

GST – CONSTITUTIONAL ASPECTS – REFORM – IMPLEMENTATION – CHALLENGES AND OPPORTUNITIES

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CONSTITUTIONAL ASPECTS

ARTICLE 246A(1)

- Notwithstanding anything contained in Articles 246 and 254, Parliament, and subject to clause (2), the Legislature of every State, have power to make laws with respect to Goods and Services Tax imposed by Union or by such State.

ARTICLE 246A(1)

- Article 246 deals with subject matter of laws made by Parliament and State Legislatures
- Article 254 deals with inconsistency between laws made by Parliament and laws made by State Legislatures
- Article 246A is notwithstanding Article 246 and Article 254
 - Departure from list based levies
 - Not in the nature of a concurrent list levy
 - **Equal power to Parliament and State to make laws with respect to GST**

LOSS OF REVENUE

- Manufacturing States apprehended revenue losses on account of GST
- Taxes on services was not expected to generate significant revenue for many States including smaller States
- Section 18 of the 101st Constitution (Amendment) Act, 2016 provides that *Parliament shall by law on the recommendation of the GST Council provide for compensation to the States for loss of revenue arising on account of implementation of Goods and Services Tax for a period of 5 years*
- GST Compensation Cess on pan masala, aerated water, lemonade, tobacco, cigarettes, motor vehicles, motorcycles, aircrafts

UOI VS. MOHIT MINERALS (2019) 2 SCC 599 (SC)

- *The expression used Article 246A is 'power to make laws with respect to goods and services tax'*
- *The power to make law, thus is not a general power related to a general entry rather it specifically relates to goods and services tax*
- *When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy Cess on goods and services tax*
- *True, that Constitution (101st Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the Constitutional provision does not indicate that henceforth no surcharge or cess shall be levied – Para 56*

ARTICLE 366

- Article 366(12A) – ‘goods and services tax’ means any tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption
 - Technically there is no distinction between goods and services
 - New Article 366(26A) **defines services to mean anything other than goods**
 - **Very wide and general in nature**
 - **Immovable property?**

GST COUNCIL IN ACTION – ARTICLE 279A

- 37 meetings as on date with unanimous resolution
- 38 Council meeting – decisions by vote
- Types of decisions
 - Rate of tax reductions
 - Exemptions
 - Date extensions
 - Kerala Flood Cess
 - Amendments

GST COUNCIL

- Article 279A(6) provides that while discharging the functions conferred by this Article, the Goods and Services Tax Council shall be guided by the need for harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services
- Article 279A(9) provides that every decision of the GST Council shall be taken at a meeting, by a majority of not less than 3/4th of the weighted votes of the members present and voting
 - The vote of the Central Government shall have a weightage of 1/3rd of the total votes cast
 - The votes of all the State Governments taken together shall have a weightage of 2/3rd of the total votes castIn that meeting

GST COUNCIL - ISSUES

- What happens if a rate reduction or exemption or change in law is recommended but not implemented by the Union or the State or States?
- **Are the decisions of the Council binding?**
- What happens if a State in order to attract investment, reduces or exempts tax?
 - *While trade, commerce and intercourse is important for the economic unity of the Nation, the State cannot be oblivious to the responsibilities of a welfare State in raising its resources by levy of taxes to meet the challenges. Incentives to invest in backward areas, subsidies and tax concessions are some of the measures used by the State to guide the location of the industries in backward areas and to generate employment. While power of taxation is indispensable, the State also has the power to grant tax concessions or incentives to indigenous manufacturers / producers. These would certainly create differentiation between the locally produced goods and the goods that are imported into the State but the same cannot be discriminatory and does not fall foul of Article 304(a) – Para 424 – Jindal Stainless Steel Ltd. Vs. State of Haryana (2017) 12 SCC 1*

TEESTA DISTRIBUTORS VS. UoI (2018) 19 GSTL 29 (CAL)

- **Whether lotteries can be subjected to GST?**
 - Actionable claims other than lottery, betting and gambling are outside GST
 - Since lotteries are kept out of actionable claims they can be taxed
 - Rates imposed by GST Council are decisions which a Writ Court is slow to examine
 - States of Sikkim, Mizoram, Nagaland and Arunachal Pradesh have supported the Writ Petitioner on the ground that rates are discriminatory but such States were present in the Council meeting
 - The resolution was carried by the requisite majority
 - While Article 279A contemplates a mechanism to adjudicate a dispute between States / Centre, it is not as if Council decisions are immune from Judicial review
 - If a resolution of the Council breaches a Fundamental Right or a Constitutional Provision, Writ would lie
 - In the instant case, the Council has deliberated extensively and approved the rates in respect of lottery and hence differential tax was permissible

ARTICLE 279A(11)

- The Goods and Service Tax Council shall establish a mechanism to adjudicate any dispute
 - Between the Government of India and one or more States; or
 - Between the Government of India and any State or States on one side and one or more States on the other side; or
 - Between two or more States,
Arising out of the recommendations of the Council or implementation thereof
- ***Can the Council itself establish a mechanism for dispute amongst members when the members collectively constitute the Council?***
- *Article 131 confers Original Jurisdiction to the Supreme Court on any dispute between the Government of India and States or between two or more States. Whether the dispute has to go to Supreme Court?*

REFORM ASPECTS

BACKGROUND - BUSINESS

- Huge number of players in the market
- Company formats, firms and many sole proprietary businesses
- Manufacturers liable to excise duty
- Manufacturers claiming SSI exemption
- Concept of non-excisable goods / nil rated goods but liable to VAT.
- Wholesalers, dealers, retail outlets
- Service providers
- Non-taxable service providers
- Job workers
- **Traditional ways of doing business Vs. Massive change in law**

GST – THE REFORM ASPECT – GAINS FOR THE INDUSTRY

- Path breaking tax reform
- Harmonization of taxes
- Elimination of cascading effect
- Widening of scope of ITC
- Uniform rate across the country
- Elimination of unwanted business structures
- Better supply chain management
- Goods can be supplied from any part of the country
- Equitable taxation
- Vendor verification by buyers
- Transparency

GST – GAINS FOR THE CONSUMER

- Massive reduction in indirect taxes on goods
- GST Awareness
- Product / Service pricing
- Consumer oriented services at a lower rate
- Anti-profiteering provisions
- **No inflation on account of GST**
- One indirect tax levy

GST – GAINS FOR THE GOVERNMENT

- New assesseees
- Widening of tax base
- Data mining
- Revenue collected from multiple assesseees
- E-way bill and trail
- Impact of demonetisation
- Consumer awareness
- Many States have shown increase in revenue
- Compensation based on 14% revenue growth rate

CHALLENGES

WHY DID INDIA IMPLEMENT GST?

REASONS	STATUS
To eliminate the cascading effect of tax	Mostly YES
To introduce a simplified indirect tax system	NO
To widen the tax base	YES
To implement an equitable levy.	YES
To bring in transparency.	YES
To achieve uniform tax rates across the country	YES
To achieve co-operative federalism	YES
To move towards a tax system based on a digital frame work	YES
To increase revenues of Central and State Governments, in order to implement better systems for the country.	?

COMPLEX LAW

- Concept of rate Notifications and non-rate Notifications.
- Excise legacy
- **235 CGST Notifications**
- **106 CGST rate related Notifications**
- Matching SGST Notifications ?
- **21 IGST Notifications**
- **109 IGST rate related Notifications**
- **Corrigendum to Notifications**
- 14 amendments to CGST Rules in 2017
- 10 amendments to CGST Rules in 2018
- 9 amendments to CGST Rules in 2019
- 1 amendment to CGST Rules in 2020
- **17 General Orders**
- **15 Removal of Difficulty Orders**
- **130 Circulars**
- Corrigendum to Circulars
- Press Releases from Ministry of Finance
- Tweets
- Advance Rulings
- **46 amendments through CGST Amendment Act, 2018 and IGST Amendment Act, 2018**
- **Amendments to CGST Act and IGST Acts through Finance (No. 2) Act, 2019 w.e.f. 01.01.2020**

TECHNOLOGY

- Data overload?
- Multiple access at same point of time.
- System collapsing / crashing or slowing
- *Currently, Government officials find access to nic in the mornings extremely difficult due to maximum usage*
- *Currently, MCA which has lot of upload requirements experiences slow speeds and downtime*
- *Tax portals slowdown or are not accessible on due dates*
- *Data security*
- *Will GSTIN assume any liability if there is misuse of taxpayers' data?*
- *Can GSTIN be permitted to share confidential information?*
- *Can GSTIN deny access?*

ADVANCE RULINGS

- Finance Act, 1993 inserted Section 245N to Section 245V in the Income Tax Act, 1961
- Chairman - retired Judge of the Supreme Court / Member – IRS / ILS
- Ruling binding only on the applicant and the revenue for that transaction
- Introduced in Central Excise and Customs in 1999 and extended to Service Tax in 2003
- **CGST Act does not envisage any major role in the creation of AAR despite the fact that CGST is a Central levy**
- Section 96 of the CGST Act, 2017 provides that the AAR constituted under the SGST Act or UTGST Act shall be deemed to be the Authority for Advance Ruling in respect of that State or Union Territory

ADVANCE RULINGS

- Multi State operations
- Most rulings are in favour of the Revenue
- Many legal concepts not considered in Rulings
- Composition of AAR
- Confusion in the market due to publicity
- Loss of business to competitors
- Litigation
- Role of High Courts
- **Way forward – European Court of Justice Format ?**

ANTI-PROFITEERING MEASURE

- Section 171 of CGST Act
 - Any reduction in rate of tax on any supply of goods or service or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.
 - An authority shall be constituted to examine whether ITC availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in price of the goods or services or both supplied by him.
 - Authority referred to in Section 171(2) shall exercise such powers and discharge such functions as may be prescribed.
- Section 171(3A) of the CGST Act – **notified** only w.e.f. 01.01.2020 by Notification No. 1/2020-CT
 - Where the authority after holding examination as required under Section 171(2) comes to the conclusion that any registered person has profited under Section 171(1) such person shall be liable to penalty equivalent to 10% of the amount so profited.
 - No penalty if profited amount is deposited within 30 days of the passing of the order.
 - *Profited means the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.*
 - *NAPA has passed orders based on this provision even before it was notified – Glenmark Pharma, Lodha Developers, Johnson & Johnson*

NAPA IN ACTION

- Other costs such as cost of production, compliance cost in GST are not relevant while determining whether benefit has been passed on. Change in cost cannot be a ground – ***Pyramid Infratech.***
- Granting of rebate or discounts is a practice for increase in sales and hence cannot be equated with passing on the benefit of ITC. – ***Friends Land Developer.***
- Agreement executed between the parties is void. – ***Bhartiya City Developers.***
- Computation of amount profited under Section 171 has to be done on the basis of facts of each case and no general methodology can be prescribed for the same – ***Hindustan Unilever.***

ISSUES IN ANTI-PROFITEERING LAW

- There is no mechanism to determine profiteering.
 - Rule 126 simply provides that authority may determine methodology and procedure for determining whether there is commensurate reduction in prices.
 - Orders reflect arbitrariness in determination
 - Orders simply compare past and current credits
 - Orders do not take into account increase in other costs
 - Orders do not factor forced reversal of ITC due to change in law (real estate)
- Who is the recipient?
- While the Act does not provide for class action, orders of NAPA cover other parties who are not even complainants
 - Pyramid Infra has 109 applicants. Order covered 2476 buyers.
- Philosophy of input tax credit has not been appreciated
 - GST credit would mean that GST will not form part of cost of inputs
 - Relevant only for mercantile system of accounting
 - If ITC is used to pay output GST, saving in cash outflow.
 - Benefit is only notional interest on cash outflow.
 - Market would determine prices.
- On one side transitional credit is questioned and on the other side the same is taken into account for determining benefit not passed on.

ISSUES IN ANTI-PROFITEERING LAW

- **Is NAPA a quasi judicial authority?**
 - Definition of quasi judicial authority in the CGST Act excludes NAPA
 - If the authority is like a Tribunal, absence of judicial member vitiates its constitution
 - No appellate mechanism
 - Three members shall constitute quorum and if there is difference of opinion, Chairman shall have a second or casting vote.
 - Rule 132 gives power to NAPA as well as Director General of Anti-Profiteering powers to summon persons to give evidence and produce documents.
 - Inquiry is deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the IPC.
- NAPA comprises of a Chairman who holds or has held a post equivalent in rank to Secretary, GOI and four technical members who are or have been Commissioners of State Tax or Central Tax for atleast one year.
 - No experts on costing
 - Entirely comprising of Government Officials
 - No industry experts

OPPORTUNITIES

THE LAW

- Complex Laws
- Frequent amendments
- New Notifications.... Notifications.... Notifications
- Delegated Legislation
- Circulars / Clarifications / Press Releases / Tweets
- High rates of taxes
- Inability to recover indirect taxes

THE LAW

- *"These are people that have lost the power of astonishment at their own actions. When they give birth to a fantastic fashion or a foolish law, they do not start or stare at the monster they have brought forth. They have grown used to their own unreason; chaos is their cosmos; and the whirlwind is the breath of their nostrils.these nations are really in a danger of going off their heads en masse, of becoming one vast vision of imbecility" – G.K. Chesterton in the essay 'The Mad Official'*

IMPLEMENTATION OF LAW

- Target approach
- Revenue Bias
- Perception of Risk
- Failure to follow binding precedents
- Government Audit
- Overlapping of proceedings
- Appeals by the Government

ROLE OF ASSESSEES AND PROFESSIONALS IN LITIGATION

- Tax planning
- Tax advisory
- Tax compliance
- Business advisory
- Original thinking
- Interpretation
 - 'and' can be read as 'or'
 - 'or' can be read as 'and'
 - Mutuality
 - Diversion by overriding title
 - Role of legal maxims
 - Trade parlance
- Revenue response
 - Substance over form
 - Colourable device
 - Look at or look through

KEY TO SUCCESS

- Facts ... Facts ... Facts
- Sound knowledge of law
- Ability to think differently
- Research
- Knowledge updates
- Memory and ability to see the link
- Preparation
- Choosing the right arguments
- Ability to think on feet
- Respect for judiciary
- Fairness in approach
- Court craft

WHO MOVED MY CHEESE

- Technology – a game changer
- E-assessments
- E-appeals
- Possible laws prohibiting use of paper
- Paperless litigation
- Video conferencing and assessments
- Judicial reforms to clear backlog
- Would there be lengthy Courtroom arguments in the future?
- Concept of summary submissions for few minutes and detailed written submissions?
- New tools for research
- Software would identify issues and even prepare submissions
- Software would identify relevant decisions to be canvassed

ARTIFICIAL INTELLIGENCE

- Law firms would buy or lease *robotic juniors*
- Paralegals would become irrelevant
- Basic and planned research would be automated
- Chatbots
- Turing test is already becoming redundant
- *Interpretation and application would still remain with human beings but aided by technology*
- *Existing litigation landscape in India in the absence of massive reforms would continue to provide opportunities for professionals*
- *Creativity in interpretation could still be within the domain of humans*
- *New laws would emerge which would require out of the box thinking and ability to link past experience, knowledge and legacy*
- *New concepts in tax levies would require a lot of experience and skills*
- *New taxes would be levied opening up new vistas*

TAXES IN 2025

- Petroleum products would be in GST
- Levies by municipalities and panchayats under powers given through State legislatures
- Taxes on gambling and betting which would have become legal
- Consolidation of land related levies
- *Inheritance tax*
- *Expenditure tax*
- *Food waste tax*
- *Paper use tax*
- *Marriage expenditure tax*
- *CSR tax*
- *Climate control taxes*
- *Good morning tax*

THANK YOU

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