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Editorial

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Development of OECD's CARF, and amendments to the CRS, seek to increase global tax transparency of crypto-assets

In October 2022, at the request of G-20 nations the OECD released a new global tax transparency framework known as the Crypto Assets Reporting Framework (CARF) to provide for the reporting and exchange of information with respect to crypto assets. The CARF consists of rules and commentary that can be transposed into domestic law, to collect information from Reporting Crypto-asset Service Providers having nexus to the jurisdiction implementing the CARF.

The rules have been designed on four pillars:

1. the scope of the crypto-assets to be covered
2. the entities and individuals subject to data collection and reporting requirements
3. the transactions that must be reported and the information to be reported in respect of such transactions
4. due diligence procedures to identify crypto-asset users and controlling persons, and to determine the relevant tax jurisdictions for reporting and exchange purposes.

Besides the development of the CARF, amendments have also been made to the Common Reporting Standard (CRS) to bring within its scope new financial assets, products and intermediaries that are potential alternatives to traditional financial products, while avoiding duplicating the reporting required by the CARF. As explained by the OECD, work is currently on to develop an implementation package to ensure consistent domestic and effective implementation of the CARF. This package would consist of a framework of bilateral or multi-lateral competent authority agreements for the automatic exchange of information collected under the CARF.

India has been at the forefront of suggestions for a global reporting mechanism for crypto and has taken a very cautious view as the government has not legitimised trading in such assets. Budget 2022 imposed a 1% withholding tax liability and a 30% tax on gains on income from cryptos.

As the year 2022 comes to an end I would like to say a big thank you to all the member firms which have contributed articles throughout the year to make this newsletter a grand success. Signing off with a hope that in 2023 many more firms contribute to this initiative, and a New Year affirmation given by Sri Paramahansa Yogananda:

With the opening of the New Year, all the closed portals of limitations will be thrown open and I shall move through them to vaster fields, where my worthwhile dreams of life will be fulfilled.

Seasons Greetings and Wishes for a blessed 2023!

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Egypt announces further tax exemptions to motivate FDI

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> *Egypt has a long history in free zone systems dating back to 1902, with the establishment of the first free zone coinciding with the opening of the Suez Canal*

A draft law submitted by the Egyptian government to amend some provisions of the Value Added Tax Law No. 67 of 2016 has finally approved the exemption of goods and services exported by economic free-zone businesses outside the country's tax law provisions. This comes with the aim of encouraging investment in Egyptian free zones, by not charging value added tax (VAT) on goods or services imported for these projects.

Businesses operating under the free zone system may switch to the internal investment system. This law's executive regulations determine the conditions for the exemption and controls on it, and the customs treatment of equipment, machinery, production equipment, lines and spare parts required by the licensed activity.

Background

Free zones in Egypt are considered a special investment system governed by the provisions of Investment Law No. 72 of 2017 and its Executive Regulations, enforcement of which is overseen by the General Authority for Investment and Free Zones (GAFI).

Egypt has a long history in free zone systems dating back to 1902, with the establishment of the first free zone coinciding with the opening of the Suez Canal. A free zone is a territory subject to Egypt's sovereignty, located (most of the time) in one of Egypt's ports (seaport, airport or on a land border). It is separated from the rest of the state by boundary walls. Within the public free zone are groups of investment projects set up to take advantage of incentives and investment privileges. The state provides the infrastructure necessary to operate business inside the zone.

There are nine public free zones in Egypt, located in Alexandria (Amrya), Cairo (Nasr City), Port Said, Suez, Ismailia, Damietta, Shebeen ALKoum, Qeft and the Media Zone in the 6th October City. Except for the last, public free zones are not specialised – each zone includes a variety of projects, such as inventory, industrial, services and financial services.

Suez Canal Free Zone

As Egypt's most famous free zone, this enjoyed huge benefits like no other:

- Customs exemptions through agreements with Europe (EUTA), North America (QIZ), Africa (COMESA and AFCTA) and GAFTA
- Being a major maritime route connecting Europe, east and north Africa with Asia via the Arabian Gulf 20% of the international container trade, 10% of global seaborne trade and almost 18,000 ships pass through each year
- All Africa can be reached by motor vehicles taking the Cairo–Dakar and Cairo–Cape Town roads
- A very central location: a container ship can reach Europe in 5 to 7 days, India in 12 days, north America in 19 days and China in 24 days.

Import and export controls in free zones

The Customs Authority states that, subject only to provisions established to prevent circulation of particular goods or materials, goods exported from Egypt or imported into Egypt by free zones in order to carry out their activities are not subject to the import or export rules, nor to Customs procedures for exports and imports. Importation from the free zones into the country is subject to limits, proportions, quantities and periods of time stipulated in the decision to license the activity. Meaning, mainland corporates may import goods from the free zones to the local market; these goods will be subject to local import regulations and taxation.

All projects that invest in a free zone are subject to customs and tax control in accordance with rules issued by a decision of the Free Zone Authority's Board of Directors in coordination with the Egyptian Customs and Tax Authority. Goods exported or imported by free zone projects are not subject to customs taxes, value added tax or other taxes and fees. "All tools, equipment, machines and necessary means of transportation of all kinds, which are necessary to carry out the licensed activity of the projects located within the free zones of all kinds", except for passenger cars, are also exempt from all these taxes and fees.

Goods in transit are exempt from the payment of any fees normally imposed on goods in transit so long as the project falls under the custom office's jurisdiction and the final destination of the goods is determined in the bill of lading and the invoice. Local components of goods produced by free zone projects are exempt from custom duties were sold in the local market (inside Egypt).

Importing for the purpose of trading within the free zones, which include an entire city, is considered local consumption.

Where goods or services are subject to tax under this law, the same tax is payable by the regions, cities, duty-free shops and special economic zones.

The Egyptian free zones system has many advantages for investors, especially in the industrial, services and warehouse sectors. Egypt is recognised as an attractive market to invest in, thanks to its unique mix of demographics and commercial links to the broader world. Its population of over 83 million makes it the largest Arab country, while it is strategically located at the gateway of trade and commerce for southern Europe, Africa and the Middle East.

Incorporation of a company to work within the public free zones

Where a company is incorporated to work within the public free zones system under Law No. 72 of 2017 on Investment Guarantees and Incentives, in addition to the documents that law requires pre-incorporation approval must be obtained from GAFI, issued by the Board of Directors of the free zone where the project will set up. Joint stock companies, limited liability companies, partnerships limited by shares, simple partnerships and sole proprietorships may all incorporate under this law.

Operating within the Egyptian free zones systems

The draft law eases the way for global investors looking to harness opportunities presented by Egypt's fast-growing domestic economy and strategic location. It also helps the obtaining of all necessary national and local approvals for start-up operations in Egypt. Rent within the free zone area is US$9/metre for industrial businesses and US$12/metre for service and warehouse businesses.

Other than the tax exemptions, Egypt's free zones law offers:

- Free transfer of invested capital and profits abroad
- Freedom to select the field of investment and the legal form of projects
- No restrictions on pricing of products and profit margins
- No minimum or maximum limits for invested capital (for public free zone projects only) except joint stock company the min investment is 250,000 LE

- No restrictions on the nationality of the capital's owner – a foreign investor can be the sole owner or hold any share in the investment (except for projects set up in Sinai)
- Scope to subcontract in order to maximise exploitation of the project's potential (GAFI publishes rules on subcontracting)
- Residency facilities for foreign investors
- Residence permits for foreign workers as requested by the project.

Businesses operating within the free zone systems are guaranteed that legal action may not be launched against them unless GAFI is first consulted. Projects and establishments may not be nationalised or confiscated.

Final FTC Regulations: significant changes to the creditability of foreign income taxes

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At a glance:

- *The main takeaway:* Foreign tax credit (FTC) final regulations have made it more difficult to determine whether FTCs are available for foreign taxes incurred by US taxpayers
- *Impact on taxpayers:* Various new requirements (such as the attribution requirement noted below) may cause double taxation of income; many common and previously creditable foreign taxes may no longer be creditable

The final regulations on foreign tax credits fundamentally modify the rules for determining the creditability of foreign tax. For creditability, a foreign income tax must satisfy the net gain requirement, which includes tests to establish realisation, gross receipts and cost recovery. Further, the net gain requirement now incorporates an 'attribution requirement' that must be satisfied. The attribution requirement is satisfied by a non-resident of the taxing country (i.e. a US taxpayer or a controlled foreign corporation (CFC) of a US taxpayer) if one of the following tests is met:

1. *Activities test:* A foreign tax imposed based on non-residents' activities must be limited to the gross receipts and costs that are attributable, under reasonable principles, to non-residents' activities within the foreign country imposing the tax (including functions, assets and risks). The test does not include the location of customers, users or similar destination-based criteria nor the location of persons from whom the non-resident makes purchases. It also excludes foreign rules that deem a permanent establishment or attribute gross receipts, or costs based on the activities of a person other than the non-resident (besides an agent).
2. *Source test:* To satisfy the source test, the foreign tax must be imposed based on a sourcing rule that is reasonably similar to the US rule. When evaluating whether a foreign-law sourcing rule is reasonably similar, the character of an item of gross income generally is determined under foreign law. For example, if a payment would be characterised as services income under US principles, but as a royalty under foreign law, the foreign-law source rule for royalties must be reasonably similar to the US source rule for royalties. For services income, the payment source must be determined based on where the services are performed. Therefore, a withholding tax imposed on payments for services performed in the country imposing the tax would meet the test. For royalties, the source of the payment must be determined based on the place of use of, or the right to use, the licensed intangible property. Consequently, for instance, an FTC would not be available if a foreign jurisdiction imposes a withholding tax on royalties under a rule based on the residence of the payment recipient. However, the US Treasury has indicated additional changes will be forthcoming to address potential relief for certain royalty withholding taxes. In the case of a sale of property, including sales of copyrighted articles (e.g. software), the source test is unavailable, and the attribution requirement can only be met under the activities or *situs* test.
3. *Situs test:* To satisfy this test, a foreign tax based on gains of non-residents from the sale or disposition of property must be attributable to gross receipts from the disposition of real property located in a foreign country, or an interest in a resident entity that owns the real property, under rules reasonably similar to the US Foreign Investment in Real Property Tax Act (FIRPTA) rules.

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> *Under the final regulations, taxpayers could find that traditionally creditable taxes may be denied and face the prospect of double taxation on income*

Nevertheless, if a foreign tax does not satisfy the attribution requirement, it may still qualify as a creditable income tax under a treaty exception. If the foreign tax is imposed on a US taxpayer, it can qualify as a creditable income tax if the tax is treated as an income tax under a US tax treaty and the US taxpayer elects benefits under the treaty. In the case of a foreign tax incurred by a CFC, because a CFC is not a US taxpayer the foreign tax must independently satisfy the qualification rules of a foreign income tax, but certain modifications under the foreign treaty may be considered.

The final regulations also tightened the cost recovery requirement. In general, a foreign tax satisfied the cost recovery requirement only if that tax allowed for the recovery of all 'significant costs and expenses'. Exceptions were possible, but only if a disallowed expense deduction was 'consistent with the principles underlying the disallowances' under US tax law. In a technical correction to the final regulations released on 26 July, the Treasury addressed concerns about the perceived stringent nature of the cost recovery rules in the final regulations. The technical correction broadens the intended reading of the rule and, in part, the regulation language was changed to 'including capital expenditures', removing the word 'significant' and referring to 'any principles' rather than 'the principles'.

While the effective dates in the final regulations may vary by provision, generally many provisions are effective for tax years beginning on or after 28 December 2021 (i.e. 2022, for calendar-year taxpayers).

The bottom line

Under the final regulations, taxpayers could find that traditionally creditable taxes may be denied and face the prospect of double taxation on income. The scope of the regulations is far broader than denying a FTC for digital services taxes. Consequently, taxpayers should carefully consider the new requirements, in particular the attribution requirement, because withholding taxes on royalties and service may not be creditable now.

“Beckham Law” regime 2.0

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Individuals who have relocated to Spain or who are appointed directors of a Spanish company may choose between being taxed as Spanish tax-resident or as impatriate

Under the Spanish tax residence rules, two tax systems (“tax regimes”) may arise for Spanish tax-resident taxpayers:

- *Full tax residents:* the “ordinary tax regime” under which taxpayers are subject to tax on a worldwide basis for any income, gain and, if applicable, net asset under the wealth tax, OR
- *Limited tax residents:* the “impatriate regime”, also known as the “Beckham Law regime”, where only employment income is subject to tax, on a worldwide basis, but any other income, all gains and net assets under the wealth tax are subject only on a source/territorial basis.

The impatriate regime applies following the change of residence to Spain for an employment or director position.

Individuals who have relocated to Spain or who are appointed directors of a Spanish company may choose between being taxed as Spanish tax-resident (under the ordinary tax regime) or as impatriate with an applicable rate of 24% up to €600,000 and 47% on employment income above this level (depending on the Spanish Autonomous Community in which they are resident).

The main benefits of the impatriate regime are:

- Worldwide employment income taxed at fixed tax rate of 24% up to €600,000
- Non-foreign income (interest, capital gains, business income, dividends etc.) liable for Spanish tax
- No wealth tax applicable
- No obligation to disclose foreign assets while under regime.

The regime applies for the year in which the individual becomes tax-resident in Spain and for the following five taxable years.

For the impatriate regime to apply the taxpayer must not have qualified as Spanish resident for the five years previous to the application, as per the recent modification of the Start-up Law recently approved by Spanish Congress on December 1st 2022.

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Dutch anti-abuse developments in international structures under EU and OECD anti-tax avoidance initiatives

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Dutch Supreme Court final decision on scope awaited. Under the MLI dividend withholding tax could increase to 15%

The evolution of Dutch anti-tax avoidance legislation reached a new milestone with the proposal of a third Anti-Tax Avoidance Directive (ATAD 3, initially introduced as the Unshell initiative) on 22 December 2021. ATAD 3 aims to tackle the misuse of shell entities and should come into effect from 1 January 2024.

ATAD 3 may be seen as a follow-up to the 2015 amendment to the EU parent–subsidiary directive ("2015 Amendment"). It adds to the directive an anti-abuse clause that includes an anti-hybrid mismatch, and a General Anti-Abuse Rule (GAAR).

The Dutch exemptions for participations and dividend withholding taxes

The Dutch participation exemption is generous: it provides full exemption without any minimum holding period for EU and non-EU subsidiaries. The minimum requirements to meet are in general that the holding comprises at least 5% of the shares or profit participations in the subsidiary. The participation exemption is denied if the subsidiary is not sufficiently active or sufficiently subject to income taxes. In line with the anti-hybrid mismatch in the 2015 Amendment, the exemption is also denied if the distributing subsidiary can set the distribution off against its taxable profits.

Alongside the participation exemption, an exemption applies for Dutch dividend withholding taxes. If in its home country a non-Dutch parent company would have qualified for the Dutch participation exemption, an exemption from Dutch dividend withholding taxes is given. The exemption applies to dividends distributed by the Dutch entity to EU parent companies or to parent companies in countries with which the Netherlands has concluded a double tax treaty that includes an arrangement for dividends.

In line with the 2015 Amendment, Dutch anti-abuse rules are in place to enforce the GAAR. These were introduced to the Dutch corporate income tax act under the foreign substantial shareholder regime ("FSS") and from 2018 comparable anti-abuse rules were adopted in the Dutch dividend withholding tax act.

Dutch GAAR

The Dutch anti-abuse rules, under both the FSS regime and the dividend withholding tax act, apply if both a subjective test and an objective test are met.

Subjective test

This test is met when an entity holds a direct shareholding in a Dutch subsidiary with the main purpose, or one main purpose, being to avoid Dutch personal income tax (FSS) or dividend withholding tax at the level of the shareholder. To apply the subjective test one should "think away" the direct parent of the Dutch subsidiary and compare the taxation under the structure in place with the taxation that would apply if the direct parent did not exist. If Dutch personal income tax or dividend withholding tax would be higher if the direct parent were "thought away", the structure is deemed to meet the subjective test.

Objective test

This second test is met when the structure is considered to be artificial in nature. Shareholders that carry on business activities to which the shareholding in the Dutch subsidiary relates should not be considered to be part of an artificial structure. The business activities that qualify under the test include top-tier holding company activities such as performing governance, management and/or financial activities for subsidiaries including the Dutch subsidiary.

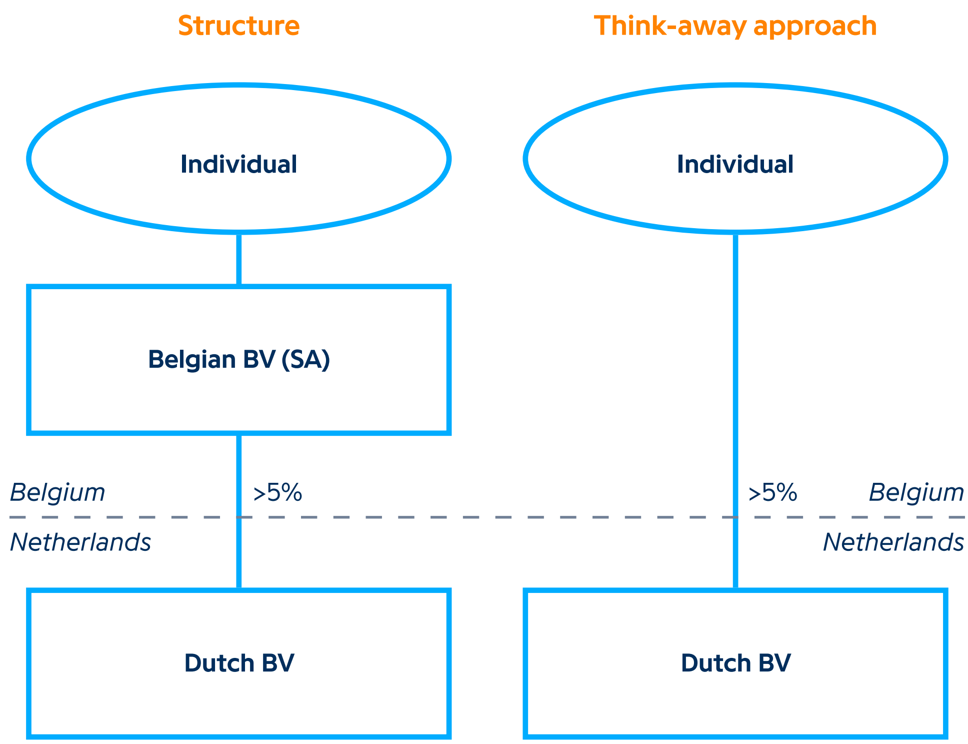
Both tests met

Even if both the subjective and the objective test are met, the structure may be deemed not abusive if the direct shareholder meets substance requirements in addition to the ordinary substance requirements ("relevant substance requirements"). The relevant substance requirements include the direct shareholder having its own office space available for at least 24 months and incurring salary expenses of at least €100,000 per annum. This exception, however, only allocates the burden of proof between the taxpayer and the Dutch tax authorities. If both the subjective and the objective test are met, the Dutch tax authorities will decide whether the structure is abusive in nature and thus whether the anti-abuse legislation nevertheless applies.

Recent Dutch case law

Since the introduction of the subjective and objective test in 2016 (FSS) and 2018 (dividend withholding tax), Dutch taxpayers have been discussing the scope of the GAAR with the Dutch tax authorities. In two recent cases examining the anti-abuse legislation under the dividend withholding tax act, the Dutch higher court brought some clarity to this question. One of the cases *will* and the other *may* be sent before the Dutch Supreme Court for a final decision.

In both cases, shares in a Dutch limited liability company were held by a Belgium limited liability company, the shares in which were held by natural persons residing in Belgium for tax purposes. Both cases found the subjective test to have been met, based on the "think-away" approach. This can be depicted as follows:



Under the “think-away” concept, the individual might be subject to Dutch personal income tax in relation to their shares in the Dutch BV. In addition, dividend distributions by the Dutch BV directly to the individual would be subject to a 15% Dutch dividend withholding tax.

In both cases the objective test was also deemed to be met. In the first case heard, the Belgian limited liability company acted as a personal holding company with no or limited activities but no active business. In the second case, the Belgian limited liability company acted as an active investment vehicle. Although the Belgian parent company was deemed to be running an active business, the Dutch subsidiary was not actively managed, so the structure of the shareholding in the Dutch subsidiary was considered artificial in nature and the objective test deemed to be met.

Because both the subjective and objective tests were met, in both cases the Dutch dividend withholding tax exemption was denied. It is now up to the Dutch Supreme Court to make a final decision.

Multi-lateral Instrument

As part of the OECD Base Erosion Profit Shifting (BEPS) initiatives, a Multi-lateral Instrument (MLI) has been negotiated and signed by over 90 countries and came into effect from 1 January 2019. The MLI can introduce anti-abuse measurements to existing tax treaties and is expected to cover over 1,600 tax treaties worldwide.

One of the main elements in the MLI is the principal purpose test (PPT). If the PPT is met, treaty benefits, such as reduced withholding taxes on dividends, may be denied. The PPT is deemed to have been met if the main reason, or one reason, behind the structure is to obtain benefits under the applicable double tax treaty.

The Netherlands has adopted the MLI and it currently applies to most of the double tax treaties concluded by the Netherlands. The Dutch government holds the opinion that when the Dutch GAAR apply, the PPT under the MLI is met. The subjective test has the same basis as the PPT – a structure having the main purpose, or one purpose, to obtain tax benefits.

Where until recently tax effects under the GAAR could be eased by a double tax treaty, the MLI may end this easement. Similar issues arose in the cases discussed above. Although the Dutch Higher Court ruled that the GAAR in the dividend withholding tax applied and denied the withholding tax exemption, under the double tax treaty between Belgium and the Netherlands the withholding tax was limited to 5%. Under the MLI this will increase to 15%, the Dutch statutory dividend withholding tax rate.

ATAD 3

ATAD 3 denies the participation exemption in cases of misuse, whereas the GAAR denies certain benefits to shareholders. Both the 2015 Amendments and ATAD 3, however, seem to tackle structures that make use of shell entities.

Under ATAD 3, a structure in which a natural person holds shares in a holding entity located in the jurisdiction of his/her residence is not deemed abusive. That personal holding entity should not be denied the benefits of a participation exemption. This explanation appears to contradict the explanation of the GAAR given by the Dutch authorities under the 2015 Amendment and the outcome of the cases discussed above.

Where to go from here

Dutch tax law is influenced by international developments and initiatives from such as the EU and OECD. These developments also impact other jurisdictions, which might have implemented (or be required to implement) comparable anti-abuse legislation.

There are still lots of questions on the scope of the anti-abuse measurements but if these apply the tax burden or the time spent on discussions with local government may be impactful. With the increasing developments in international anti-abuse legislation, it may be worth spending time considering and rethinking their international structures.

GST in India – Reflections on five years

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GST has brought many positives, but still steps need to be taken

Recently, writing on the completion of five years of the Goods and Services Tax (GST) regime in India, Finance Minister Ms Nirmala Sitharaman stated "GST has emerged strongly after facing turbulence from the COVID-19 global pandemic and its fallout. It is to the credit of the GST Council that the Centre and the states held each other's hand to not just face the crisis but to lift our economy onto the path of recovery. It is this working together that has made India stand out now as the fastest growing economy, as projected by many, this year and the next."[1]

Is India's GST definitely a tax reform?

When the Constitution Amendment Bill on GST was introduced in India's Parliament in 2015, the new tax was touted as a revolutionary tax reform. Without a doubt, there have been many positives in the five years since the introduction of GST and no debate is required. A few have been real stand-outs, such as merging multiple central and state levies into a single tax, fungibility of tax credits for utilisation, abolition of check posts at state borders, electronic waybills for tracking physical movement of goods, electronic filing of tax returns on the GSTN portal and electronic invoicing. GST has eliminated the tax arbitrage that existed between the states under the CST/VAT regime. This has greatly increased logistics supply-chain efficiencies.

One crucial requirement for introducing tax reforms in many developing and transitional economies has been to evolve a tax system to meet the requirements of international competition. In an export-led open economy, the tax system should not only raise the revenues needed to provide social and physical infrastructure but also minimise distortions.[2]

India's approach to tax reform under GST laid emphasis on minimising distortions in tax policy to keep the economy competitive. Minimising distortions implies

- gradually reducing the share of GST in total indirect tax collections
- reducing marginal rates of GST and
- reducing differentiation in tax rates to reduce unintended distortions in relative prices.

To achieve this, broadening the tax base was a key focus. A vital indicator that distortions in a tax system are reducing is the level of litigation in domestic tribunals or courts. Let us take a look at all these aspects (GST collections, tax rate reduction and reduction of GST litigation) in some detail via developments, tax rate amendments, rulings and judgments notified in the public domain in the past five years.

GST collections

Any indirect tax burdens the poor disproportionately, as it takes no account of affordability. Hence, it is safe to assume that any reform of indirect taxes will aim to gradually reduce the tax burden in the medium to longer term.

On average, in OECD countries two-thirds of total taxes collected are direct taxes. The FM, Arun Jaitley, stated in 2015 that the GST Council would focus on capping GST collections. It is pertinent to note that average monthly GST collections increased from US$13.5 billion in 2020/21 to US$17 billion in 2021/22, and that in the first three months of 2022, collections averaged US$20 billion.[3] India's current FM has stated that "it is a reasonable and fair expectation that this steady increasing trend will continue".[4]

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GST rates

Before the GST, on most items indirect taxes levied by the centre and the states in India totalled more than 31%. Under the GST, rates have reduced on over 400 goods and 80 services. The highest, 28%, rate is meant only for demerit or "sin" items – such as aerated beverages – and luxury items. Out of 230 items originally in this category, close to 200 have been shifted to lower tax rates.[5]

In the Parliamentary debate on the GST Bill, Jaitley had said the government would shun the high-tax approach and focus on smoother, investor-friendly tax policy to boost industrial activity and generate higher revenues. "We are interested in ... reviv[ing] that sentiment," he told Parliament. "My approach has been [to] try and resolve disputes … end arbitrariness … give as much relief to the vulnerable as possible. On 80% of products, total centre and state taxes go up to 27% now. We will rationalise this and reduce the tax rate", he stated.

In a report to the Government of India,[6] the Chief Economic Advisor recommended that GST be capped at 18% and a separate higher rate be considered for demerit goods, because "the more you lower your tax rate, the more your GDP will grow, as the number of people who don't pay tax will lessen". Agreeing, Prime Minister Narendra Modi stated during the debate that "consumers and small businesses will gain tremendously. Small business will feel more secure with this. Small business is our strength."[7]

A tax reform can be judged by the number of rate bands; a two-rate structure would be ideal. India's GST broadly has four tax rates – 5%, 12%, 18% and 28% – and some goods and services are zero- rated ("nil-rated"). A surcharge ranging between 7% to 22% of GST is charged on "sin" goods, a further 3% is levied on gold, 0.25% on "rough, uncut diamonds" and 1.5% on finished/polished diamonds.

It has been recently reported in the media that the GST Council is working on a two-tier rate structure.

Thus, the report card on rates shows, though there are some challenges, implementation of GST in India is a substantial tax reform for the country.

Tax litigation

Now, let us come to the final litmus test. Typically, a levy can be considered a reform if disputes with tax authorities reduce significantly over (say) a three-year horizon. Here are the statistics for tax disputes under GST for the first three years of operation,[8] categorised separately for cases before High Courts (HC) or the Supreme Court (SC) (*see table on left*).

Category of tax dispute*	**HC**	**SC**	**Total**
Transitional credit	70	1	71
ITC freezing and release	288	6	294
Interests gross/net, other reasons	386	4	390
Search and seizure	175	3	178
Arrest and bail involving allegations of evasion	84	3	87
Attachment of bank accounts pending investigation	66	1	67
Actions on non-filing and unregistered persons	9	0	9
Classification matters	46	0	46
E waybills/seizure of goods	175	2	177
Cancellation of registration, problems in registration, etc.	242	1	243

*The list includes not only final orders but also orders of remand, dismissal of writ petitions, etc.

Now, let us examine cases before the Advance Ruling Authorities (AAR) or their Appellate bodies (AAAR) (*see table over page*).

Here we see that 1,000+ applicants approached the authorities for advance rulings in the first three years of the levy (some appear under more than one

Category of disputes	AAR	AAAR	Total
Classification matters	417	46	463
Eligibility of items to tax as services	397	59	456
ITC eligibility/reversal/others	172	36	208

heading). It is also important to note that there are more than 13.8 million taxpayers in India registered to pay GST, of which only 1,000 or so felt the need to seek clarification from the AAR.[9]

Now, let us take a look at some typical GST disputes that have been decided in favour of taxpayers.

1. *Transitional credits missed on lapse of due date*[10]
   In a landmark decision that could free up ITC worth hundreds of millions of rupees that was stuck in dispute with the GST Authorities, the Supreme Court has allowed all affected taxpayers to claim accumulated ITC accrued in the pre-GST indirect tax regime within 60 days ending 30 October 2022. The GSTN portal has been directed by the Court to enable all registered persons to claim transitional credit. With this judgment alone, the Supreme Court disposed of a batch of 400 appeals. However, taxpayers who have not petitioned the courts, possibly thousands of them, could now avail themselves of this facility.

2. *No GST on ocean freight CIF, booked by overseas exporter*[11]
   Upholding a decision of the Gujarat High Court, against which the Revenue had appealed, the Apex Court concurred that the legislation must be given a strict interpretation:

   Article 265 of India's Constitution does not permit imposition of a levy by virtue of delegated legislation in the absence of express legislative provision. Thus, it is unconstitutional. Consequently, Revenue has erred in treating importers as recipient of services as the services are actually received by the foreign exporter. The Indian importers were not even liable to pay consideration to the foreign shipping lines and hence, cannot be held liable to pay tax on such services. A beneficiary of services cannot be [described] as a recipient of service. The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.

3. *No GST on incidental charges recovered from customers along with electricity charges*[12]

4. *Services provided to parent company (separate legal entity) are export of services*[13]

5. *Interest cannot be levied on gross liability before adjusting ITC*[14]

6. *Mere availability of ITC that is not claimed liable for interest*[15]

Summing up

So, implementation of GST in India is certainly a bold and major reform, but one that has yet to take certain steps. But in any case, it would be appropriate to mention that GST is one of the best things to happen to India's fiscal environment in a long time.

REFERENCES

1. Nirmala Sitharaman, "GST: five years stronger", *Indian Express*, 1 July 2022, accessed at https://indianexpress.com/article/opinion/columns/gst-five-years-stronger-8001468/.
2. M. Govinda Rao, "Tax reforms in India – achievements & challenges", *Asia Pacific Development Journal*, Vol 7, No. 2, December 2000.
3. US$1 = INR78.
4. Sitharaman, "GST: five years stronger".
5. Sitharaman, "GST: five years stronger".
6. 'Report on the Revenue Neutral Rate and the structure of rate for Goods and Services Tax (GST)' – Chief Economic Advisor to the Government of India; December 2005.
7. *The Hindu*, "Lok Sabha passes GST Bill", 8 August 2016, accessed at www.thehindu.com/news/national/Live-Monsoon-Session-of-Parliament/article60527033.ece.
8. Source: www.taxindiaonline.com.
9. Published by Statista Research Department, 6 December 2022.
10. *Union of India vs Filco Trade Centre Pvt. Ltd*, 2022 Livelaw (SC) 62.
11. *Union of India vs Mohit Minerals*, [2022] 138 taxmann.com 331 (SC).
12. *Torrent Power Ltd vs Union of India*, TS-858-HC-2018 (Guj)-NT-Torrent Power.
13. *Linde Eng. Ind. Pvt. Ltd vs Union of India*, 2020-VIL-349-Guj-ST.
14. *Refex Industries Ltd vs ACCGST & CE*, 2020-TIOL-382-HC-MAD-GST.
15. *Commercial Steel Engineering Corporation vs State of Bihar*, 2019-TIOL-1585-HC-PATNA-GST.

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