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ARTICLE 246A : POWER TO LEVY TAX WITH RESPECT TO GST - PERTINENT ISSUES

Legislation is always enacted with some purposes, objects and reasons. A proposed Legislation is placed before Parliament with a statement of objects and reasons appended to it.

The objects and reasons accompanying a bill, which subsequently gets converted into an Act, are to be taken into consideration in interpreting the provisions of the statute. It is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of the law to determine the purpose or object of the legislation.

One of the salient features of the statement of Objects and Reasons accompanying the 122nd Constitution Amendment Bill was as follows:

- The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both.

It is therefore, very clear that the Constitution was amended mainly to provide concurrent taxing powers to the Union as well as the States so far as GST is concerned. Accordingly, article 246A was inserted into the Constitution (One Hundred and First Amendment) Act, 2016 to facilitate the same.

The newly inserted article 246A reads as under –

Special provision with respect to goods and services tax –

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 the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

The above article 246A which was inserted into the Constitution is the most important operative provision for implementation of GST in India. It has provided the legislative competence to the Centre and the States to make laws with respect to GST. However, since article 246A begins with a non-obstante clause which overrides Articles 246 and 254, for a better understanding of article 246A, one need to understand articles 246 and 254 first.

Article 246 - Subject-matter of laws made by Parliament and by the Legislatures of States –

- (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).
- (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).
- (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).
- (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Article 254 - Inconsistency between laws made by Parliament and laws made by the Legislatures of States –

- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
- (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Article 246 clearly demarcates the subject matters where the Union and the States have their legislative competence and Article 254 deals with the issues of inconsistency or repugnancy of laws made by the Parliament and the State Legislatures. Article 246(2) does not provide for concurrent levy of tax, it lists the subject matters where both the States and Centre have legislative capacity but the laws made by them are independent of one another. It does not apply concurrently on the same transaction.

On few occasions, co-existence of Central and State laws in a particular area or on the same subject matter may lead to problems because the Union or a State may encroach upon each other’s territory. It may also arise because though there may not be any encroachment as such, still the two laws might conflict. Where

the subject matter of the legislation in question falls within either the State List or the Union List only, the question that is to be decided with reference to legislative competence is whether the same is ultra vires or not. On the other hand, where the legislation passed by the Union and the States is on a subject matter of the concurrent list, the matter cannot be determined by applying the test of ultra vires because the hypothesis is that both the laws are constitutionally valid. Accordingly, test of repugnancy comes under such circumstances under article 254(2).

Because of adopting a dual GST model in India where a particular transaction is concurrently taxed both by the Union and a State/UT, a situation has arisen where the concurrent powers of legislation to both the Union and States/UTs are to be ensured. Article 246A was therefore, inserted to confer concurrent taxing powers on the Union as well as the States including Union Territories with Legislature (Delhi and Puducherry) to make laws for levy of GST on every transaction of supply of goods or services or both. However, article 246A does not categorically provide that the laws made by the Union as well as the States with respect to GST will apply concurrently or simultaneously on the same transaction although the statement of Objects and Reasons clearly states that the Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States. If for any reasons, the laws made by the Union and the State on the same subject matter of GST differ, how the test of inconsistency or repugnance will be applied considering the fact that Article 246A has overridden Article 254 so far as Goods and Services Tax is concerned? Is the GST Council or any other authority legally competent to ensure that CGST and SGST/UTGST laws run consistently to achieve the principles of dual GST?

Question also arises about the necessity of inserting a new article whereas GST as a subject matter of legislation could have been included in the concurrent list under Seventh Schedule to the Constitution. The necessity has arisen because so far as the subject matters of the concurrent list are concerned, the Legislature of any State as well as the Union has powers to make laws with respect to those subject matters but that does not necessarily mean that the laws enacted by the States as well as the Union will run parallel or concurrently which may defeat the purpose and intention of dual GST model. The system of levy of dual GST on the same transaction necessitated that the laws need to be completely or substantially similar in so much as that these can be concurrently applied on the same transaction. The newly inserted article is therefore, unique in the sense that for the first time a legislative power has been provided to enact laws on a subject matter which has not been included in any of the lists under Seventh Schedule.

So far as the above amendment to article 246A as proposed in The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011 and The Constitution (One Hundred Twenty Second Amendment) Bill 2014 are concerned, most of the States agreed to this amendment. Two states were, however, sceptical that this amendment would take away the fiscal autonomy of the States given by the Constitution since 1950 and also the proposed article 246A inflicts severe blow on provision of distribution of legislative powers by introducing a separate category. While some states also felt that it should be ensured that the Constitutional Amendments should not affect the fiscal autonomy of the States as enshrined in the Indian Constitution, some other states were of the opinion that since the proposed article 246A provided for concurrent jurisdiction for both Union and the States, there should be a clarity as to which legislative power shall prevail had there been a case of conflict of interests.

The Ministry of Finance (Department of Revenue) clarified their position with the narrative that they agree to the fact that both Centre and States will have power to simultaneously levy GST on supply of goods and services but this power was not being given through an entry in the Concurrent List but through insertion of an Article in the main body of the Constitution itself. The proposed article 246A does

not limit the legislative power of the States as the intention is to allow autonomy to the State legislature on the basis of the recommendations of the GST Council until it affects the harmonized working of GST. It gives reasons to believe that while some of the states were sceptical about the new article, the Ministry had tried to allay the fears subject to a rider that such autonomy should not affect the synchronized working of GST i.e. CGST and SGST/UTGST laws need to be similar.

Nevertheless, confusions on the following issues still remain -

- (a) Does Article 246A categorically provide that the laws made by the Union as well as the States with respect to Goods and Services Tax will apply concurrently or simultaneously on the same transaction?
- (b) If for any reasons, the laws made by the Union and the State on the same subject or area differ, how the test of inconsistency or repugnance will be applied considering the fact that Article 246A has overridden Article 254 so far as Goods and Services Tax is concerned?
- (c) Does GST council have the legal authority to restrain a state from promulgating different laws deviating from the standard and commonly accepted GST laws? Is there any authority which can hold back the states from opting a different SGST rate on any product or service if the state wishes so? Will it then fulfil the coveted One Nation, One Market, One Tax principle?

It appears we have already experienced rough waters in case of prospective/retrospective amendment in Sec 50(1) where it was said that the amendment could not be given a retrospective effect due to technical limitations. The above confusions therefore, remain pertinent.

References :

- (a) lawaids.blogspot.com
- (b) The Constitution of India – P.M. Bakshi
- (c) A background paper on concurrent powers of legislation under List III of the Constitution – P.M. Bakshi