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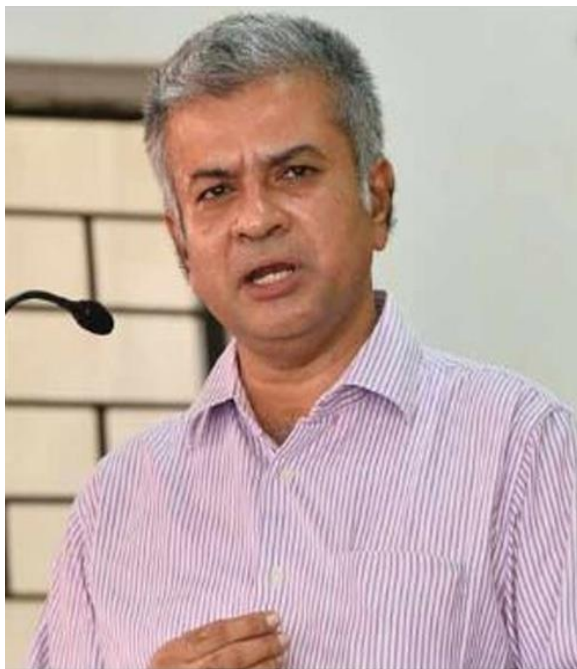
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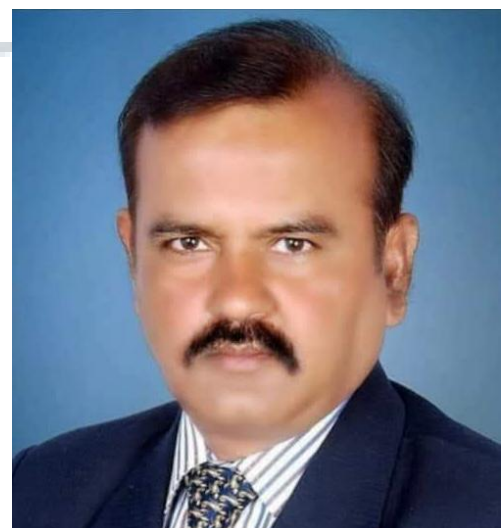


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

GST REGIME AND CO-OPERATIVE FEDERALISM IN INDIA

AUTHORED BY - VIGNESH. T*

INTRODUCTION:

The Union Government enforced Goods and Services Tax Laws in India thereby subsuming many Union and States taxes under one roof. The Act empowers both the Union and States to levy taxes on the same subject matter of taxation.

Albeit, the GST laws is successfully completing four years of its revenue generation in India, the true nature of co-operative federalism in revenue generation and revenue sharing between the Centre and States is to be analysed. In this paper the researcher has made an attempt to analyse the GST law in India and to analyse the efficacy of the doctrine of co-operative federalism between the Centre and the States in levy, collection and sharing of GST.

SALIENT FEATURES OF 101st CONSTITUTIONAL AMENDMENT ACT, 2016:

The GST Bill was enacted as 101st Constitutional Amendment Act, 2016 by the Parliament of India and came into force on 01st July 2017 (FY 2017–2018). The salient features of the GST Bill with regard to the concept of co-operative federalism are as follows: -

1. Both the Parliament and the State are empowered to enact laws governing Goods and Service Tax.
2. Compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period of five years.
3. GST on Inter-State trade and Commerce shall be levied and collected by the Union and apportionment of such tax between the Union and States shall be done by the manner provided by the parliament on the recommendations made by the GST Council.
4. Creation of Goods and Services Tax Council to examine issues relating to goods and services tax and make recommendations to the Union and the States on parameters like rates, taxes, cesses and surcharges to be subsumed, exemption list and threshold limits, Model GST laws, etc. The Council shall function under the Chairmanship of the Union Finance Minister and will have all the State Governments as Members.

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The new GST regime has subsumed various kinds of taxes that were levied by the Union and the States. This has made GST to stand unique in the indirect tax arena. The taxes that are subsumed by the GST are as follows¹: -

A. Union taxes that are subsumed into GST are: -

- a. Central Excise Duty,
- b. Duties of Excise (Medicinal and Toilet Preparations),
- c. Additional Excise Duty (Goods of Special Importance),
- d. Additional Excise Duty (Textiles and Textile Products),
- e. Service Tax,
- f. Additional Customs Duty (commonly known as Countervailing Duty CVD),
- g. Special Additional Duty of Customs,
- h. Service Tax, and
- i. Central Surcharges and Cesses so far as they relate to supply of goods and services.

B. State taxes that are subsumed into GST are: -

- a. State VAT,
- b. Central Sales Tax,
- c. Luxury tax,
- d. Entry tax (all forms including Octroi),
- e. Entertainment Tax and Amusement Tax (except when levied by local bodies),
- f. Taxes in advertisements,
- g. Purchase Tax,
- h. Taxes on lottery, betting and gambling, and
- i. State Surcharges and Cesses so far as they relate to supply of goods and services.

SOVEREIGN POWER AND DISTRIBUTION OF SOVEREIGN POWERS TO THE STATES:

The concept of 'Sovereign Power' in the aspects of taxation means the 'Fiscal Sovereignty' of the State. Fiscal Sovereignty means the ability of the State to take fiscal decisions such as fixing up its fiscal policy, tax policy and other finance related activities without any interference of

¹ Director General, National Academy of Customs, Indirect Taxes & Narcotics (NACIN), *Frequently Asked Questions (FAQs) on Goods and Services Tax (GST)*, CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS (CBIC) (June 20, 2019, 10:00 AM), <http://www.cbic.gov.in/resources/htdocs-cbec/gst/Final-GST-FAQ-31218.pdf>.

any other external power.

Distribution of Sovereign Power to the States under the concept of Fiscal Sovereignty means the fiscal autonomy enjoyed by the Union is delegated completely or partially to the States. Under GST, the concept of Fiscal Sovereignty of the Union Government is distributed to the States also. This is evident by omission of Entry 92C² from List – I (Union List): Seventh Schedule of the Constitution of India which explicitly rules out the taxation of service from the Centre's ambit and impliedly extending the same to the States also. Further, Article 246A³ of the Constitution of India, provides autonomy to the States to make laws on GST. Article 246A(1) has explicitly enshrined with the words as "Notwithstanding anything contained in Articles 246 and 254", which means the Article 246⁴ and Article 254⁵ shall not apply to the Union or States in enacting laws with regard to GST. As a result, the strict demarcation of the Entries and Lists under Seventh Schedule are abolished in the case of law making with regard to GST. This is called distribution of Sovereign Power to the States. There are also other aspects of distribution of Sovereign Power to the States under the GST Laws in the area of levy,

² Tax on services.

³ **Special provision with respect to goods and services tax.**

(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.”.

⁴ **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.

(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.

(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.

(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.

⁵ **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.

collection, appropriation and assignment of the revenue that is generated from GST.

FEDERALISM AND CO-OPERATIVE FEDERALISM:

India is not strictly federal in nature. It has some federal features that are essential for a better governmental administration. On the other hand, India is also called as a Quasi-federal in nature. Federalism means a system of government in which the entities such as the States and Local Bodies share powers with the Union Government. In other words, it is a type of Government in which powers are divided between the Union and other constituent units such as the States and local bodies in a single political system.

The process of Nation making was boosted by an innovative attribute of Federalism termed as “Co-operative Federalism” by Granville Austin, which lucidly means cooperation between Union and States.⁶ Generally, Co-operative Federalism means where the Union, States and the local bodies jointly co-ordinate and co-operate collectively amongst themselves to achieve a common goal in solving public grievances with harmony. Co-operative Federalism with regard to fiscal federalism in GST means where the Union and the States jointly co-ordinate and co-operate collectively amongst themselves in levy, collection, appropriation and assignment of the revenue that is generated from GST and to achieve an effective GST regime with harmony.

COMPLEXITIES IN ACHIEVING CO-OPERATIVE FEDERALISM IN GST LAWS

Even though the 101st Constitutional Amendment Act, 2016 has provided for harmony between the Union and States in taxing GST, it has given rise to various complexities, such as: -

1. The Union Government gets a share as tax revenue from Intra-State trade or commerce in GST transactions from each State as Central Goods and Service Tax (CGST) and an exclusive privilege upon taxation of Inter-State trade or commerce in GST transactions as Integrated Goods and Service Tax (IGST) which is contested by the States at the time of revenue sharing.
2. Although GST is a Destination-Based Tax, the destination State directly cannot utilise the revenue generated through GST in Inter-State trade or Commerce.
3. The Law completely revolves around a new concept ‘Place of Supply’ and new tax structures.

⁶ Ankush Sharma, *Cooperative Federalism in India*, CIVIL SERVICES INDIA (July 20, 2019), <https://www.civilserviceindia.com/subject/Essay/cooperative-federalism-in-india.html>

4. Similarly, under the new Article 269A⁷, the apportionment of tax collected as GST in Inter-State trade or commerce shall be done by the law enacted by the parliament based on the recommendations of the GST Council. Whereas, the distribution of tax revenue between the Union and the States are also made as prescribed by the Finance Commission of India under Article 280(3)(a)⁸ of the Constitution of India. This might cause confusion on the revenue sharing/allocation between the Centre and the States.
5. The tax rate for GST shall not be varied by the Parliament but shall be done by the GST Council as per the 101st Constitutional Amendment Act, 2016 which is constitutional body and not an organ of the State unlike Parliament.
6. The Union Government comparatively has high weightage of votes in the GST Council than that of the States.
7. The 101st Constitutional Amendment Act, 2016 explicitly embodies provision for compensation to the states for loss of revenue on account of introduction of GST for a period of 5 years on the recommendation of the GST Council. Hence, there might be possibility for loss of revenue to the State Governments.
8. Under Article 251⁹ of the Constitution of India, the law made by the Parliament shall prevail over the law made by the Legislature of the State. This by itself empowers

⁷ **Levy and collection of goods and services tax in course of inter-State trade or commerce.**

(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

⁸ It shall be the duty of the Commission to make recommendations to the President as to the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

⁹ **Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States.**

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but 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 has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

supremacy to the Parliament in making laws irrespective of whether any law is already in existence on the same subject – matter made by the Legislature of the State.

ROLE OF GST COUNCIL IN ENSURING CO-COPERATIVE FEDERALISM:

The GST Council is a best example to state that the concept of co-operative federalism is ensured between the Centre and the States. It is embodied with enormous power in deciding matters relating to GST. The GST Council stands to be the key-decision making body and will have the last say in issues relating to GST in India such as fixing tax rates, adjudicating disputes etc. The Former Union Finance Minister Mr. Arun Jaitley has said that the GST Council will ensure co-operative federalism between the Union and the State Governments as the Council shall have representations from both the Union Government and the State Governments. As per the new Article 279A of the Constitution of India inserted by the 101st Constitutional Amendment Act, 2016, the GST Council stands to be an independent constitutional body constituted by the President of India. Under Article 279A, the composition of the GST Council shall be: -

- a) The Union Finance Minister as the Chairperson;
- b) The Union Minister of State in charge of Revenue or Finance as the Member;
and
- c) The Minister in charge of Finance or Taxation or any other Minister nominated by each State Government as Members.

This proves that there are equal participation/representation of States in GST Council.

ANALYSIS OF THE REALITY:

In India, an attempt by the Union Government to unify indirect taxes under one umbrella legislation as GST is a welcoming move. But on careful analysis of the 101st Constitutional Amendment Act, 2016 as discussed above, it appears that the Union Government has an upper hand over the revenue generated through the levy of GST. The Amendment Act embodies participation of both Union and State Governments in the GST Council whereas the supremacy vests in the hands of the Union government either directly or indirectly. However, in reality, it is evident that the GST laws are successful since implementation and paves way for co-operative federalism between the Centre and the States. The conclusions derived out of the analysis made in this paper are as follows: -

1. The new regime of GST, the Union Government generates revenue in Intra-State trade or commerce transactions in the name of Central Goods and Service Tax (CGST) and

exclusive revenue on Inter-State trade and commerce transactions in GST in the name of Integrated Goods and Service Tax (IGST). This significantly will hamper revenue collected by the States through levy of GST.

2. The Law involves around a new concept i.e., 'Place of Supply' and new tax structures, which might cause confusion for the people and supplier may end up in levying wrong type of GST.
3. The assignment, distribution and apportionment of the tax revenue collected as GST shall explicitly fall under the ambit of the Union Government directly or indirectly either through Parliament, GST Council or Finance Commission of India as the case may be.
4. The GST Council shall have representation of both Union Government and the State Governments. Whereas as per the 101st Constitutional Amendment Act, 2016, Article 279A(9)(a)¹⁰ and (b)¹¹ explains the weightage of votes that the Union Government and the State Governments hold. As per the Article, the Union Government have a weightage of one-third of the total votes cast and the State Governments together shall have weightage of two-thirds of the total votes cast to pass a decision in the GST Council regarding GST. In that case, there are 28 States and 8 Union Territories, totally summing up to 36. The weightage of votes that the Union Government holds in the GST Council shall be 33.33% (one-third) and the weightage of votes that each State Government holds in the GST Council shall be 1.85% (irrespective of the population and other factors) i.e., 66.67% (remaining two-third) divided by 36 (total No. of the States in India including Union Territories).
5. The amendment by itself incorporates a compensation clause for the States in case of any loss of revenue for a period of 5 years.¹² Which means it is very clear that the Union Government shall not incur any loss out of GST. Moreover, the financial relations between the Centre and States under Part XII of the Constitution of India majorly emphasis on revenue allocation by the Union Government to the State Governments. This may further stain Centre-State relation in revenue sharing.¹³

¹⁰ The vote of the Central Government shall have a weightage of one-third of the total votes cast.

¹¹ The votes of all the State Governments taken together shall have a weight age of two-thirds of the total votes cast, in that meeting.

¹² Ins. by the Constitution (One Hundred and First Amendment) Act, 2016, s. 18.

¹³ Indivjal Dasmana, *CAG findings on IGST sharing may strain Centre-state relations further*, BUSINESS STANDARD (September 25, 2020), https://www.business-standard.com/article/economy-policy/cag-findings-on-igst-sharing-may-strain-centre-state-relations-further-120092500656_1.html#:~:text=According%20to%20GST%20rules%20which,its%20share%20to%20the%20states.

6. The 101st Constitutional Amendment Act, 2016 states that the GST Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.¹⁴ The word “harmonised” used at the first instance is vague and is subjected to wide interpretation and debate, as the amendment complicates the concept of GST.

However, since implementation of GST till date it is evident that it had been successful in revenue generation than the previous system. It had made tax compliances easier than the previous regime.

CONCLUSIONS AND SUGGESTIONS:

To have a true harmony between the Union and the States in taxing GST in India, the following suggestions shall provide some relief. These suggestions are majorly with regard to the 101st Constitutional Amendment Act, 2016 and other constitutional provisions vis-à-vis the concept of co-operative federalism. The conclusions and suggestions are as follows: -

1. To uphold the Gandhian principle of decentralised democracy, there should also be economic decentralisation in India. Hence, in case of the Central Goods and Service Tax (CGST), the assignment, distribution and apportionment of the tax revenue collected as GST shall be made based on a quantified percentage value that shall be determined amicably between the Union and the concerned State Government based on the statistical data of the GST revenue generated by such State Government and various other factors such as population, economic status of the people, poverty index, HDI etc.
2. Further, in case of GST collected in the Inter-State trade or commerce by the Union Government as Integrated Central Goods and Service Tax (IGST) a part of the GST revenue shall be shared with the concerned State that performs such transition and then the remaining shall be appropriated by the Union. The Union Government under the recommendations of the GST Council shall propound a uniform principle for revenue sharing under the concept of Destination-Based tax so that there is a win-win situation in revenue sharing between the Centre and the States.
3. The Union shall have a liberal approach while sharing the revenue generated through IGST after due consideration of both the States that has generated the revenue.
4. The transfer of revenues between the Union and the States and between the States seems to be a long route of transactions. It is clear that the Assessees' are reduced with the

¹⁴ Ins. by the Constitution (One Hundred and First Amendment) Act, 2016, s. 12 under Article 279A(6).

procedural compliance with regard to GST. However, it is seen that the burden has shifted upon the Government. The process may be simplified in near future.

5. Since GST is Destination-Based tax, the origin State is left with no relief in tax sharing except the revenue generated by them with State Goods and Services Tax (SGST). Thus, the Union can allocate more funds under other provisions of the Constitution such as Grant-in-aid etc., since many State taxes has been subsumed into GST and also to motivate origin States so that Inter-State trade or commerce shall be promoted.
6. The weightage of votes shall be given to the State Governments on the basis of proportionality by considering various factors such as the population, GDP of the State, contributions to revenue through GST transactions etc. So as to avoid bias in decision making with regard to GST in the Council. There must be some limitations on the powers and functions of the GST Council.
7. Arbitrary powers that vest with the Union under Art. 251 of the Constitution of India shall be invoked by the Centre in the rarest of rare case so that fundamental concept of co-operative federalism is not diluted.
8. The compensation shall be fixed in consonance with the quantum of loss of revenue that the State would incur on account of implementation of GST for a period of five years and shall be subjected to review after five years. If there is no progress in recovery of such loss of revenue by the State, then the Union Government shall provide for some additional monetary benefits to the States.
9. The ambiguity of the term “Harmonised” in Article 297A(6) shall be addressed by determining which authority shall be empowered to provide for such harmonised structure of GST.
10. Any matters regarding the GST including policy decisions of the Government with regard to GST shall be subjected to judicial scrutiny and shall not be given any immunity.