

AN ANALYSIS OF THE CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016

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Why a Constitution Amendment Bill needed?

- Under the current system, power to levy taxes on goods & services shared between the Union & States
- EXAMPLE: Service Tax levied by Union, while sales tax (VAT) levied by States
- Under the proposed unified system, both Centre & States will (together) levy tax on the same
i.e. GST on supply of services as well as goods

ARTICLE 246A

- Gives power to the Parliament & State legislatures to make laws on GST *imposed by Union or by such States*
- Begins with a *non-obstante clause*
- Such GST to be imposed on *supply*
- Parliament reserves *exclusive right* to legislate when *supply* happens in course of *inter-state state trade or commerce*
- *Exception:* GST in respect of crude petroleum, HSD, MS, Natural gas & ATF, to take effect from a later date to be recommended by the GST Council

ARTICLE 246A

(our comments)

- Presupposes *imposition* of GST
- Peculiar feature: For the first time a power to make laws has been given other than by way of lists i.e. Article 246A
- Begins with *Notwithstanding anything contained in Art. 246 & 254*: Meant to override the division of power to make laws between the Union & the States
- *Inter-state trade & commerce* has not been defined
- GST paid on inputs for petroleum industry would not be available as credit
 - GST paid would become additional cost
 - Very cumbersome to apportion ITC of GST between the non GST and GST (naphtha, kerosene, carbon black, etc) products

Residuary Power of the Parliament

- Article 248 i.e. the residuary power of Parliament to legislate has been made subject to Article 246A

Our comments:

- Parliament therefore, may now make laws on all matters except those covered under the State List, Concurrent List or Art. 246A
- Entry 97 of List I has not been expressly stated to be subject to Art. 246A
 - Though stating so would only be clarificatory (Lists are anyways subject to the Art. 246)
 - Expressly defining the powers would remove ambiguity

Stamp Duties remain

- Art. 268 which provides for collection of duties by the States (while the levy is by the Union) amended to exclude excise duties
- In respect of stamp duties, the Article is sustained and there has been no change
- Interestingly, there has also been no change in Entry 91 (List I) & Entry 63 (List II) on rates of stamp duty
- Wide definition of services proposed in Art. 366(26A) to include transactions in *immovable property*
- Therefore, levy of GST as also stamp duty

Stamp Duties remain (Our comments)

- Stamp duty on every transaction without credit, continued
- Currently, no tax on land {but only on services (service tax), or goods (VAT) portion}, whereas proposed GST would be on full value (including land)
- Transaction will be even expensive
- Black money problem not solved; rather aggravated

Article 268A & Entry 92C - omitted

- Article in respect of levy and Collection of service tax has been omitted
- Entry 92C of List I (though not notified) enumerating levy of taxes on service tax by the Union, has also been omitted

Our comments:

- Shows clear intention of the Legislature to charge unified GST on services

GST on supplies in course of inter-state trade or commerce – Article 269A

- Supplies in course of *inter-state trade or commerce & in course of import into the territory of India*
 - levy & collection by Union
 - to be apportioned between Union & States
- Method of apportionment between States to provided by Parliament by law based on recommendations of the GST Council
- Parliament has been given the power to formulate principles for determining
 - when a supply takes place in course of inter-state trade or commerce
 - place of supply

Taxes levied & collected by Union (assigned to States) – Article 269

- Article on taxes on sale or purchase of goods and on consignment of goods (except as provided u/ Art. 269A), when the same is in course of inter-state trade or commerce has been sustained
- However, the Article specifically excludes the subject matter in Art. 269A

Revenue Distribution between the States – Article 270

- Art. 270(1A) introduced:
GST levied & collected by the Union,
(except the GST having been apportioned *with*
the States u/A 269A(1))

Shall be distributed between the States in accordance
with Art. 270(2)

Our comments:

Not clear as to whether the entire tax referred in Art.
269A is to be excluded, or only the tax apportioned *to*
the States is to be excluded

Revenue Distribution between the States – Article 270

Our understanding:

IGST comprises of Central Govt's share + State Govt's share

$$I = C + S$$

Under Art. 269A(2) S is assigned to States

Therefore, Art. 270A(2) contemplates apportionment of revenue of Centre alongwith C (above)

No surcharge w.r.t. GST – Article 271

- Power of the Parliament to impose surcharge over and above the taxes, has been curtailed as regards GST imposed u/A 246A

GST Council – Article 279A

- To be constituted by the President, by order, within 60 days from commencement of this Bill
- Members:
 - Union FM as Chairperson
 - Union Minister of State for Finance/ Revenue
 - Ministers in charge of Finance / Taxation of each State
- Vice-chairperson to be chosen amongst the Ministers of State Government

GST Council – Article 279A (Recommendations)

The GST Council may make recommendations on the following:

- Taxes, cesses etc. to be subsumed
- Goods/services which are exempt
- Model GST, principles governing place of supply, principles of levy, apportionment
- Threshold exemption limit
- Rates, floor rates, band, any special rates
- Special provisions w.r.t. certain states (Arunachal Pradesh, Assam, J&K, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh, Uttarakhand)
- Date for GST to be levied on petrol & related products

GST Council – Article 279A

Is Uniformity a Myth?

- Only recommendations & not binding
- Each State/Centre while making their GST law would be free
- State which may have agreed while making recommendations, may deviate from the very recommendation later on

GST Council – Article 279A

(Decisions)

- At meetings
- **Quorum:** $\frac{1}{2}$ of total number of members
- Decision by majority of $\frac{3}{4}^{\text{th}}$ weighted votes of members present & voting
- Weightage of votes:
 - CG – $\frac{1}{3}^{\text{rd}}$ of total votes cast
 - SG (all taken together) – $\frac{2}{3}^{\text{rd}}$ of total votes cast
- Clause 11, provides for devising modalities to resolve disputes arising from recommendations
- Guided by need for
 - a harmonized structure of GST &
 - a harmonized national market for goods & services

GST Council – Article 279A

(Dispute resolution)

- The GST Council shall establish a mechanism to adjudicate any dispute arising out of its recommendations. Disputes can be between:
 - The centre V. one or more states
 - The centre and states V. one or more states
 - State V. state

Athena Comments

- This is inserted by Rajya Sabha. Earlier the clause contains the following:

The GST Council may decide upon the modalities to resolve disputes arising out of its recommendations

Issue:

- Why “harmonized structure” & not “harmonized law”?
- Purpose of “decide about the modalities to resolve disputes”? What disputes can possibly arise on recommendations, which by their very nature are not binding

GST Council – Article 279A (our comments)

- Recommendations are not mandatory for States; the Principal VAT Directive, to the contrary is binding on a community level
- Prima facie does not seem to be binding, then how will harmonization/uniformity be attained?
- Major decisions like what all *taxes to be subsumed*, left open & subject of Council's recommendations
- No mention of the system of VALUE ADDED TAX

Restrictions on imposition taxes on sale/purchase of goods - Article 286

- The taxable event is “supply”; therefore necessary changes made in nomenclature
- The phrase “sale or purchase” removed, substituted with “supply”; “goods” substituted with “goods or services or both”
- Parliament reserves its power to formulate principles as to when a supply may be said to *be outside the State or in course of export, or import*
- Provisions in respect of *goods of special importance* done away with; omitted

Restrictions on imposition taxes on sale/purchase of goods - Article 286 (Our Comments)

- Art. 286 amended; Clause (1) & (2) done away with and not preserved in respect of goods/services out of the ambit of GST
- In respect of VAT on alcohol (& petroleum for 3 years), in absence of Art. 286(2), states will determine their own boundaries; may lead to multiple taxation or confusion

Definitions Clause – Article 366

- Clause 12A inserted, to define *goods & services tax*:
(12A) “goods and services tax” means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquors for human consumption
- Clause 26A inserted, to define *services*:
(26A) “services ”means anything other than goods

Definitions Clause – Article 366

(our comments)

- Whether “consideration” aspect not to be included in the definition of GST
- Principal VAT Directive says,
Art. 2
 - 1. Following transactions shall be subject to VAT:*
 - (a) the supply of goods for consideration*
 - (c) the supply of services for consideration*

AMENDMENT IN SCHEDULES

SCHEDULE VI

- For administration of tribal areas in *Assam, Meghalaya, Tripura & Mizoram*, the District/Regional Council has been granted the power to impose taxes on
 - Entertainment & Amusements

SCHEDULE VII

(Union List)

Entry 84 substituted for the previous entry, as follows:

84. Duties of excise on the following goods manufactured or produced in India, namely:

- (a) petroleum crude;*
- (b) high speed diesel;*
- (c) motor spirit (commonly known as petrol)*
- (d) natural gas;*
- (e) aviation turbine fuel;*
- (f) tobacco and tobacco products*

Our comments:

- Excise duty may only be charged in respect of the aforesaid items i.e. by way of a positive list
- Above products leviable to excise duty even when it is chargeable to GST too

SCHEDULE VII

(Union List)

- *Sale & Manufacture* have been recognized as two separate aspects in the decision in *Bombay Tyre International*
- There remains a possibility therefore, that Centre may seek to levy tax on the aspect of *manufacture* under Entry 97

SCHEDULE VII

(Union List)

- Entries omitted:

*92 – Taxes on sale or purchase of newspapers
and on advertisements published therein*

92C – Taxes on services

SCHEDULE VII

(Union List)

(our comments)

Following entries have not been omitted:

89 – *Terminal taxes on goods/passenger*

90 – *Taxes on transactions at stock exchanges*

92A – *Taxes on sale or purchase of goods (in the course of inter-state trade or commerce)*

92B – *Taxes on consignment of goods (in the course of inter-state trade or commerce)*

SCHEDULE VII

(State List)

Entry 54 substituted as:

“54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods”

Previous Entry 54:

“Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I”

Issue

- Issues raised in slides relating to Art. 286:
Whether sale in course of international trade or commerce be also defined? If so, Art. 286 should have been amended accordingly

SCHEDULE VII

(State List)

Entry 62 substituted as:

"62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council"

Previous Entry 62:

"62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling"

Entries Omitted:

52 – Taxes on entry of goods

55 – Taxes on advertisements

Issue

Why is the power for entertainment & amusement being granted to Panchayat, Municipality?

SCHEDULE VII

(State List)

Entries not touched upon:

- 49 – *Taxes on lands & buildings*
- 50 – *Taxes on mineral rights*
- 53 – *Tax on sale/consumption of electricity*
- 56 – *Taxes on goods & passengers by road or inland waterways*
- 57 – *Taxes on vehicles*
- 58 – *Taxes on animals & boats*
- 63 – *Stamp duty*

SCHEDULE VII

(State List)

- Entry 54 preserved only in respect of petroleum products, and alcohols meant for human consumption
- Entry 54 is a specific entry. Also Entry 84 enlists subjects on which excise to be levied. Entry 92A could also have been substituted in a similar manner
- Taxes on entertainment & amusements preserved to the extent levied by local bodies
- No change w.r.t. stamp duty

ADDITIONAL TAX

- ~~**Rate :** not exceeding 1%~~
- ~~**Subject:** Supply of goods in course of *inter state*
——— *trade or commerce*~~
- ~~**Levy & collection:** By Government of India~~
- ~~**Period:** upto 2 years or such time as recommended by
——— GST Council~~
- ~~**Assignment of revenue generated:**
—— Not a part of the Consolidated Fund of India
—— To be assigned to the state from where it originates~~
- ~~**Exemption:** may be given, if thought fit in public
——— interest~~

Our comments

- This amendment is deleted by Rajya Sabha. Now no additional tax.

Compensation to States – Article 19 of Bill

- Parliament ~~may~~ **shall** compensate for loss of revenue to States, on account of implementation of GST
- For a period of 5 years

Athena comments

- The word “may” is substituted by word “shall”. Thus now Parliament necessarily requires to compensate states for loss of revenue due to implementation of GST.

Check for:

- Destination based tax
- Credit chain remains maintained
- Not amendable very easily such as on the whims & fancies of the States
- Multiplicity of taxes is curtailed

THANK YOU

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