revenue or moderate tax rate, both directly and indirectly by increasing the cost of

collection and often facilitating fraud. Reforms to eliminate these concessions have often met with fierce resistance.

Challenges:

Countries, including India, have on the whole coped well with emerging VAT/GST challenges. For instance, to deal with growing cross-border e-commerce, simplified GST registration processes have been introduced for non-resident suppliers. To tax the supply of digital services, online platforms have become GST/VAT collectors. New digital technologies may also bring opportunities.

For example, blockchain and digital money, may in the future provide the tax administrations with information about transactions along the full supply chain, so that multistage GST may no longer be needed. And if these transactions can be linked to information about individuals, consumption taxes could be personalised and compete with personal income tax as an efficient redistributive instrument. Overall, VAT/GST has withstood globalisation and its revenue share has risen in recent decades. Whether in the current or revised form, VAT/GST's future as an important revenue-raising instrument is assured.

Thus, some common core features of an ideal VAT/GST design can be summarised as under:

- VAT/GST is a tax on consumption paid, ultimately, by final consumers and collected by businesses.
- The tax is levied on a broad basis, as opposed to Excise duties paid only by manufacturers
- Businesses should not bear the burden of the VAT/GST itself and so there are mechanisms for refund or credit of the tax levied on transactions between businesses
- The tax collection is in a staged process with successive businesses entitled to deduct input tax on purchases and account for output tax on sales. Thus, each business in the supply chain remits tax corresponding to its value addition.
- The application of VAT to international trade is based on the destination principle. This means that exports are free of VAT/GST and imports are taxed at the same rate as local production.

These features give VAT/GST one of its main characteristics, that of 'Neutrality'. The full right to deduct input tax through the supply chain, except by the final consumer, ensures the neutrality of the tax, whatever the nature of the product, the structure of the distribution chain and the technical means used for its delivery (retail stores, physical delivery, Internet). VAT/GST is neutral in international trade since it is normally destination based. This means, that exports are free of VAT/GST and imports are taxed on the same basis and at the same rate as domestic supplies. Most of the rules currently in place aim therefore at taxing supplies of goods, services and intangibles within the jurisdiction where consumption takes place. Practical means of implementing this are, nevertheless, diverse across countries, which in some instances lead to double taxation or unintended non-taxation and uncertainties for both businesses and tax administrations.

India GST:

Before the introduction of GST in India, it was stated⁴:

“Any commodity, in general, is produced on the basis of physical inputs as well as services, and there should be integration of VAT on goods with tax on services at the State level as well, and at the same time there should also be removal of cascading effect of service tax. *In the GST, both the cascading effects of CENVAT and service tax are removed with set-off, and a continuous chain of set-off from the original producer’s point and service provider’s point up to the retailer’s level is established which reduces the burden of all cascading effects. This is the essence of GST, and this is why GST is not simply VAT plus service tax but an improvement over the previous system of VAT and disjointed service tax.*

However, for GST to be introduced at the State level, it is essential that the States should be given the power to levy taxation on all services. This power to levy service taxes has so long been only at the Centre level. A Constitutional Amendment will be made for giving this power also to the States.”

The moot question now is: what are the key policy interventions and critical shifts that may be needed to transform GST into tax ‘neutral’ for businesses, which is one of the stated objectives of this pathbreaking reform? Every rupee of input GST turning to be a ‘cost’ in the hands of the business, inevitably lead to tax cascading and exert inflationary pressure. Every exemption or exclusion from the GST regime (e.g., Power, Petroleum products, etc.) adds to the erosion of the tax base and input tax cost.

While the GST legislation has addressed many of the critical concerns, the following continue to run counter to the spirit of GST and the principle of neutrality of tax:

- **Blocked credits:** In terms of Section 17(5) of the CGST Act, input tax credit on many business expenditures is restricted. The restrictions at the time of the introduction of GST in July 2017 were as follows:
 - Motor vehicles and conveyances, except where they are used for specified purposes
 - Food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, except where they are used for specified purposes
 - Membership of a club, health and fitness centres
 - Rent-a-cab, life insurance and health insurance, except where it is a legal obligatory for the employer
 - Works contract services when supplied for construction of an immovable property (other than plant and machinery), except where it is an input service for further supply of works contract service
 - Goods and services received for construction of an immovable property (other than plant and machinery) on his own account, including when such goods or services are used in the course or furtherance of business
 - Goods or services received by a non-resident taxable person, except goods imported by him

- Goods lost, stolen, destroyed and written off
- Tax paid under Sections 74, 129 and 130 of the CGST Act.

Over a period of time, the aforesaid restrictions have been expanded to inter alia include the following:

- Services of general insurance, servicing, repairs and maintenance in respect of motor vehicles (having a seating capacity of up to 13 persons), vessels and aircraft, except when such services are used for specified purposes
- Leasing, renting or hiring of motor vehicles, vessels or aircraft, except when the services are used for specified purposes or for making outward supply of the same category or as an element of composite or mixed supply
- Life insurance or health insurance, except when such services are used for making outward supply of the same category or as an element of composite or mixed supply

The constitutional validity of Section 17(5)(c) and Section 17(5)(d) of the CGST Act have been challenged before various High Courts inter alia including in the case of **Safari Retreats Pvt. Ltd. [2019 (5) TMI 1278 - Orissa High Court]** (currently pending before the Honourable Supreme Court), **Bharti Airtel Ltd. [2020 (10) TMI 371 - Delhi High Court]**.

- **Ineligibility to input tax credit on Lower GST slabs:** The rate notification specifying the lower rate of GST is subject to the restriction of input tax credits. In such a scenario, ITC is artificially restricted by way of a notification despite its eligibility under the legislative scheme of the CGST Act. Examples of such supplies include the supply of residential apartments, restaurant services, outdoor catering, transportation of passengers (subject to certain exceptions), transportation of goods (subject to certain exceptions), tour operator services, etc.

While certain supplies (such as GTA, transportation of passengers, etc.) highlighted above also provide an option to allow ITC on payment of a higher GST rate, the same is not available for all classes of supplies. In the context of restaurant services, the aforesaid argument is a subject matter dispute before the Honourable Gujarat High Court in **Hardcastle Restaurants Pvt. Ltd. [2019 (11) TMI 888 - Gujarat High Court]**.

- **The onerous burden for availing of input tax credit:** Under Section 16 of the CGST Act, 2017 imposes various conditions on the recipient to claim an input tax credit, some of which are:
 - The supplier has furnished Form GSTR-1 (indicating the details of supplies made to the recipient) and has also made payment of tax to the Government in respect of such supplies, on which the recipient has no say
 - Details of such supplies are communicated in Form GSTR-2B and such supplies have not been classified as ineligible procurements.

The aforesaid restriction results in a scenario where despite the fact that a recipient has duly paid GST to its

⁴ First Discussion Paper on Goods and Services Tax In India by The Empowered Committee Of State Finance Ministers 10 November 2009

suppliers, such recipient has been vicariously held liable for the defaults of its suppliers. The validity of aforesaid condition(s) is a subject matter of litigation before various High Courts inter alia including in the case of **Unifab Engineering [2021 (11) TMI 646 - Bombay High Court]**, **Sahil Enterprises [2021 (9) TMI 826 - Tripura High Court]** and **Aniruddha Banerjee [2021 (8) TMI 1010 - Calcutta High Court]**.

- **Ineligibility of input tax credit on procurements used for making non-GST supplies:** Since certain petroleum products, power and alcoholic liquor for human consumption are outside the purview of GST, they are referred to as 'Non-GST supplies'. Procurement of goods or services used in making Non-GST supplies is not available to the recipient.

While the track record of the last few years derives immense satisfaction for all stakeholders in this momentous journey, the need of the hour is to transform the Indian GST system into a world-class model for the levy of tax on Goods & Services. Our model of levy of GST on inter-state supply has evoked interest in many jurisdictions. The journey thus far has been bumpy but resolute and firm. It is said that 'man cannot discover new oceans unless he has the courage to lose sight of the shore'



THE EXPERT SPEAK



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THE LITIGATION LANDSCAPE UNDER GST

A famous quote of Abraham Lincoln reads “Discourage litigation! Persuade your neighbours to compromise wherever you can”. The pertinence thus would centre around your persuasive skills to convince the neighbour or the degree of the propensity of the parties to resort to the litigation route, more out of desperation rather than a reason. The principle remains relevant not just in civil suits involving individuals but in tax litigations too.

GST implementation envisioned the unification of mushrooming and countless indirect tax levies and ushering in ‘Good and Simple Tax’ for the citizens, as well as containment of burdensome compliance challenges on taxpayers. The aim was to simplify the tax structure, facilitate the free flow of goods and services across the country and promote transparency through a robust IT infrastructure thereby converging the ‘informal’ economy operating in the country into formal.

After half a decade of implementation of the pathbreaking reform, despite enormous efforts to ideate, deliberate, formulate and implement GST, it appears that litigations under this new legislation loom large. Before one dwells into the specifics, it is worth mentioning that even when the new regime was rolled-out, the taxation horizon was represented by burgeoning tax controversies and the indirect tax laws were no exception. It was reported⁵ that there were over 16,000 Show Cause Notices (SCNs) pending for adjudication under Central Excise and Customs involving INR 630bn. Further, there are nearly 200,000 SCNs involving INR 1,140bn, pending under Service Tax law. While the numbers are overwhelming, it reminds us of the challenges faced by tax authorities as well as the taxpayers in concluding disputes, especially considering the fact that these issues pertain to the past periods and the individuals handling the matter may not be manning the position which may have fallen vacant on account of transfer, separation, etc. leading to unwarranted effort and duplication.

Despite this, it is not all doom and gloom as far as litigations of legacy laws. As per a written reply submitted in 2019 by Mr. Anurag Thakur (then Minister of State for Finance) to a question in the Rajya Sabha, the total pendency of appeals at the Supreme Court, High Court and

CESTAT (Customs Excise and Service Tax Appellate Tribunal) as on 30 June 2017, was 273,591 and it has significantly come down to 105,756 as on 31 March 2019, a reduction of 61%⁶!. While this may seem slow compared with certain overseas jurisdictions, considerable momentum has been achieved in the disposals of cases by courts/tribunals.

Due credit must go to the Government, which has taken measures to mitigate avoidable litigations. One such mitigation measure has been the ‘Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019’ which was introduced with an avowed objective of providing a one-time measure to liquidate past disputes under Central Excise and Service Tax laws, as well as to offer an opportunity of voluntary disclosure to non-compliant taxpayers.

Inevitably, any new legislation gives rise to fresh interpretational issues between the tax authorities and the taxpayers. GST is at its nascent stage with just five years since its introduction and is bound to bring in complexities on account of interpretations. Adoption of many statutory provisions in GST law from legacy laws has compounded the malady, especially when some of them are already under challenge before the Courts. Considering that these have been borrowed from legacy tax laws, it is expected that the interpretations under legacy laws continue to exert persuasive value even under the new regime. For example, the extremely debated issue of payment of Service Tax under Reverse Charge Mechanism (RCM) by an importer on ocean freight. This issue continued to exist under the GST regime as well, which the Supreme Court held to be ultra vires the CGST Act.

Apart from the legacy issues, GST has also brought with it fresh litigations revolving around interpretations and constitutional validity having financial implications of gigantic proportions. One such matter is the taxability of Online Gaming transactions and one such matter is being heard by the Karnataka High Court now. The fact that the SCN has been issued demanding INR 210bn has made it one of the most high-profile cases under the GST regime, already. The implications seem to be disproportionate, especially considering that the Online Gaming industry itself is slowly evolving in India and the matter was already ceased-off by the GST Council for a decision on the taxability of such transactions.

Apart from interpretational issues, the frequent amendments in the GST Act, Rules and Notifications have not made the transition too easy for the taxpayers, especially the smaller and medium enterprises who lack the resources to track and keep themselves abreast with the frequently changing laws. This coupled with the dearth of

⁵ Source: <https://www.cnbcvt18.com/finance/tax-legacy-tax-dispute-india-wants-to-end-rs-2-lakh-crore-sets-up-new-commission-14928511.htm>

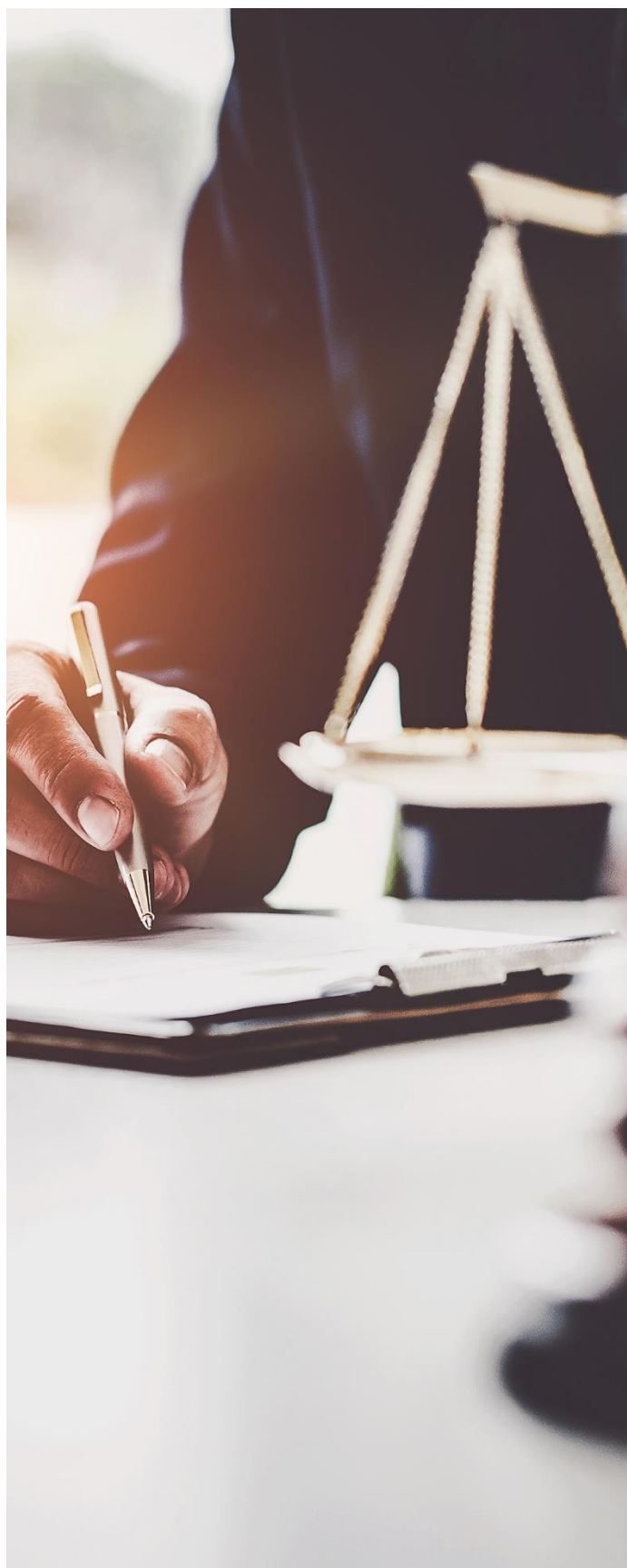
⁶ Source: <https://timesofindia.indiatimes.com/business/india-business/pendency-of-indirect-tax-appeal-cases-down-61-pc-in-2-years-mos-finance/articleshow/70345730.cms>

awareness at the field formation is a perfect recipe for escalating controversies and litigations. A few practical situations which are common across the industry are:

- Notices for reconciliation of ITC availed in Form GSTR-3B with Form GSTR-2A
- Notices for belated GST returns despite the issue of notifications waiving a late fee
- Notice seeking filing of GSTR-9/9C though it is not applicable for the taxpayer
- Notices directing taxpayers to file GSTR-9/9C despite the same being filed in, timely
- Notices to cancel registrations or freezing bank accounts for minor non-compliances
- Transport vehicles being stopped despite the submission of valid documents
- Routine denial of refunds

In addition, there have been instances where tax authorities have initiated assessments/adjudication by requisitioning a host of documents/information from the taxpayer but not concluding the process, leaving the necessity to 'reinvent the wheel' in these days of high attritions, transfers, rotations and other disruptions. Where the assessments have been concluded by the adjudicating officer and/or the first appellate authorities, the taxpayer is unable to approach the tribunal to resolve their grievance, leaving them in an unjustified situation with no avail but to approach the High Courts. The inefficient and revenue-centric approach of the Advance Ruling mechanism has failed to live up to the promise.

While there may be several pain points, it cannot be denied that the CBIC in consultation with the GST Council is taking initiatives to contain unwarranted litigations to curb confusion and create an environment of healthy compliance. Periodic and frequent circulars issued to clarify contentious issues have certainly instilled confidence in the taxpayer community, such as the recent circular on the taxability of liquidated damages, notice pay, etc. which was haunting the taxpayer since the inception of GST. These measures will take a long way in restoring the confidence of the taxpayers and give more credence to the GST Council's role and continue to channelise its efforts to restrict tax disputes, bring clarity and promote ease of compliance for the taxpayers.



IN-TALES

ONLINE GAMING - A GAME OF 'THORNS'

Global Outlook

The global digital media market has been consistently growing with Online Gaming (OG) accounting for the biggest share of market revenues. The global OG market was valued at USD 137.9bn in 2019 and is expected to reach a market value of USD 450.8bn by 2029 with an anticipated increase at CAGR of 10.7%⁷. The three most common platforms for OG are Computers, Game consoles and Mobile devices.

The OG market has grown quickly in recent years due to the expanding population, rising disposable incomes, increased smartphone penetration and technological advancements including internet penetration and connection speeds. The Covid-19-induced lockdowns also played a huge role in the growth of the gaming sector. The increased smartphone penetration is evidenced by the global market size of online smartphone and tablet games which was valued at USD 30.49bn in 2019 and is projected to grow at a CAGR of 21.8% to USD 149.93bn by 2027.⁸

The OG Market in India:

With the growth of the global OG industry, India is on its way to becoming one of the world's leading markets in the gaming industry. Growing steadily for the last five years, it is expected to treble in value and reach USD 3.9bn by 2025⁹. India's percentage of new payers in gaming has been the fastest growing in the world for two consecutive years, at 40% (in 2020) and 50% (in 2021)¹⁰.

The growth in popularity of OGs can be attributed to a rise in the number of smartphone users and easy and cheap internet accessibility. Currently, India ranks second after China in the total number of online gamers and houses approximately 420mn online gamers. Further, there are more than 400 gaming companies in India¹¹. By 2025, it is estimated that 94% of gamers in India's casual gaming market will use smartphones¹².

Revenue Models¹³

OG companies follow different revenue models, depending on their market positioning. Certain OG companies combine two or more of the following revenue models to widen their earning opportunities:

Free Games

- **Completely free for users** - User does not have to pay anything to download and play games. The developer may earn revenue from in-game advertising.

- **Freemium** - Users can download the game and play for free but subsequently are required to pay to unlock more levels or for upgrades provided within the game.
- **Shareware** - Users can download and play the free or the trial mode of the game and the entire version of the game is available only on a payment basis.

Paid Games

- **Upfront payment model** - The user is required to make a one-time payment for downloading the game, post which, no further payments are required from the user.
- **Subscription model** - The user is charged a recurring fee, usually on a monthly basis. This model is not common for mobile gaming and is more frequently used for Massively Multiplayer Online Games (i.e., online video games involving a large number of players, on the same servers).

- **Platform-fee based games:** The gaming platform/application facilitating the games charges platform fees (i.e., Rake fees) from the users. Examples of such games include Fantasy sports, Teen Patti, Rummy, etc. Such games can further be categorised based on the involvement of real money as prize winnings as follows:

- **Prize winnings in real money:** Here, the players also place bets in the form of real money and the amounts collected from various players are pooled together. The amounts so collected are commonly referred to as stake value. Subsequently, the entire stake value is distributed to the winners.
- **Recreational games without any prize winnings:** Here, the users are not required to place bets in real money terms. In the absence of stake value, such games are non-monetary in nature, and hence, the question of distribution of stake value (in real money) to the winners would not arise.

Regulation of the OG industry in India

There is no specific legislative framework for regulating the OG industry. However, games involving monetary stakes (stake-values) which are in the nature of 'Betting' and 'Gambling' are covered under List II to Seventh Schedule of the Constitution of India (State List). Thus, betting and gambling games are regulated by State Governments.

7 <https://www.globenewswire.com/news-release/2022/10/27/2542542/0/en/Online-Gaming-Market-Size-2021-2029-to-Reach-USD-450-8-Billion-and-Exhibit-a-CAGR-of-10-7-Industry-Trends-Mergers-Acquisitions-Challenges-and-Future-Growth-Opportunities-Adroit-Mar.html>

8 <https://www.alliedmarketresearch.com/online-smartphone-and-tablet-games-market>

9 <https://economictimes.indiatimes.com/news/international/business/big-bang-growth-of-indias-gaming-industry/articleshow/92053190.cms?from=mdr>

10 <https://indianexpress.com/article/explained/explained-sci-tech/india-online-gaming-industry-rules-laws-task-force-8197042/>

11 <https://economictimes.indiatimes.com/news/international/business/big-bang-growth-of-indias-gaming-industry/articleshow/92053190.cms?from=mdr>

12 <https://www.forbes.com/sites/zengernews/2021/10/20/one-countrys-online-gaming-business-turns-into-serious-opportunity/?sh=5d6e466b41f4>

13 <https://inc42.com/datalab/decoding-the-revenue-models-in-mobile-gaming-in-india/>

Accordingly, various State governments have enacted legislation for the prevention/regulation of gambling. The legislation enacted by all the State Governments expressly stipulates its non-applicability to a 'game of mere skill'¹⁴.

Thus, a 'game of skill' would not be construed as 'gambling' and hence, the prohibitions/restrictions contained in the respective State legislations would not apply to such games. As regards the 'game of chance' is construed as 'gambling'.

Consequently, the prohibitions/restrictions in the respective State legislations would apply to a 'game of chance'. Since the games facilitated by the OG industry inter alia include games involving monetary stake in real money, one must examine whether such a game is a 'game of skill' or a 'game of chance' and hence, whether such a game is covered under the purview of the term 'gambling'. The principle laid down by the Honourable Supreme Court¹⁵ to determine whether a game is a 'game of skill' or a 'game of chance' is that where the success of competition depends on a substantial degree of exercise of skill and can be considered as a 'game of skill' and hence, outside the purview of 'gambling'.

Applying the aforesaid principle, the Honourable Supreme Court and High Courts have examined various games and determined whether such games are a 'game of skill' or a 'game of chance', some of which are set out below:

- 'Rummy' involves memorising the fall of cards and requires considerable skill in holding and discarding cards and hence, the same is a 'game of skill'¹⁶
- Online poker involves a considerable amount of skill and hence, would be treated as a 'game of skill' and would not amount to gambling¹⁷
- Horse racing is a 'game of skill' and is, therefore, not covered within the purview of the terms 'gaming' or 'gambling'¹⁸
- Playing fantasy sports requires considerable skill, judgment and discretion. Accordingly, the element of 'skill' predominated the outcome of the fantasy game and hence, fantasy games are of 'mere skill' and would not amount to gambling¹⁹

Having examined whether the games facilitated by the OG industry would amount to 'gambling' or not, it is imperative to understand the various challenges faced by the OG industry. The lack of regulatory framework due to the potential for the difference in views of different States is a major challenge faced by the OG industry. Such ambiguity in the regulatory framework poses various challenges to the Investors and the players. It also creates an additional compliance burden on the OG industry.²⁰

In addition to the above, while 'betting and gambling' is covered in the State List, State Governments may find it

difficult to enforce certain rules like geo-blocking apps/websites within a State. Another issue that arises is the regulations of one State would not apply to another. Inconsistencies between various State legislation and effective enforcement of regulations pose a challenge to the OG industry. Stakeholders have also highlighted various societal concerns arising from the proliferation of OGs. The absence of a central-level framework could lead to a lack of player protection, loss of data and intellectual property rights that could lead to misleading advertisements.

In this regard, an Inter-Ministerial Task Force was set up by the Ministry of Electronics and Information Technology (MeitY) to propose contours of national-level legislation for the regulation of OG. The key recommendations of the task force are set out hereunder:

- Enactment of central-level legislation for OG which would apply to real money and recreational/casual games of skill. Casual games with no real money involvement may be kept outside the ambit of such legislation, unless they have a high number of users in India or permit the publication or transmission of information on inappropriate content
- Creation of a regulatory body for the OG industry to determine what constitutes a 'game of skill' or a 'game of chance', and accordingly, certify different gaming formats requiring specific compliance and enforcement
- Constitution of a three-tier dispute resolution mechanism and an oversight committee led by the Government for OG
- An OG platform (domestic or foreign) offering real money online games to Indian users must be a legal entity incorporated under the Indian law and the same would be treated as a 'reporting entity' under the Prevention of Money Laundering Act, 2002
- Department of Sports and MeitY to act as the nodal registry to regulate e-Sports and OG industry (excluding e-Sports), respectively
- The scope of regulation should cover OG i.e., 'game of skill', and the issues of online betting and gambling being a 'game of chance' in nature should be excluded from its scope
- The proposed Digital India Act can include 'game of chance', gambling websites or apps being played online in the list of prohibited items.



14 Illustrative list of such provisions - Section 14 of the Kerala Gambling Act, 1960; Section 13 of the Maharashtra Prevention of Gambling Act, 1887; and Section 13 of Delhi Public Gambling Act, 1955

15 RMD Chamarbaugwala Vs. Union of India [AIR 1957 SC 699]

16 State of Andhra Pradesh Vs. K. Satyanarayana & Ors. [1968 AIR 825 SC]

17 Indian Poker Association & Anr. vs State of West Bengal & Ors (W.P.A. No. 394 of 2019) and Indian Poker Association (IPA) Vs. The State of Karnataka (WP 39167/2013)

18 K.R. Lakshmanan Vs. State of Tamil Nadu [AIR 1996 SC 1153]

19 Varun Gumber Vs. Union Territory of Chandigarh [(2017) CWP No. 7559 (P&H)], Ravindra Singh Chaudhary Vs. Union of India and Ors. [2020 (42) GSTL 195 (Raj.)] and Gurdeep Singh Sachar Vs. Union of India [2019 (30) GSTL 441 (Bom.)]

20 <https://indianexpress.com/article/explained/explained-sci-tech/india-online-gaming-industry-rules-laws-task-force-8197042/>

Key open tax issues relating to the OG industry

While the above challenges continue to haunt the industry, there are tax issues and specifically certain challenges under GST which are enumerated below:

- Value of Supply:
 - Rule 31A(3) of the Central Goods & Services Tax Rules, 2017 (CGST Rules) provides that ‘The value of supply of actionable claim in the form of chance to win in betting, *gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator*’.
 - The validity of the aforesaid provision was challenged before the Honourable Karnataka High Court (Single Member Bench) in Bangalore Turf Club Ltd. Vs. Union of India and Ors. [2021 (6) TMI 230 - Karnataka High Court] wherein it was held that Rule 31A(3) is contrary to the provisions of the CGST Act and the GST is leviable on the commission received for providing services and not on the total amount collected in the totalisator.
 - Aggrieved by the above, the GST authorities have filed an appeal before the Division Bench of the Honourable Karnataka High Court which has been admitted [2021 (8) TMI 1007 - Karnataka High Court]. The matter is currently pending before the Division Bench of the Honourable Karnataka High Court.
 - The issue which arises in the present case is whether the following amounts recovered by the OG industry from the players would be leviable to GST:
 - **Rake Fees:** Amounts charged for providing platform and facilitating online bets.
 - **Stake-value:** Amounts collected and pooled by OG companies from various players for its subsequent distribution to the winning player(s).
 - **Deposits:** Amounts paid by the players which are credited to their e-wallet and are refundable, subject to certain conditions.
- Rate of tax:
 - Under HSN code 9996, gambling is leviable to GST at the rate of 28% whereas recreational, cultural and sporting services (residuary entry) are leviable to GST at the rate of 18%. Importantly, whether the game is a ‘game of skill’ or a ‘game of chance’ would determine the applicable rate of GST.
 - While the tax authorities seek to tax the services supplied by the OG industry at the rate of 28%, the industry believes that the applicable rate of GST in case of a ‘game of skill’ would be 18%.
- To address the aforesaid dispute, the Ministry of Finance constituted the Group of Ministers (GoM) on Casinos, Racecourses and OG. GoM, in its draft recommendations in June 2022 placed before the GST Council had inter alia recommended that:
 - OG is part of betting and gambling and hence, should attract GST at the rate of 28%
 - GST is leviable on the full value of consideration including the contest entry fee paid by the player for participating in the game. This recommendation seeks to levy GST on all OGs irrespective of whether such games are a ‘game of skill’ or a ‘game of chance’.

- GST Council, in its 47th meeting, had directed the GoM to re-examine the issues based on the inputs received from various States during the GST Council meeting.
- As per the recent news reports, since there is no consensus in GoM even after its September 2022 meeting, the GoM has decided to seek legal opinion on the distinction between a ‘game of skill’ and a ‘game of chance’ before taking its decision on the applicable GST rates²¹.
- In cases where the GoM/GST Council concludes that a ‘game of skill’ is not covered under the purview of ‘gambling’, the same would have the following impact on the taxability and valuation of OGs (which are ‘game of skill’) and which involves prize in real money terms:
 - Entry fees charged for entering the contest would be leviable to GST at the rate of 18%. Further, the stake value i.e., the face value of bets pooled by OG would be treated as ‘actionable claims’
 - Since actionable claims other than betting and gambling are covered under Schedule III to the CGST Act, the same would neither be considered as ‘goods’ nor ‘services’
 - As a result, the face value of bets pooled by OG would not be leviable to GST.
- In addition to the issues highlighted above, another issue that needs to be examined and deliberated is the determination of the location of the recipient of service and geo-tagging such locations. The complexity would further increase where the location of the recipient as per the records is different from the IMEI location of the recipient.

Way Forward

The OG industry in India is poised for rapid growth. However, various regulatory and tax issues impacting the industry need to be addressed on priority so that the industry can realise its growth potential. Considering the above, the way forward would be to:

- Develop a robust policy framework for the OG industry in consultation with the industry.
- Bringing suitable clarifications concerning the tax liabilities of OG players under Indirect tax legislation.
- Ensuring smooth coordination between OG players and the Government for establishing best practices to bring in the required transparency and reporting and thereby preventing illegal activities and money laundering.



²¹ <https://www.moneycontrol.com/news/business/economy/group-of-ministers-panel-on-gst-on-casinos-gaming-may-stick-with-28-taxation-decision-9488101.html>

DECODED

Interest and Penalty not leviable on CVD and SAD demands, in the absence of specific provisions for these levies in the Customs Tariff Act, 1975 - Bombay High Court

Introduction:

In a judgement favouring importers, the Bombay High Court²² has held that levy of interest and penalty is not applicable on the demand for Countervailing Duty (CVD) and Special Additional Duty (SAD) payable on imports, in the absence of substantive provisions in the Customs Tariff Act, 1975 (CTA).

Facts:

Mahindra and Mahindra Limited (the Appellant) had imported various goods from multiple suppliers. The customs authorities alleged that the Appellant had not declared the entire amount payable in connection with imports with an intent to evade duty. The Appellant approached the Settlement Commission, who confirmed the duty demand, granted concession in interest in all cases and waived/reduced penalties, apart from granting immunity from prosecution. Aggrieved by the order, the Appellant approached the Bombay High Court, which quashed and set aside levy of interest and penalty on the Customs duty, other than Basic Customs Duty (BCD) and remanded the matter back to the Settlement Commission for passing order on merits after hearing both sides. The Settlement Commission confirmed its earlier order, recording reasons, why the earlier orders passed by it were correct. The Appellant again approached the Bombay High Court against the order.

Contentions of the Appellant:

The Appellant took the following grounds in its arguments against demand:

- Section 90 of the Finance Act, 2000 related to Surcharge, section 3 of the CTA related to CVD equal to excise duty and section 3A of CTA related to SAD, does not provide for the imposition of Penalty or Interest on the duty chargeable thereunder. Accordingly, there are no powers under the provisions of law to impose a Penalty or Interest.
- Various judgments were cited supporting the contention that the charging provisions for levy of CVD and SAD are Section 3 and 3A of the CTA and it was submitted that since the CTA does not have any provisions for levy of interest and penalty on demand of CVD and SAD, they cannot be demanded.
- Reference was made to section 9A of CTA, the charging section for Anti-Dumping Duty (ADD), which initially did not contain any provisions for levy of interest and penalty until it was subsequently amended to specifically provide for levy of interest and penalty on demands of ADD. However, even at that time, no amendment was carried-out to section 3 or 3A of CTA which deals with CVD and SAD, which substantiates that there is no intention to levy Interest or Penalty on demand of CVD or SAD.
- Levy of interest is a substantive law and must be construed strictly.
- Section 28AB of the Customs Act to levy interest is only applicable to the customs duty levied under the Customs Act and not to any other duty levied under other acts.



- Reference was made to similarly worded provisions for the levy of Additional Duty of Excise (Goods of Special Importance) Act and the Sugar Export Promotion Act, where the Courts in the past interpreted these provisions as lacking the power to levy interest and penalty.

Contentions of the Customs Authorities:

Justifying the order passed by the Settlement Commission, the counsel for Customs argued that:

- The CVD and SAD, though charged under different statutes are duties of customs and provisions of the Customs Act for levy of interest would be applicable.
- The charging section for the levy of CVD and SAD is section 12 of the Customs Act and not section 3 or 3A of CTA.

Judgment:

The Bombay High Court accepted the submissions made by the Appellant and held that the charging section for the levy of CVD and SAD are sections 3 and 3A of the CTA. These provisions do not provide for the levy of interest and penalty and accordingly, the Customs Act provisions cannot be read into them by reference for such demand of duties.

Comments:

This judgment underscored the need for a finer analysis of the legal provisions, especially where an Act incorporates the provisions of certain other Acts by reference, in order to evaluate whether all the relevant provisions of the other Act are incorporated through the said reference.

Section 3(6) of the CTA incorporates by reference, various provisions of the Customs Act during the period under dispute. Section 3(6) had undergone amendments, which presently appear as section 3(12) of the CTA which also incorporates various provisions of the Customs Act by reference. The provisions of section 3(6) (as existed then) and currently valid section 3(12) of the CTA are *pari materia*. Thus, the ratio of this judgment cannot be construed to be irrelevant even under the current provisions and may continue to have precedential value under the present law.

The Integrated Goods and Services Act (IGST Act) also incorporates various provisions of the Central Goods and Services Tax Act (CGST Act) by reference. It specifically states, *inter alia*, in section 20 of the IGST Act that the miscellaneous provisions including the provisions relating to the imposition of the interest and penalty incorporated in CGST Act shall apply to IGST Act as well as if they are incorporated under the IGST Act and this judgment may not support an argument that in case of default in payment IGST, no interest and penalty can be levied.

However, some of the issues arising from the above judgment, which the importers may consider, are as under:

- The fate of the interest and penalties pertaining to the levies under the Customs Tariff Act, where no substantive provision exists for levy of interest and penalty e.g. IGST and Compensation Cess on import, which is levied under section 3(7) and 3(9) of the CTA; section 3(12) of the CTA, which is the relevant section, does not specifically mandate levy of interest and penalty. The language of section 3(12) is similar to the language of section 3(6), which was interpreted in this judgment for the period under dispute.

- A similar analysis may be interesting, where the provisions of other laws are incorporated by reference.
- Situations where the importer has availed benefits under various Foreign Trade Policy schemes, undertaking to fulfil export obligation as applicable (e.g., Advance Authorisation, EPCG scheme, etc.) for availing exemption of entire customs duty on imported goods. In the event of non-fulfilment of export obligation, while the importer may seek to defend levy of interest and penalty on CVD, SAD, IGST, etc. in the absence of specific provisions to exact interest and penalty under the CTA by relying on the above judgment, can such demands be enforced by the Customs Authorities by taking recourse to the Bonds/Undertaking executed by the importers to levy interest (at a rate fixed in the notifications)?
- Possibility of the claim of refund of interest and penalty paid in past on CVD, SAD, IGST, Compensation Cess, etc.
- Validity of adoption of similar grounds, if liability arises out of finalization of provisional assessment under Customs law.

While the taxpayers would need to assess all the above, they would also need to remain cognisant of the possibility of a retrospective amendment of law as they determine the next steps.



GLOBAL TRENDS

VAT/GST News:

International:



Uganda: WhatsApp Business services are subject to Value Added Tax (VAT)

WhatsApp Business services in Uganda are subject to VAT from October 2022. This development comes after the Uganda Revenue Authority (URA) announcement in July 2022 that it will begin collecting VAT from non-resident electronic service providers. Uganda started collecting VAT at the applicable local VAT rate from non-resident electronic service providers, including social media giant Facebook, from 1 October 2022.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/uganda-vat-whatsapp>)



Ukraine: Requirements for registration for non-resident electronic service providers

The Ukrainian State Tax Service (STS) issued a notification explaining the requirements for non-resident electronic service providers to register for VAT. The amendment also clarifies the issued notice where non-resident providers are required to register if the total amount of revenue from B2C electronic services from the previous calendar year exceeds UAH 1Mn.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/ukraine-registration-digital-service>)



Kenya: Government announces VAT clarifications on invoicing for non-residents of digital services providers

The Kenyan Revenue Authority announced a notice which clarifies the regulations for VAT invoicing for non-residential digital service providers. Digital service providers registered as non-residents are exempt from the electronic invoicing requirement. Providers of digital services must submit invoices or receipts that entail the supply's cost and the applicable tax. When importing digital

services, Kenyan registered taxpayers can utilize the agency's iTax system to claim the input tax that was levied. (Source:

<https://www.globalvatcompliance.com/globalvatnews/kenya-invoicing-digital-services>)



New Zealand: Explanation of the updated Goods and Services Tax (GST) invoicing rules and recordkeeping requirements

The New Zealand Inland Revenue provided clarification regarding changes to the GST recordkeeping and invoicing procedures that took effect on 30 March 2022. The explanation illustrates how customers who do not receive tax invoices may nevertheless support expense claims with other documentation.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/new-zealand-gst-invoicing>)



Switzerland: Swiss Parliament approves new VAT rates applicable in 2024

Swiss Parliament approved the raise of VAT rates to be applied in 2024. The Swiss voters proposed the rate increase on VAT to address the funding shortage of Swiss pension system. Increased rates will have an impact on the Federal Constitution, which calls for a national referendum.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/switzerland-new-vat-rates>)



Luxembourg: Temporary decrease of the VAT rates on goods and services

The government announced a temporary decrease of 1% for the VAT rates in Luxembourg which had been reached through negotiations between the government, trade unions and employers to combat inflation.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/luxembourg-decrease-vat-rates>)

Mandated B2B e-invoicing in Spain approved

The Spanish Gazette has officially published the 'Law Crey y Crece' that mandates companies and professionals in Spain to issue and receive e-invoices to and from other businesses (B2B) from 2024.

(Source: <https://www.avalara.com/blog/en/europe/2022/10/mandated-B2B-e-invoicing-in-spain-approved.html>)

Upcoming B2B e-invoicing mandate in France: Official Decree published

The French gazette has officially published Decree No. 2022-1299 and an associated order on e-invoicing. This confirms the implementation of the e-invoicing technical requirements and specifications that had already been announced and published.

(Source: <https://www.avalara.com/blog/en/europe/2022/10/upcoming-b2b-e-invoicing-mandate-in-france-official-decree-published.html>)



India

October GST collection stands at INR 1.52tn, second highest since implementation

GST collections for the month of October stood at INR 1.52tn, according to the data shared by the finance ministry. This is the second highest collection since the implementation of GST.

(Source: <https://economictimes.indiatimes.com/news/economy/finance/gst-collection-for-october-stands-at-rs-1-51-lakh-crore/articleshow/95224710.cms>)

50% rebate in VAT for industries using natural gas in Haryana

The Haryana state government has decided to give a 50% rebate in VAT to industrial units that will replace diesel generator sets required to meet their energy requirement with natural gas.

(Source: <https://www.hindustantimes.com/cities/chandigarh-news/50-rebate-in-vat-for-industries-using-natural-gas-in-haryana-101666467484499.html>)

GST Appellate Tribunals (GSTAT): Can it reduce the problem of pending cases

The proposition of setting up GST Tribunals gathered some momentum with cabinet approval and subsequent

notification for the creation of the GSTAT national bench at New Delhi, approval for the formation of the state tribunals in identified states and formation of GST Tribunal Rules for appointment of members in the past few years.

(Source: <https://economictimes.indiatimes.com/small-biz/gst/gst-appellate-tribunals-can-it-reduce-the-problem-of-pending-cases/articleshow/94777985.cms>)

Games of skill and games of chance: gst law panel working to define them for proper taxation

The Goods and Services Tax (GST) council's law committee discussed the issues over the definitions for 'Games of Skill' and 'Games of Chance' to ease the formation of separate taxation design for them.

The complex issue of levying GST on online games has been hanging fire for over a year now and in the absence of a clear definition, tax notices are sent to online game portals that ultimately leads to litigations.

(Source: <https://news.abplive.com/gaming/games-of-skill-and-games-of-chance-gst-law-panel-working-to-define-them-for-proper-taxation-1561743>)

Customs News:

International:



UK traders 'left unsupported' as another customs-switch deadline passes

As an EU fund supporting European traders with post-Brexit negative impacts is launched, UK traders left disadvantaged by continuing problems with the new customs IT platform, Customs Declaration Service (CDS).

(Source: <https://theloadstar.com/uk-traders-left-unsupported-as-another-customs-switch-deadline-passes/>)



Slovak customs authorities reportedly allowed dual-use exports to Russia

Slovak Customs police have allowed the export of IT and technology products to Russia, as well as to Belarus or Iran, which can be used for military purposes. These include technology for manufacturing tyres, bearings or entire gears.

(Source: <https://www.intellinews.com/slovak-customs-authorities-reportedly-allowed-dual-use-exports-to-russia-261697/>)



China exports fall in October, first decline since 2020

China's exports shrank in October, the first such decline since mid-2020, as a domestic slowdown and the threat of global recession hit international trade. Exports fell 0.3 percent year-on-year in October, according to the General Administration of Customs, a steep drop from September's 5.7 percent increase.

(Source:

<https://economictimes.indiatimes.com/news/international/business/china-exports-fall-in-october-first-decline-since-2020/articleshow/95351315.cms?from=mdr>)

WCO launched the new online Authorised Economic Operator (AEO) compendium website

WCO announced that a new Online AEO Compendium (OAC) has been launched with financial support from Dubai Customs and the Customs Cooperation Fund Korea (CCF/Korea), the new OAC will replace the current annual AEO compendium compilation and publication processes.

(Source: <https://indiashippingnews.com/wco-launched-the-new-online-aeo-compendium-website/>)

India

Customs brokers must register online: CBIC

The Central Board of Indirect Tax and Customs (CBIC) has made it mandatory for customs brokers to register themselves online to integrate them into the 'paperless' Customs regime.

(Source:

<https://economictimes.indiatimes.com/news/economy/customs-brokers-must-register-online-cbic/articleshow/95152170.cms>)

CBIC to implement Paperless Customs compliance for exports soon

CBIC is working on a new system where web-based registration of goods export would be allowed, to facilitate the integration of Customs systems with other regulatory agencies.

(Source: <https://indiashippingnews.com/cbic-to-implement-paperless-customs-compliance-for-exports-soon/>)

Web-based system for faster export consignment clearance likely to roll out next year: report

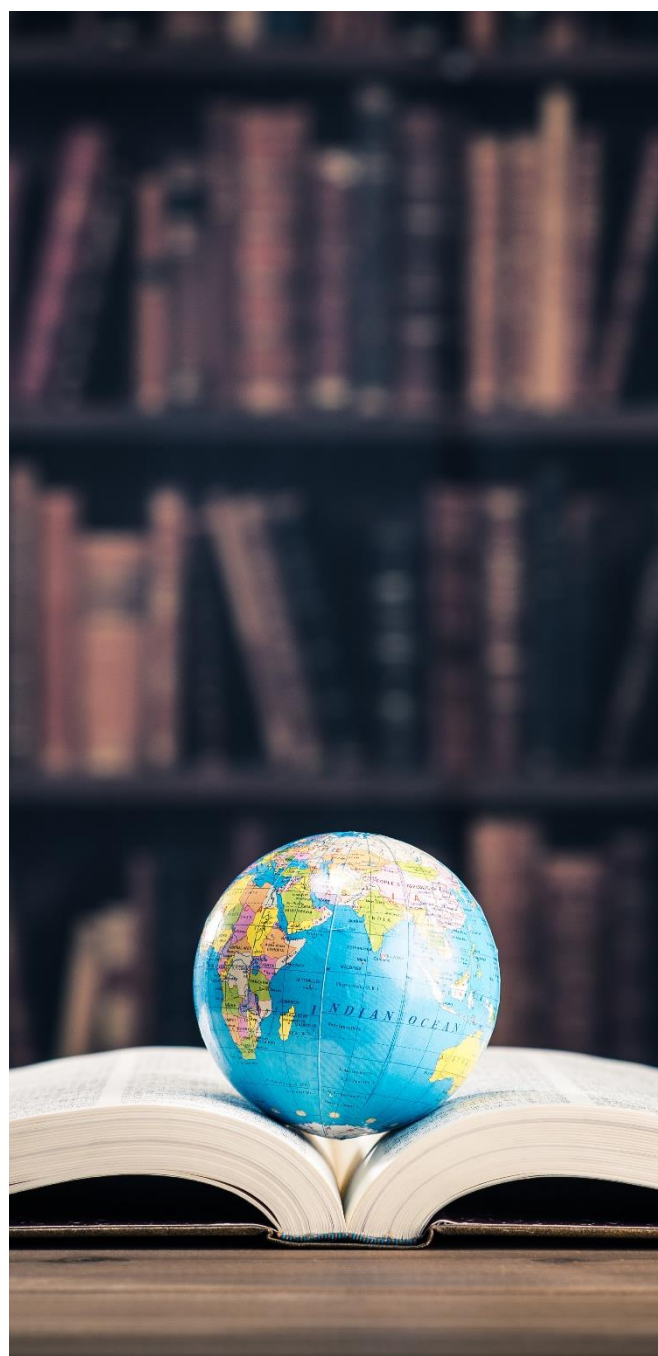
A new web-based system for expedited export consignment clearance is likely to be rolled out in the following fiscal year. This system will eliminate the need for separate applications required by various regulatory bodies. The new system will also allow exporters to submit their export declaration documents online at a single point of approval.

(Source: <https://www.outlookindia.com/business/web-based-system-for-faster-export-consignment-clearance-likely-to-roll-out-next-year-report-news-235830>)

India eases customs procedures for exports to Bangladesh via inland waterways

CBIC has further eased customs procedures to allow the export of goods to Bangladesh through inland waterways. Radiofrequency identification (RFID) seals will be used to ensure that containers once cleared at a customs facility in India are not tampered.

(Source: <https://www.livemint.com/news/india/india-eases-customs-procedures-for-exports-to-bangladesh-via-inland-waterways-11663223719822.html>)



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