

Indirect Tax Proposals in Union Budget 2018-19



Remarkable! best describes this year's Union Budget presented in the wake of the last real occasion to make lasting policy decisions before the Government readies to meet the electorate in 2019. Remarkable for the expectations that have been attended and those that could not be attended. Remarkable for the hundreds of representations made on GST. Remarkable for the scores of predictions that went awry. Remarkable that any amendment to CGST Act would require an almost immediate amendment of 31 State/UT enactments just to maintain parity. Remarkable also because of the things that remain on the statute book after leave was granted to move the Bill. Here's a quick look at what else makes this Budget remarkable! Read on to know more....



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Whatever one may have said after the Hon'ble Finance Minister's address, the determination to leave all the 'issues' raised unamended on Budget Day already makes it remarkable. It becomes important that while there may be nothing new to call out, there's plenty that needs to be brought to attention from Union Budget 2018-19.

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Customs

Rate of Duty (2 Feb, 2018)*

- Social Welfare Cess of 10% alters effective customs duty through peak rate of Customs duty has been increased to 15 per cent.
- Education Cess and Special Education Cess exempted (not abolished) on all goods.

* Declared provision under Provisional Collection of Taxes Act, 1931

Legislative Changes (Presidential assent)

- Offences committed outside India also actionable under Customs Act.
- Act to extend to 'Exclusive Economic Zone'.
- Finality after completion of assessment of unsettled by selective verification of imports/ exports.
- Provisional assessment for exports also and time-limit for securing necessary information.
- Special dispensation for goods involved in repair, processing or manufacture:
 - a) Imports exempted; and
 - b) Exports also exempted.

However, no reprieve from GST on consideration for these services.

- Show Cause Notice enjoined with new features:
 - a) Pre-consultation permitted;
 - b) Supplementary SCN, not like Statement-of-Demand, allowed but circumstances to be notified;
 - c) Appellate Commissioner's authority to remand cases withdrawn in 2001 to be restored; and
 - d) SCN abates unless disposed timely, extension allowed.
- Manifest(s) to include import/export data.
- Customs Automated System operational.
- Appellate Authority for AAR established.
- Payments through 'Electronic Cash Ledger'.
- Audit process enters Customs transactions.
- Board authorised to notify pecuniary limits for adjudication.
- Redemption fine remaining unpaid up to 120 days to prove fatal.
- Sale of bonded goods allowed:
 - a) IGST under Section 3(7) to apply on 'last' in a series of transactions, if any
 - b) New expression 'transaction value' coined for this purpose
- Power of remand, to be restored.

Tariff Changes (from 2 Feb, 2018)*

- Rates of duty increased to give fillip the 'Make in India' of the Government.
- Number of tariff revisions made but with corresponding exemption to retain effective rates in some cases.
- Imposition of Social Welfare Surcharge at 10% applies on all customs duties but not on IGST and Cess levied under Customs Tariff Act.

*Declared provision under Provisional Collection of Taxes Act, 1931

Increase in Customs duty

Unprecedented is this policy decision to increase customs duty. Although the increase is not substantial, it places the Government's resolve to advance the cause of domestic industry at the risk of accessing this seemingly protectionist lever. Whether it is welcomed or not, it's bold and makes a remarkable statement of how this nation will be moving forward.

'Make in India' is not a PR line but a guide for policy making. It is these kinds of unequivocal bullet-biting decisions that are required, committing resources to improve the business ecosystem while inviting investment in productive assets with long-term play.

Boost to agriculture is seen not only in the largesse in budgetary allocation but also in the fine print on tariff changes impacting this sector.

Pre-consultations

SCN is not issued in vacuum but after consultations where Noticee is informed about liability relying on documentation collected and alluding to specific cause-of-action. Now, statutory recourse of pre-notice consultations seems to push forward mandatory penalty and leave no room for appellate authorities to consider 'lenience in penalty'.

It is a first for the Government to seek powers to impinge on the discretion of judiciary. But the judiciary is not one to allow its discretion to be fettered in any manner. But the attempt is visible and remarkable at that. Surely, penalty could be imposed with even greater rigour if the opportunity of pre-notice consultations are not availed. Seems like penalty proceedings will be guided 'under dictation' in law.

Penalty

For long, law-abiding citizenry have cried 'fowl' with lenience that defaulter's have enjoyed. Someone said

it well to call us 'the most defaulter-friendly nation.' Circumstances occasioning the imposition of penalty requires inquiry and adjudication. Judicial oversight is welcome only to examine if the inquiry follows 'due process' without interfering with another view that is possible on the same facts. Discretion in imposition of penalty and judicial interference into exercise of discretion is probably the greatest disservice to society.

Penalty ought not to be a 'range' but a finite amount linked to the 'nature' of wrong-doing. Discretion is permissible in determining whether the offence was committed or not. And once offense is established, there should be no further discretion of the quantum of penalty to be imposed. It is the Legislature's privilege to consider all facts and circumstances while laying down the law regarding the 'nature' and 'extent' of penalty. Thereafter, it is the duty of the Executive to investigate and impose penalty under the watchful eyes of the Judiciary.

Power of Remand

2001 saw the withdrawal of power of Appellate Commissioner to 'remand'. Hon'ble SC in *MIL India's* case held that after recording a 'finding' and calling upon original authority to carry out verification of documents and then to pass further orders based on the said finding does not amount to 'remand'. Circular 120/1/2010-ST dated 19th January, 2010 confirmed that such process did not amount to remand.

Now, we see restoration of power to remand being permitted under Section 128A unequivocally along with the circumstances for such remand. Power of remand enjoins duty to give clear directions and powers akin to higher judiciary is seen to be allowed to the Appellate Commissioner for:

- failure to follow principles of natural justice
- failure to pass order after re-assessment
- failure to attribute reasons for crediting refund to Consumer Welfare Fund.

This is welcome!

Step-down but not 'out'

Hon'ble SC in *Naval Group's* decision held that failure to satisfy invoking extended period of limitation displaces the demand but into the normal period of limitation and not dislodge the SCN entirely. Specific provision is sought to be inserted in Section 28(10B) to restore this power.

On the other hand, it is even possible that all SCNs could be issued for the extended period, without regard to the responsibility to establish the circumstances necessary to fasten liability. And expecting that the issue will be finally decided at least for the normal period of limitation.

Such remedies could perhaps be possible because demand in both situations flow from the same section but not when they are authorised by two different Sections (like 73 and 74 of CGST Act). It would be interesting if this measure finds a place into GST (someday).

In-bond Sales

Goods stored in bonded warehouse are assessed to duty when ex-bond bill of entry is filed. Circular 46/2017-Cus. dated 24th November, 2017 invited criticism for claiming that IGST under Customs law was 'applicable but was deferred.' Though admitted that in-bond sales have always been liable to valuation as per Section 14 at the time of clearance as per Section 15 of Customs Act, the circular claims to carve out a specie of in-bond sales (that do not involve ex-bond clearance) to be taxable without any regard to '...the "point" when duties of customs are levied....'; in proviso to Section 5(1).

Now, in respect of integrated tax on goods in bonded warehouse, Section 3(8A) is being inserted in Customs Tariff Act to prescribe:

- Tax to be computed on 'last' transaction when goods are cleared from warehouse
- Transaction value to be 'cash price' of the warehoused goods.

Does this new provision unseat the position stated in Circular 46/2017-Cus. dated 24th November, 2017? Or does it deal with what was obvious on the Customs side that already stood the test of time as stated in this circular itself?

Circular seems to suggest that while 'goods imported into India' are yet to cross the 'customs frontiers', IGST will be imposed in the interregnum. That makes even merchanting trade transactions – goods purchased from Country 'A' and directly sold to Country 'B' without 'crossing customs frontiers of India' by a registered taxable person in India – to succumb to IGST.....remarkable!

Valuation in Tariff Act

Sub-section 8A is proposed that provides the valuation mechanism to impose IGST on in-bond

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sales. Determination to go ahead with this double-layer of tax is remarkable but not without first answering:

- whether IGST under Section 3(7) of Customs Tariff Act can be imposed contrary to Section 15(1)(b) when ex-bond bill of entry is yet to be filed?
- whether Section 7(2) of IGST Act can authorise the imposition of IGST on goods that are yet to enter (leave alone, cross) the 'customs frontiers' of India?
- whether Section 7(2) of IGST Act which is a declaratory provision to oust States from seeking to tax transactions before they 'cross' customs frontiers of India can operate on the same plane as *proviso* to Section 5(1) of IGST Act?
- whether 'the point when duties of customs are levied' in *proviso* to Section 5(1) of IGST Act qualifies the point when value is determined under Customs Act or leaves the imposition of IGST co-equal and simultaneously with levy of Customs?
- how does levy of IGST on goods lying in-bond spare 'merchanting trade' where the person causing this supply is still within taxable territory though the goods themselves are outside 'customs frontiers' of India?
- how could IGST apply to bonded goods whose ex-bond clearance is 'uncertain and contingent' at the time of intra-bond sale?

Though many questions exist but the Governments' resolve to impose tax on in-bond sales along with a valuation methodology of its own makes it remarkable!

Cross-border repairs/processing

New Section(s) 25A and 25B to exempt goods imported and exported, respectively, on goods meant for 'repairs, processing or manufacture'. These transactions enjoyed exemption under notification 158/95-Cus. dated 14th November, 1995, the wisdom of the Government in crafting two new sections leaves everyone breathless.

Remarkable still, is that the consideration for these processes does not enjoy benefit of zero-rated supply due to the restrictions in Section 13 of IGST Act on Place of Supply in such cases.

Appellate AAR

Apart from reorganising AAR and reducing time for disposal of applications, Appellate Authority in

respect of AAR is welcome. In fact, both tax payer and tax administration will be permitted to appeal against orders of AAR.

Recent experience with AAR and the pressing need to avail the desired clarity in interpretation of law or applicability of a notification may have prompted this proposal. It is not the quantum of tax that irks industry but uncertainty surrounding the application of the tax that too after investments are committed. A robust AAR and Appellate Authority for AAR bring the desired certainty that industry looks forward to.

It is indeed remarkable that multiple appellate fora are being established but remarkable still will it be when all of them will be full to the brim.

Customs Audit

Remarkable also, is a new Chapter XIIA is now proposed for audit by Customs authorities outside the confines of the 'customs station.' Although experience in Central Excise has led to demands for less intrusive and interactive governance, it is indeed remarkable that an express provision is being given a place in the statute book.

Preparedness is key and this second-tier 'look in' opens new avenues to attend to transactions that have already passed the scrutiny.

Exchange of Information

Government to exchange information to monitor cross-border activities. Agreements to be entered with other countries will make it obligatory to share information in routine manner and not limited to occasions when sensitive intelligence comes to light. And there's some urgency associated with entering into these agreements immediately.

Exchange of information makes for more stringent implementation of the law and administration will now enjoy information that equips them to take the battle to the door-step of offenders.

Central Excise

Central Excise Tariff schedule has been pruned by *Taxation Laws Amendment Act, 2017* to the 5 petroleum products. Now, tariff amendments have been made:

- Road and Infrastructure Cess* to be levied on motor spirit with a corresponding abolition of AED (Road Cess)
- R&I Cess exempted on blended petrol, ethanol blended petrol and bio-diesel

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- Reduced R&I Cess on 4 specified refineries.
* Declared provision under Provisional Collection of Taxes Act, 1931

Service Tax

Retrospective tariff changes by issuing exemption to maintain alignment with corresponding exemptions in GST:

- Naval Group Insurance Fund on policies issued to Coast Guards
- Services of GSTN to Government(s)
- Government's share of profit-petroleum
* Retrospectively, from various dates specified in Bill

GST "Amendments"

By its absence, the Budget brings sharp focus to the high-pitched issues that were expected to be resolved. Here's a quick look at all those issues and the impact they are likely to have as the Government moves forward with determination and resolve.

'Definitions' remain

- Despite anguish caused, these definitions continue (with anguish) such as aggregate turnover, consideration, voucher, etc.
- Uncertainty continues with the scope of location of supplier of goods, deferred revenue expenditure, tax on unbilled revenue, write-down in carried value of capital goods, impairment restatement, etc.

Transactions 'not' Supply

- Supply is supply even when it is 'agreed to be made', it does not attract tax merely on issue of PO unless Time of Supply occurs.
- Assets disposed off continues to be supply whether or not ITC has been availed.



- Even slightly 'involved' (or extended) role of an agent eclipses agency and attracts supply *inter se*.
- Tax applies even without existence of active 'business' in service-imports and Schedule II.
- Except 'land and building', all other 'forms' of immovable property decidedly taxable. And Time of Supply deferred to 'registered' landowners raises questions than it answers.
- No reprieve from tax on 'implied' supply in transactions between associated entities at 'nominal' value that would be unusual to be taxed at OMV.
- Tax on 'development rights' implies tax on TDRs itself though legislative support for the same remains in doubt.

Inward supply from Unregistered Suppliers

- Extant exemption set to expire on 31st March, 2018.
- Applies only if recipient is 'registered'.
- No tax payable if supplier and recipient are both unregistered.
- 'All' inward supplies to answer tax payment unless excluded (Schedule III) or exempt.
- Be sure of 'place of supply' and pay up tax only if the place of supply is home-State.

Bona fide 'Transition' without Relief

- Returns filed 'with' error unresolved.
- Returns 'missed' to be filed unresolved.
- TRAN1 rectification unresolved.
- TRAN1 verified but recourse to SCN stays.
- Cash paid incorrectly unresolved.
- EWB 'deferment' without notification.
- Disqualification of inter-State stock unpalatable to composition taxable persons.

Registration 'messy'

- Conflict between Section 23 and 24 remains unresolved making it mandatory for persons liable to RCM to pay tax even below threshold limit.
- Inference of 'single' registration in home-State for multi-State activities such as property rental or installation-at-site or house-keeping remains an inference.
- Composition taxable persons seem to require separate registration as business vertical for trading and service (food-drink).
- Cancellation of auto-migration unresolved.

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State of 'touch-me-not' of GSTN/EWB

- GSTRs uncertain yet 3B required.
- Outward supplies reported as B2C not (yet) permitted to be restored as B2B.
- EWB announced but deferred.*
- Inter-State supply involving intra-State movement continues to confuse with type of EWB to use.

* Deferment announced due to technical issues on portal without proper notification to rebut queries in inter-State check points

Blocked Credits

- ITC on motor vehicles and immovable property not involved in supply remains blocked.
- Ambiguity in implications of 'in respect of' excludes capex and opex on blocked items.
- Reversal of *bona fide* belief in exemption imposes tax without restoration of eligible credit.

Reversal of Credits

- Extended definition of 'exempt supplies' under Section 17(3) continues for partial reversal.
- Special additions and deletions to this extended definition flowing from Rule 42 seems deficient in law making process.

ITC Refund

- Deemed exports continues to lack authority in Act to qualify for refund.
- Formula for refund riddled with anomalies – export turnover, net ITC and total turnover.
- Repeated amendments to Rule 89 and manual refund process riddled with confusion.

Classification and Rate of Tax

- Rate of tax 'upgrade' too frequent and fuels fresh confusion along with piecemeal amendments. Only if frequency of changes reduce will it allow time for correct position to be visible and adopted. Perhaps a limited duration 'black out' for amendments be considered.
- Informal engagement with trade has become too unsavoury. And without resolution of conflicting answers on social media leaves doubts unresolved.
- Language of exemption notifications not lucid to ease application.



SCN-domino!

Tax Invoice issued by Supplier passes through the network and reaches Recipient who has no occasion to 'rectify' tax paid incorrectly. As a result, there would be a domino-effect through the entire supply chain where notices can be issued on the same issue but on each taxable person involved who has been led into the error from the preceding supply.

Issues will multiply, if not for anything, the sheer newness of this law. But it's remarkable that notice(s) on the same issue can be served to all taxable persons who have perpetuated this error.

Having rendered credit ineligible of taxes recovered under Section 74, relief is needed to stop this runaway train from barreling down the entire supply chain implicating everyone. Someone said this was a one-of-a-kind law, it rings true on all counts!

Conclusion

Amidst all the technology melee, GST has been rolled out and industry is at large to make sense of a brand-new law that seeks to impose tax on remarkable new transactions in remarkable new ways. Determination and resolve is not in short supply and that encourages continuous engagement by trade and industry with a Government that is befittingly receptive. Attitude towards cross-border trade guides long-term strategy and domestic trade taxation is different. Perhaps it's the law-making process of GST that robs the sheen off the indirect tax portion of the Budget. But the clarity that emerges in the law only means that changes will come but not unbeknownst to industry. Perhaps that's the future of every 21st century legislation and that makes this year's Budget remarkable! ■