Undoing the Good in GST - Part I : By Adv. K. Vaitheeswaran

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When GST was introduced it was identified as a 'good and simple tax'. The 'simple' part of it became illusory from inception but the recent set of amendments are likely to take away even the 'good' in GST.

A person who wants to start a business should be focusing entirely on his business and if law requires registration, the procedure must be simple, seamless and smooth. GST registration was the biggest reform as it was an online process and did away with age-old, ancient practices of physical inspection and verification of premises which contributed to delay, discretion and unethical practices.

Fake invoice racket is not a problem only in India but many GST / VAT nations face similar problems of disappearing assessees. The Government will argue that these changes are on account of fraudsters mining the system but should there not be some respect for the other 95% plus bonafide assessees who participate in the nation building exercise? While action should be taken against such fraudsters and vigilance should increase at the time of registration, the vaccine seems to be worse than the disease.

Businessmen and professionals have stopped buying GST books. It is not on account of the digitisation of the world but only because of mind boggling, continuous changes in the law and the obsession to introduce; substitute; re-substitute provisions in the rules. This Article is prompted by the 14th Amendment to the CGST Rules, 2017 in 2020 not forgetting the fact that there were 14 amendments in 2017; 14 amendments in 2018; and 9 amendments in 2019.

One cannot but recollect the words of the great Nani Palkhivala in the Preface to the Eighth Edition of *Law and Practice of Income Tax* where he states that *two things strike the student of Indian Income Tax Law with trepidation and amazement – the precipitate and chronic tinkering with the law by bureaucrats who are the unacknowledged legislators of India, and the anaesthetised patience of the Indian public.* This rings true equally for GST.

Registration

When there is a taxable supply, the starting point is registration and it should be the easiest of tasks and it must not be a law which should keep changing. Rule 8 of the CGST Rules, 2017 deals with application for registration and Rule 8(4A) was inserted vide Notification No. 16/2020 – CT w.e.f. 23.03.3030 providing that the applicant should undergo authentication of Aadhaar Number for grant of registration w.e.f. 01.04.2020. However, Notification No.62/2020 – CT dated 20.08.2020 w.e.f. 01.04.2020 substituted Rule 8(4A). The effect of the substitution was that an applicant other than a person notified under Section 25(6D) who opts for authentication of Aadhar Number while submitting an application for registration, w.e.f. 21.08.2020 has to undergo authentication of Aadhar and the application date shall be considered as the date of authentication or 15 days from the date of submission of application, whichever is earlier.

Now, Notification No. 94/2020- CT dated 22.12.2020 has come which has again substituted Rule 8(4A) and it will come into force from a date to be notified. An application has to be followed by a biometric based Aadhar authentication and taking photograph unless exempted under Section 25(6D) where Aadhar authentication option has been chosen. In case such option is not chosen, the application shall be

followed by taking biometric information, photograph and verification of such other KYC documents as notified unless the applicant is exempted under Section 25(6D).

This new procedure is required for an individual applicant or such individuals in relation to applicants as notified under Section 25(6C). Accordingly, authorised signatory of all types, Karta of HUF, Managing and Authorised Partners of partnership firms are required to undergo authentication of possession of Aadhar to be eligible for registration.

The provisions are structured in such complex language; layered with procedures; amended at the drop of the hat; effective from another date which will have to be notified; calls for documents which are yet to be notified. If this is the story for registration, it's time we stop saying that we have improved our rankings in the ease of doing business.

Physical Verification

Rule 9 of the CGST Rules, 2017 deals with verification and we have progressed from three working days to seven working days for approval of registration. Rule 9(1) had a proviso which was inserted through Notification No. 16/2020 – CT; substituted by Notification No. 62/2020 – CT and now again substituted by Notification No. 94/2020 – CT. The sum and substance of the new provision is that where a person does not undergo authentication of Aadhar number or does not opt for authentication, or the proper officer with the approval of an officer authorised by the Commissioner, not below the rank of Assistant Commissioner, *deems it fit to carry out physical verification of place of business*, the registration shall be granted within 30 days of submission of application after physical verification of the place of business and verification of such documents as the proper officer may *deem fit.* The time lines for issue of notice for seeking clarification or information has been extended.

The provisions are loaded with discretion and completely go against the philosophy of the Government in ushering E-assessments, E-verification, etc. On one side, the Government firmly believes that the best way to eliminate discretion; risk of unethical practices and to improve the ease of business is to go faceless and deploy technology. However, on the other side, there is a complete U-turn with physical verification if 'proper officer' deems it fit and calls for such documents as the officer may deem fit.

There is no guarantee that the malice that is sought to be addressed would be addressed by these amendments. In fact, it may even be counterproductive with fraudsters continuing to have their way after sorting out objections through unethical methods. The amendment also opens the bigger risk of a bonafide player not able to obtain registration on account of his refusal to succumb to corruption at the time of physical verification in the hands of some officers within the Department.

Suspension of Registration

Rule 21A of the CGST Rules, 2017 deals with suspension of registration and sub-section (2) provides that where the proper officer has reason to believe that the registration of a person is liable to be cancelled under Section 29 or Rule 21, he may after affording the said person *a reasonable opportunity of being heard,* suspend registration pending completion of proceedings. During such suspension, the economic activity of the person comes to a standstill as he cannot make any taxable supply during the period of suspension.

In a bizarre move, Notification No. 94/2020 – CT amends Rule 21A to omit the requirement of *reasonable opportunity of being heard.* Further, the scope of suspension is expanded through Rule 21A(2A) where on comparison of outward supplies in form GSTR – 1 and details of inward supplies derived based on the details of outward supplies furnished by his suppliers in Form GSTR – 1 or *such other analysis* carried out on the recommendations of the Council show that *there are significant differences or anomalies indicating contravention of Act or Rules leading to cancellation.* When this wizardly exercise is carried out, the person will be intimated about the differences calling him to explain within 30 days as to why his registration should not be cancelled. Adding insult would be the suspension of registration till the conclusion of proceedings.

Firstly, the GSTIN as a portal has posed and continues to pose immense challenges to the industry on account of technical glitches. Secondly, the so called efficient matching system through GSTR – 1, 2 and

3 got derailed as GSTR -2 and GSTR -3 did not see the light of the day. Thirdly, a Writ is filed every day in every High Court where an assessee pleads that some relief or claim is not possible because the portal is not allowing it. Fourthly, there are scenarios where the portal does not even admit an appeal against orders forcing manual filing of appeal with some jurisdictions refusing to accept manually filed papers. Fifthly, there is no mechanism for rectification of errors and one cannot control the filing by the suppliers.

With this background, even if excellent data analytics tools are used, the potential for unfounded allegations and notices based on system-based errors are quite high. The very fact that a separate portal was chosen for e-way bill and other portals are used for e-invoicing is testimony for the load bearing capacity of GSTIN and the potential for errors.

A businessman is likely to be slapped with FORM GST REG – 31 electronically based on the back-end wizardry and a simple reading of this form would show that it is an intimation for suspension and notice for cancellation and calls upon the noticee to explain to the satisfaction of the jurisdictional authority to avoid cancellation of registration. Guilt is presumed; registration is suspended; business comes to a standstill; and the assessee would be at the mercy of the officer to escape cancellation. The script is well written for physical assessment; possible harassment. It is no secret that in tax matter even if the assessee has a wonderful case and the issue is covered by decisions of higher judicial forums including the Supreme Court, the assessing authorities tend to confirm the show cause notice on the basic fear that if the notice is dropped, they would be answerable to Revenue Audit or CAG Audit. Some officers even sympathise with the assessee and advise them to seek relief in appeal.

Social Media

When the social media expressed their shock to the amendments, it's a matter of irony that the CBIC responded through social media justifying the amendments under the heading 'Myth Vs. Fact'. The tweet tries to assure that personal hearing would be granted at the discretion of the officer. A casual reading of any tax journal would show High Courts setting aside orders and remanding matters for the simple reason that the concerned authority had not afforded an opportunity of being heard even when the statute provided for it. If this is the state of affairs, removal of the requirement of an opportunity of being heard is unheard of.

The Supreme Court in the case of ***Mohinder Singh Gill Vs. Chief Election Commission (AIR 1978 SC 851)*** held that if an administrative action involves civil consequence the rules of natural justice must be followed. The Supreme Court defined 'civil consequence' as under

"But what is a civil consequence, let us ask ourselves by passing verbal booby-traps, 'civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that effects a citizen in his civil life inflicts a civil consequence."

The second myth supposedly demolished by the Board is through the assurance that cancellation of GSTIN will not happen for clerical errors and only fraudulent cases would suffer. This assurance is of no use when vague and wide language is used in Rule 21A(2) and authorities have been empowered to take action.

The Madras High Court in the case of ***Sun Dye Chem Vs. Assistant Commissioner [***TS-953-HC-2020(MAD)-NT***]*** has observed that when GSTR 2A and GSTR 1A are yet to be notified, the mismatch between details of credit and suppliers return might well have been noticed and appropriate and time action taken. In the absence of an enabling mechanism assessee should not be prejudiced from availing credit that they are otherwise legitimately entitled to.

Courts are actively engaged in directing manual filing or permitting rectification of errors. When there is no guarantee that genuine tax payers would not suffer because of errors, the amendment only increases the fear amongst the assessees. When Apex Court decisions and CBIC Circulars are not followed at the field level resulting in the explosion in litigation, a social media message does not give any assurance.

While no one can deny the benefits of data analytics, the metrics chosen for comparison are likely to yield differences which are based on justifiable reasons but the damage would have been done. For

example, one cannot fathom this obsession to compare income tax returns and GST returns. While the former is a tax on income, the later is a tax on transactions. Inter-State stock transfers are not sales in the financial statements or IT returns but are supplies in GST. IT is based on cash system of accounting for many professionals while GST is mercantile system. Advances for goods is exempt and advances for services is taxable in GST whereas mere receipt of advances does not constitute income. A person could have lower income tax liability due to carry forward losses; depreciation claims; higher outflow of expenditure; etc. There are businesses which operate on razor thin margin and sometimes even on losses. Therefore, to assume fraud based on lower income tax liability has the potential of affecting a majority of bonafide players. While it would also address the menace which the Government is concerned about, the solution is not suspect; show cause; suspend; and then say sorry.

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