

GST - Well Begun is Half Done; Time Ripe to Pursue 2nd Half!

Jan 31, 2023



Gunjan Prabhakaran

Partner and Leader, Indirect Taxes, BDO India LLP



Kartik Solanki

Partner, Indirect Tax, BDO India LLP



Parin Masalia

Manager - Indirect Taxes, BDO India LLP

Five and half years have passed since the introduction of GST law in India and it has been a roller-coaster ride. The taxpayers faced various teething issues such as availment of transition credits, time-bound GST compliances while grappling with technical glitches on the GST Portal and changes in the compliance mechanism, frequent changes to GST rates, etc.

While the taxpayers were facing these issues, the government has been facing its own challenge in plugging revenue leakages, stabilising tax revenues in the aftermath of the pandemic, augmenting revenue to compensate States for revenue shortfall, etc. Easing of pandemic induced restrictions and stricter compliance protocols (e-way bill, e-invoice, etc.) have helped stabilisation of GST revenue, of late. With this backdrop, it is expected that the GST Council would now shift its focus to overcome the issues faced by the taxpayers and to make the GST law more taxpayer friendly. This part of the journey of GST could bolster the economic growth and enable ease of doing business.

This article focuses on some of the key areas where the taxpayers are looking for remedial action from the GST Council.

1. GST on Petroleum products

The Petroleum products i.e. Petroleum crude, High speed diesel, Petrol, Natural gas and Aviation turbine fuel (collective referred to as 'Petroleum products') are still outside GST net and leviable to excise duty and VAT/CST. This results in GST on procurements by the oil and gas sector becoming their cost. Further, the consumers of the Petroleum products also cannot claim the credit of the taxes paid on procurement of Petroleum products. This results in cascading of taxes, the removal of which was one of the stated

objectives for introducing GST. While there are revenue implications for the Governments, the time has now come to lay down a roadmap for bringing Petroleum Products in GST net.

2. GST rate structure

The present GST structure has multiplicity of rates, ranging from 5% to 28%, in addition to special rates for precious metals, jewellery, etc. and varying rates of compensation cess, as applicable. The multitude of rates leads to complexities and potential disputes relating to classification, tax rate, etc. The taxpayers would expect the rate rationalisation to take place at the earliest, to promote ease of doing business and discourage malpractices.

3. Valuation

- **Value of supply in case of Online Gaming ('OG'):**

While the issue as regards the applicable rate of tax for the OG industry is a subject matter of debate, equally large issue is valuation, i.e. whether tax is leviable only on the platform fee or entire stake money paid by the players. While the recommendations of the GoM on gaming industry are pending for consideration by the GST Council, some disputes involving substantial demand have already cropped-up.

4. Restrictive conditions in availing ITC

- **ITC eligibility subject to fulfilment of conditions qua the supplier:**

Section 16(2)(aa) and (c) of the CGST Act lay down stringent conditions to claim ITC, i.e. declaration of supply by supplier and payment of GST by the supplier. While these activities can be carried-out only by supplier, the recipient stands to lose credit in the event of default by the supplier, even though he has paid the entire consideration to supplier. These conditions go against the settled legal principle that the law cannot compel a person to do an act, which he cannot possibly perform. These provisions are already under challenge in various High Courts and the taxpayers are hoping that such impossible conditions are relaxed.

- **Payment within 180 days:**

Second proviso to Section 16(2) of the CGST Act requires the recipient to reverse ITC claimed, if the recipient fails to pay the supplier within 180 days from invoice date. However, this condition does not reckon the accepted commercial practices where the mutually agreed credit period exceeds 180 days, necessitating ITC reversal. This provision calls for significant record keeping efforts to track ITC reversal and reclaim. Thus, the law require necessary changes to factor-in commercial realities.

5. Restricted/blocked credits

- **Goods/services for construction of immovable property:**

ITC on goods/services (including Works contract services) used for construction of immovable property is specifically restricted under Section 17(5)(c) and (d) of the CGST Act. The Orissa High Court^[1] had read down this provision to allow claim of ITC on the aforesaid procurements and SLP against it is pending before Supreme Court. The taxpayers hope that suitable amendment is carried-out to relax this restriction, especially where the immovable property is used for providing taxable supply, e.g. hotels, ports, airports, malls, etc.

- **Goods lost, stolen, destroyed, written-off or disposed of by way of gift or free samples:**

ITC on goods lost, stolen, destroyed, written-off or disposed of by way of gift or free samples is not allowed under Section 17(5)(h) of the CGST Act. However, the law is silent on the following aspects:

- Re-availment of ITC on goods which are written back (i.e., goods not traceable initially but identified subsequently or where the goods were written off to comply with the accounting norms, where the goods were ultimately used for making outward supplies);

- Manner of reversal in case of goods partially destroyed/modified to make it fit for consumption/use in some other supplies.

- Requirement for reversal in case of goods given as gifts/free samples as a promotional measure, the cost of which is considered for pricing of product on which GST is paid;

- **Corporate Social Responsibility ('CSR') expenditure:**

Under Section 135 of the Companies Act, the Companies are mandated to incur expenses towards meeting CSR obligations. The taxpayers have claimed ITC on various CSR related expenses, since these expenses are incurred as mandated by law and also, it is important for the taxpayers to support the community, resulting in better work force availability and supplementing the efforts of the Government in various initiatives. While this is clearly an expense relating to business, the conflicting advance rulings on ITC have created confusion and a suitable clarification is required to allow the ITC.

6. Reversal of ITC

- **ITC Reversal by supplier of sponsorship services:**

Under section 17(3) read with section 17(2) of the CGST Act, in case of services which are taxed under reverse charge, the supplier is required to reverse the ITC relating to such supplies. This creates an anomaly where despite the supply attracting GST, the supplier would not be entitled to claim ITC on such supplies. The industry would hope for amendment of this provision to allow the supplier to claim ITC and where ever required, a methodology to monetize accumulated ITC if any, as the supply is liable to tax.

7. Availment of ITC in special circumstances

When an exempt supply becomes taxable, section 18 of the CGST Act enables a taxpayer to claim ITC on the inputs and capital goods in stock on the date on which such supply becomes taxable. However, the ITC on input services received, for which the benefit is received for a longer duration e.g. services received to install capital goods is not allowed to be claimed. The GST Council may have to consider a suitable redressal for the same..

8. Credit Notes

Section 34 of the CGST Act permits issuance of Credit note only in following cases:

- Taxable value or tax charged in Tax invoice exceeds taxable value or tax payable;
- Deficiency in goods or services or both supplied
- Goods return; or

Due to these restrictions, the credit note for other than the above reasons, e.g. subsequent price reductions, additional discount, or in extreme cases, inability of the recipient to pay, cannot be issued with GST and the taxpayer is forced to issue a commercial credit note, without GST. Further, the credit notes with GST cannot be issued beyond the October month of the subsequent financial year. The restriction on issue of credit note as above require a revisit and suitable amendment.

9. Computation of interest

- **Calculation of ITC balance to determine utilization:**

Section 50(3) of the CGST Act provides for levy of interest where ITC has been wrongly availed and utilized. Rule 88B of CGST Rules provides that interest under Section 50(3) of the CGST Act would be leviable only when the balance in the Electronic Credit Ledger ('ECL') falls below wrongly claimed ITC. There is a lack of clarity as to whether balance in ECL would be aggregate of tax heads or has to be viewed independently for CGST, SGST or IGST. The taxpayers would hope that it is clarified as aggregate balance.

- **Payment of interest on delayed reporting of transactions:**

In case of delay in filing of returns, a taxpayer is required to pay interest only on the amount of tax paid by debiting the cash ledger, effectively accepting that no interest is payable on tax paid by using ITC. However, similar provision does not exist, when the taxpayer misses to report a transaction, but discloses in subsequent months while there is accumulated ITC. It is hoped that the Government will suitably amend the provisions to clarify non applicability of interest in such cases, in the absence of prejudice to revenue.

10. Issues relating to refunds

• Accumulated ITC balance on closure of business:

Refund of unutilized ITC is available only in case of zero-rated supplies and inverted duty structure and no specific provisions exist for refund of ITC balance on closure of business. While there are various judgments allowing such refund under Central Excise law, the taxpayers would hope for introduction of specific provisions allowing such refunds in GST law.

• Formula to compute refund in inverted duty structure:

In case of inverted duty structure, the Supreme Court in case of VKC Footsteps^[2] had affirmed the stand of Government to not allow refund of accumulated ITC pertaining to input services and capital goods. The taxpayers would hope that the GST Council may reconsider this law, so as to enable them to reduce the accumulation of ITC and free up the working capital.

• Procurements by foreign tourists:

The enabling provisions to grant refund of GST paid by foreign tourists on procurements made during their stay in India are not yet operationalised. This provisions may be operationalised at the earliest.

• Unutilized ITC on capital goods used in making zero-rated supplies:

The formula for computing refund of unutilized ITC by a person making zero-rated supplies (under Rule 89(4) of the CGST Rules) excludes ITC pertaining to capital goods for calculations of refund. The Government may provide a mechanism to allow refund of accumulated ITC on capital goods, either by amending the formula or otherwise.

11. Transitional credits

GST law permitted taxpayer to carry-forward tax credits accrued under the erstwhile indirect tax regime to the GST regime. There have been series of controversies concerning the transitional credit provisions in respect of the following:

- Eligibility to carry-forward CENVAT credits pertaining to cesses such as Education cess, Secondary and Higher Education Cess, Krishi Kalyan Cess, etc. under Section 140(1) of the CGST Act;
- Re-availment of CENVAT Credit reversed due to value of inputs being written off but the inputs are used for making outward supply.
- Re-availment of CENVAT Credit reversed due to non-payment of consideration to the vendor after the requisite payment is duly made to the supplier;
- Eligibility to claim ITC in respect of duties and taxes pertaining to pre-GST regime which have been admitted and paid by the taxpayer after 1 July 2017;
- Eligibility to carry forward the undistributed balance of credit by an input service distributor;
- Eligibility to carry forward credits under Section 140(3) of the CGST Act in respect of inputs held in stock on the appointed day, which were purchased prior to 30 June 2016;

Many of these issues are pending in the Courts, despite passage of five and a half years since GST introduction. The taxpayers expect a facilitative and benevolent view from the Government, allowing such credits.

12. Anti-profiteering

The GST law also introduced Anti-profiteering provision under section 171 of the CGST Act. While it was intended to be a transitional provision for a limited period, it has continues to exist. The anti-profiteering provision suffers from lack of clarity (e.g. no specific guidelines on what constitutes profiteering, the elements of profiteering, the duration for passage of such benefits, etc). This has resulted in practically all the orders being challenged including the constitutional validity of the anti-profiteering provisions itself and the matters are currently being heard in the Delhi High Court. The taxpayers expect clarity on various grey areas in these provisions, as well as deadline for phase-out of anti-profiteering provisions, allowing prices to be determined by market forces.

13. Dispute resolution

- **Pre-deposit for filing appeals:**

To file an appeal, the taxpayer is required to pre-deposit 10%/20% of the tax demand, depending on the stage of appeal. There is a difference of opinion as to whether the accumulated ITC balance can be used for pre-deposit or not, due to conflicting decisions of the Orissa High Court^[3] (disallowing use of ITC for pre-deposit) and the Bombay High Court^[4] (allowing use of ITC for making pre-deposit). The taxpayers await clarity.

- **Formation of National Appellate Authority for Advance Ruling ('NAAAR'):**

Finance (No. 2) Act, 2019 had proposed introduction of NAAAR, to deal with divergence in views expressed by authorities in States. However, the NAAAR has not yet been formed. It is important to operationalise NAAAR at the earliest, to avoid hardship caused to taxpayers.

- **Formation of Goods and Services Tax Appellate Tribunal ('GSTAT'):**

Even after passage of five and a half years, the GSTAT is yet to be formed. In absence of the GSTAT, the taxpayers are forced to either approach the High Courts, adding to the burden of pending cases or are constrained to wait for clarity, till GSTAT becomes operational. It is important that the GSTAT are made operational at the earliest, so that the taxpayers can get certainty in legal position at the earliest.

14. Issues concerning the applicable GST rates

- **Restaurant service:** The GST rate on supplies made by restaurants is 5%, subject to non-availment of ITC. However, no option has been provided to the Restaurants to pay GST at the normal rate with ITC benefit. In other words, it is mandatory to pay @ 5% (without ITC).
- **OG industry:** GST rate on online gaming is a widely debated topic and a view on the same is yet to be finalised by the GST Council.
- **Virtual Digital Assets ('VDA'):** Under the Income tax law, specific provisions dealing with the taxation of VDA were introduced in the Union Budget 2022-23. However, the tax treatment and valuation mechanism under GST laws on VDA are yet to be clarified by the GST Council.
- **Health insurance premium and term life insurance premium:** The insurance industry has represented multiple times for reduction in GST rates on health insurance premium and term life insurance premium for making them more affordable for penetration of insurance service to the rural India.

15. Other issues pertaining to levy of tax

- **Input Service Distributor vs Cross Charge mechanism:**

This is one of the hotly debated issue devoid of clarity. Since different registrations of taxpayer in different States are deemed to be separate persons, intra-entity shared responsibilities (say Head office/Registered office to Branches/depots and vice versa) are deemed supply of services, even though it is not recognized as supply of service nor is there any consideration. Many taxpayers have taken a view that there is no service supply involved as the corporate office carries out its responsibility at the enterprise level.

A view that it is supply of service, would lead to anomalous situation including valuation, various cost

components that would form the value (including the salaries), treatment of common services subjected to ISD process. GST Council had considered issuing a circular, the draft of which was discussed in 35th meeting of GST Council. However, no circular has been issued so far. Meanwhile, taxpayers have received notices/queries on this issue from the GST authorities. Hence, it is imperative that the GST Council clarify the issue.

- **Transfer of units:**

While transfer of businesses on a going concern are exempted from GST, few advance rulings have held that such exemption is available only for the transfer of business between two legal entities and the transfer of units between two different registrations of same entity are not eligible for such exemption and GST would be payable on such transfer. This goes against the deeming fiction under law treating two separate registrations as two separate persons. To resolve this, the taxpayers hope that the intra-entity transfer of units as a whole should be included in Schedule III, and a specific provision in rule 41 and 41A be introduced for transfer of accumulated ITC in case of intra-entity transfer of units.

- **Reimbursement of salary costs of seconded employees:**

Until last year, applicability of service tax on salary cost reimbursement in respect of seconded employees under reverse charge appeared settled. However, the Supreme Court^[5] reversed the position to hold that reimbursement of salaries of seconded employees would be subject to service tax. This judgment under service tax law may have its implication under GST also, where taxpayers followed the decision of the past, which is in their favour. The taxpayers expect that Government may clarify that GST would not be applicable in such cases, there being dual/joint employment and the reimbursement is in the nature of salaries, which has been kept outside the scope of GST levy.

These are only some of the important issues faced by the taxpayers which needs redressal sooner than later, enabling the taxpayers to reap the benefits of GST. The taxpayers would hope that the upcoming budget would take suitable steps in this direction.

[1] Safari Retreats Pvt. Ltd. [\[TS-350-HC\(ORI\)-2019-NT\]](#)

[2] UOI & VKC Footwear & Others [\[TS-472-SC-2021-GST\]](#)

[3] Jyoti Construction vs. Deputy Commissioner of CT & GST and Anr. [\[TS-523-HC\(ORI\)-2021-GST\]](#)

[4] Oasis Reality vs UOI & Ors. [\[TS-493-HC\(BOM\)-2022-GST\]](#)

[5] Central Excise & Service Tax, Bangalore v. Northern Operating Systems Pvt. Ltd. [\[TS-216-SC-2022-ST\]](#)