Pre-Legislative Briefing Service (PLBS)

A Report on The Constitution (115th Amendment) Bill: GST

Submitted to the Standing Committee, Finance of the Lok Sabha on 23 May 2011

Table of Contents

Executive Summary 3

Introduction 4

A. A Comparative Overview of GST 6

I. The European Union 6

II. The United States 7

III. Canada 8

IV. Australia 8

V. Singapore 9

B. Clause 2 – Provisions on Legislative Competence 9

I. The non-obstante clause 10

(i) The Present Constitutional Scheme 11

(ii) The Proposed Scheme under Clause 2 18

Option 1: Remove the non-obstante clause in entirety 19

Option 2: Introduce a mechanism to resolve the conflict in Article 246A 19

Option 3: Remove the reference to Article 254 in the non-obstante clause 20

II. Clause 2 – 'Imposed by' 23

III. Clause 2 and Inter-State Trade and Commerce (Azad Coach) 23

C. Clause 3 – Relationship with Article 246A 24

D. Article 286(3) and clauses 4-8 and 13 25

E. Is the new Art. 269A appropriately drafted (clause 9)? 25

F. Clause 17 - The Amendments to Schedule VII 25

I. Outline of the Present Law 26

II. Reasons to Reformulate Clause 17(b) 30

G. Clause 14 - The GST Definition and Amendments to Art. 366 33

I. An Outline of the Present Law 33

II. Reasons to Reformulate Clause 14 34

III. Recommendations 41

Summary of Recommendations 42

About us and Contact Details 45

Executive Summary

The Goods and Service Tax regime proposed to be introduced in India is without question the most widespread restructuring of India's taxation regime attempted in recent times, but in a sense just seeks to take the pre-existing VAT scheme to its logical conclusion. The Constitution (One Hundred and Fifteenth) Amendment Bill, 2011 ["*the GST Bill*"], as a first step in this regard, confers concurrent legislative competence on Parliament and State legislatures to impose taxes on goods and services. However, changes sought to be affected by the GST Bill to the pre-existing scheme of legislative competence under the Constitution, and in particular, how it fits with well-established rules of constitutional interpretation such the doctrine of repugnance, the jurisprudence on deemed sale, and the rule of harmonious construction of legislative entries throw up several important questions of interpretation. In this report, we discuss some of these and propose changes that we believe may contribute towards creating a more coherent indirect tax structure in India.

In the first section, after briefly outlining the economic rationale that supports the introduction of a comprehensive goods and service tax regime in India, we undertake a brief survey of the goods and service regimes operating in other jurisdictions. The second section examines the impact of the *non-obstante* clause in Clause two of the bill suggesting that it leaves unaddressed the possibility of a conflict between Central and State laws, and discusses three options that are now available to rectify this defect. The report then examines the impact of the recent decision of the Supreme Court in *Azad Coach* on Clause 3 of the Bill, suggesting that the decision may be inapplicable to the interpretation of the phrase "*inter-state trade and commerce*" in Clause 3. Finally, the report considers the impact of amendments sought to be made to entry 84 (List I) of the Seventh Schedule as well as the legal consequences of the definition of the phrase "goods and services" in Art. 366(29A) of the Constitution. The scope of the expression "goods and services" is of considerable importance because it identifies the range of transactions to which GST legislation to be enacted may be extended. The Report identifies concerns that emerge from the elaborate rules that have come to occupy centre stage in India's goods and services jurisprudence, especially in the context of intersection of tax legislation, such as service and sales tax.

Introduction

1. The importance of a just and efficient indirect tax regime in India is perhaps best vindicated by the fact that very few countries in the world have a higher ratio of indirect tax collection to direct tax than India.[1] Indirect tax reforms in India received a major breakthrough with the introduction of VAT, which contributed immensely towards removing inefficiency resulting from the earlier cascading effect that forced assesses to often pay a 'tax on tax'. The VAT system achieved this result by taxing only the 'value addition' at each level as opposed to the entire value of the commodity itself. However, after about half of decade of implementation of VAT in India, several of its shortcomings came to light, most notable among them being the fact that several levies (for instance, additional customs duty, levied under s. 3(1) of the Customs Tariff Act) were left out of the VAT scheme, and the inability of the VAT scheme to capture value-addition before the stage of manufacture. The GST was thus proposed as "the next logical step" to VAT.[2]

2. The economic rationale underlying introduction of the Goods and Services Tax in India broadly falls under the following heads:

3. **Broadening the Tax Base:** It is a settled proposition of law in India presently that the taxable event that attracts a charge of central excise is the process of 'manufacture'. The term 'manufacture' has been narrowly construed by the Apex Court in its landmark decision in *Delhi Cloth and General Mills*[3] and affirmed consistently be later rulings as, the process of "*bringing into existence a new substance… and not merely to produce some change in a substance*". Evidently, this results in an extremely narrow tax base. It is accepted all over the world today that a wide tax base with a 'multiple-point-taxation system' is certain to result in a more efficient realisation of taxes than a tax regime based

[1] National Council of Applied Economic Research, MOVING TO GOODS AND SERVICE TAX IN INDIA (2009) available at http://www.gstindiablog.com/upload/NCAER%20GST%20Report.pdf

[2] The Empowered Committee of State Finance Ministers, "First Discussion Paper on Goods and Services Tax in India", p. 8 (2009).

[3] Union of India v. Delhi Cloth and General Mills, AIR 1963 SC 791.

on a narrow tax base and higher rates of tax.[4] GST thus seeks to replace the single-point levy of tax, focussed only at the stage of manufacture with a system that seeks to levy tax extending from the pre-manufacture stage till the retail stage thus resulting in a wider tax base.

4. **Overlap between Goods and Services**: Some of the most controversial issues in day taxation law in India today concern the classification of taxable commodities as 'goods' or 'services' or 'a combination of both'.[5] With the advent of technology, especially in the context of software products, classification into watertight compartments has become extremely difficult, and often impossible. As a result, courts have recognised that taxable commodities are often partly 'goods' and partly, a 'services'. Applicability of entirely different regimes of taxation to 'goods' and 'services', as under the present system, adds to complications related to classification. In addition, it has been noted that the proportion of contribution by 'service tax' to the total collection of indirect taxes has been steadily increasing.[6] Under the pre-GST constitutional scheme, exclusive power with respect to service taxes was conferred on the Centre by virtue of Entry 92C of List I. This deprived states of a significant avenue of revenue collection also, heavily constraining their tax bases to 'goods' alone.

5. **Non-Comprehensiveness of the VAT system**: While the central and state VAT schemes alleviated the problem of double taxation to a great extent, as alluded to before, the solution remained incomplete under the VAT system. The inefficiency resulting from imposition of a "tax on tax" – a problem that the VAT intended to resolve, remained problematic at least in three respects; *first*, with respect a variety of goods and services that did not fall within the ambit of the VAT scheme, *second*, as regards a number of levies such as additional customs duty, luxury tax, entertainment tax which

[4] Poddar and Ahmed, "GST Reforms and Intergovernmental Considerations in India", Working Paper No.1/2009-DEA, p. 5 (2009).

[5] *See*, Tata Consultancy Services v. State of Andhra Pradesh, AIR 2005 SC 371.

[6] Poddar and Ahmed, "GST Reforms and Intergovernmental Considerations in India", Working Paper No.1/2009-DEA, p. 6(2009).

were not covered by the VAT scheme and *finally*, since credit for CENVAT payment was not allowed under the State VAT schemes.

6. **Simplification of the Tax Regime**: A plethora of distinct levies collected by both the centre and the state, a variety of administrative institutions involved in their collected and varied multiplier and exemption rates applicable to them, all contribute to the complexity of the present indirect tax regime in India. It has also been noted that the complexity of the administrative regime involved in tax collection is among the prime reasons for the substantial compliance gaps.[7] The difference in the applicable rates across the country also imposes a considerable trade barrier for inter-state trade and commerce. Though the White Paper on VAT issued by the Finance Minister, five years ago had promised the removal of these trade barriers, they still remain a considerable impediment to inter-state movement of business commodities. The comprehensive overhaul of the taxation regime sought to be effected by the GST is expected to put in a place a simple and uniform system of taxation across various parts of the country.

A. A Comparative Overview of GST

I. *The European Union*

7. The European Union mandated the creation of a system similar to the GST through its directive 2006/112/EC issued on 28 November 2006. The directive intended to create a common system of VAT applicable to all goods and services unless specifically exempted levying an amount proportional to the price of the goods and services.[8] In pursuance of providing for a large tax base, the VAT scheme was to be applied up to and including the retail trade stage. The directive treats supply of goods and services as exhaustive categories by defining 'supply of services' as "*any transaction which does not constitute a supply of goods*"[9] and by specifically listing transactions that would

[7] Poddar and Ahmed, "GST Reforms and Intergovernmental Considerations in India", Working Paper No.1/2009-DEA, p. 7(2009).

[8] Subject Matter and Scope, Paragraph 2, EC directive 2006/112/EC.

[9] Art. 24, EC directive 2006/112/EC.

constitute 'supply of goods'.[10] The directive also provides for the creation of a three tier rate system, namely, standard (not less than 15%) and reduced (not less than 55%) rate. The directive leaves open the internal administration of the indirect tax system to the discretion of member states.

8. In pursuance of United Kingdom's entry into the European Economic Community, a uniform VAT system imposing indirect taxes on goods and services was introduced in the UK in 1973. Indirect tax is imposed at three different rates under this scheme depending on the goods or services provided, namely, 20% (standard), 5% (reduced) and 0%. Since the EU directive leaves open matters of internal administration of tax, the UK has chosen to adopt a nationalised GST system as opposed to the Dual Scheme proposed to be introduced in India (where both States and the Union Government collect taxes). The centralised indirect tax regime in UK is administered by the HM Revenue and Customs.

II. *The United States*

9. The United States is among the few economically developed countries without a nationalised VAT system. Indirect tax in the USA is restricted to sales tax imposed both by States as well as local authorities. The quantum of indirect tax payable is thus a sum of the tax payable under the State rate and the rate payable as per the regulations of the local authority to which the transaction bears a nexus. In contradistinction to other VAT systems, the sales tax in the US is a tax on retail sales i.e. a tax on the end purchase of a good.[11] Though the sales tax imposed was initially confined to goods alone, recently, they have been expanded to include services as well, especially when they are bundled with sales of goods.

10. Though the introduction of a goods and services tax as a value added tax was debated by the Obama administration, this proposal was however, rejected in 2009 following

[10] Art. 14, EC directive 2006/112/EC.

[11] Harley Duncan, "Administrative Mechanisms to Aid in the Coordination of State and Local Retail Sales Tax with a Federal Value-Added Tax", 63 TAX LAW REVIEW 713 (2010).

recommendations of the 'Center for Freedom and Prosperity Foundation (CF&PF)' which warned against the imposition of a centralised federal VAT scheme.

III. *Canada*

11. The background behind the introduction of Goods and Services Tax in Canada closely mirrors the present situation in India. GST was introduced in Canada in 1991 following widespread criticism relating to the inefficiency of the pre-existing Manufacturers' Sales Tax. However, the most popular argument in Canada in favour of the GST was that it would make Canadian exports competitive in the world market since the proposed GST regime exempted export oriented industries. Yet another factor that motivated the implementation of a GST regime in Canada was the recession that began in 1990 forcing the government to resort to immediate measures to raise revenue.[12]

12. Implementation of the GST in Canada however, follows a nationalised model as opposed to the model of dual implementation proposed in India. The GST is administered by the Canada Revenue Agency and the proceeds are then divided among the provinces in accordance with the pre-determined formula.[13] The GST in Canada is however, not an exhaustive levy. There are additional taxes, at both the federal and provincial levels, assessed at different rates. Even the administration of these levies is not always vested with the Canada Revenue Agency and is vested with different bodies.

IV. *Australia*

13. A value added tax in the form of a harmonised Goods and Services Tax was introduced in Australia with the enactment of the A New Tax System (Goods and Services Tax) Act, 1999. The enactment followed the recommendations of the Asprey Report which recommended that "*the weight of taxation should be shifted towards the taxation of goods*

[12] Brandon A. Ketterman, "VAT? A Look Inside Canada's Experience with the Goods and Service Tax" 8 SAN DIEGO INTERNATIONAL LAW JOURNAL 259 (2006).

[13] Brandon A. Ketterman, "VAT? A Look Inside Canada's Experience with the Goods and Service Tax" 8 SAN DIEGO INTERNATIONAL LAW JOURNAL 259 (2006).

and services and away from the taxation of income",[14] leading to the abolition of the Wholesale Sales Tax (WST).

14. The mechanism of the Australian GST was modelled on the Canadian tax regime and closely mirrors the proposed GST in India, being a wide based tax extending to all stages of production expending up to retail sales.[15] In terms of the structure of administration as well, the Australian system is similar to the Canadian model with the central government collecting the whole amount and then distributing a certain quantum of the proceeds to provincial governments. The Australian GST categorises goods under three heads namely, taxable, zero-rated and exempt.

V. *Singapore*

15. The Goods and Services Tax in Singapore was introduced in 1994 and is modelled on the VAT system followed in the UK.[16] The prime reason for the introduction of GST in Singapore was, as in Australia, the necessity to shift focus from direct to indirect tax so as to encourage flow of highly skilled human resource to the country. Singapore's GST follows the model of central administration the assessment, collection and enforcement of the GST being carried out by the Inland Revenue Authority of Singapore (IRAS). In contradistinction to the three tier classification under the UK system however, the Singapore GST only taxes goods and services under two heads – standard-rated (7%) and zero-rated.

B. Clause 2 – Provisions on Legislative Competence

[14] Kathryn James, "We of the Never Ever: The History of the Introduction of a Goods and Service Tax in Australia" BRITISH TAX REVIEW 320 (2007).

[15] Abe I. Greenbaum, "A goods and Service Tax for Australia" 3(2) REVENUE LAW JOURNAL 152 (1993).

[16] Nand Singh Gandhi *et al*., "Singapore: Public Consultation on draft GST (Amendment) Bill, 2006", 4(11) TAX PLANNING INTERNATIONAL INDIRECT TAXES 11 (2006).

I. The *non-obstante clause*

16. One of the primary purposes of the Constitution (115th Amendment) Bill, 2011 ["**GST Bill**"] is to grant legislative powers to the State in relation to service tax and the Centre in relation to sales tax. This purpose is sought to be achieved through Clause 2 of the Bill.

17. Clause 2 of the Bill currently reads-

> **2**. After article 246 of the Constitution, the following article shall be inserted, namely:—
>
> '246A. Notwithstanding anything contained in articles 246 and 254, Parliament and the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by that State respectively:
>
> Provided that 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.— For the purpose of this article, "State'' includes a Union territory with Legislature.'. [emphasis supplied]

18. The first major change effected by this provision is the non-obstante clause that prevents the application of Articles 246 and 254 to the proposed power of the Parliament and the State Legislatures to make laws with respect to goods and service tax. These two provisions can broadly be said to represent the concepts of competence and repugnance respectively. Competence refers to the power of a legislature to pass laws with respect to certain matters; while repugnance refers to conflicts between laws passed by two legislatures, both of which were competent to pass those two laws. Thus, in the case of a conflict between a Central law and a State law, ensuring that the legislative bodies were competent to pass the laws is the first step, and is governed by Article 246. If both legislative bodies are competent to pass the laws, then the issue of repugnance between them falls to be considered. This is addressed by Article 254. Although Clause 2 prevents both these provisions from applying, it does not appear to replace them with any other conflict-resolution mechanism. Against this backdrop, two issues fall to be examined- *first*, what is the Constitutional scheme contained in Article 246 and Article 254 which the Clause does away with; and *secondly*, what mechanism does the Clause provide in its stead?

(i) *The Present Constitutional Scheme*

19. This section shall provide a brief overview of Article 246 and Article 254 and the discrete roles that they play in the Indian Constitutional scheme.

(a) Article 246 – The Question of Competence

20. Article 246 of the Indian Constitution reads-

> 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 specified in Part A or Part B of the First Schedule 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.

21. This provision serves two functions. First, it grants the Centre and the States competence to legislate with respect to the Lists in Schedule VII. It is settled law that the entries in the legislative lists are merely fields of legislation, and that the competence of the Centre and State to pass laws in those fields emanates from Article 246.[17]

22. The second purpose which Article 246 serves is laying down the hierarchy between the laws passed by the Centre and the State relating to the areas of their competence. This is achieved by the opening words of clauses (1), (2) and (3). However, while the creation of the hierarchy is clear, it is important to note what this hierarchy relates to. Each of the clauses deals with the 'power to make laws' which a legislative body has relating to

[17] Hoechst Pharmaceuticals Ltd. v Bihar MANU/SC/0392/1983; Union of India v. Harbhajan Singh Dhillon, (1971) 2 SCC 779.

matters in a said legislative list. It is this power which is either subject to some other power (in the case of the power of State legislatures in (3)) or exists notwithstanding any other power (in the case of the power of the Parliament in (1)). In other words, Article 246 deals only with the scope of the power to legislate of the Centre and the State with respect to the matters in the legislative lists. If these *powers* conflict, then they will be ordered and reconciled in accordance with the hierarchy laid down.

23. The principle of harmonious construction of the legislative lists is one of the cardinal principles of Indian Constitutional interpretation, most succinctly summarised in the decision of the Supreme Court in *Tika Ramji*.[18] Following that principle, in most cases, the entries in which this power is to be exercised will be clearly separated from another, either on the text of the entries, or by means of judicial construction. It is only when inspite of dealing with discrete entries, there is a conflict between the laws passed by the Centre and the State that problems arise. This, as mentioned earlier, is the problem of repugnance, which should be dealt with by Article 254. What then is the function of the hierarchy laid down by Article 246? If Article 254 dealt with the entire area of repugnance, then the initial words of clauses (1) to (3) in Article 246 would appear to be otiose. However, the interpretation of Article 254 by the Supreme Court means that certain instances of repugnance are left unaddressed, which makes falling back on Article 246, though conceptually unsound, practically essential.

(b) Article 254 – The Question of Repugnance

24. The three tests of repugnance employed in India were laid down by the Supreme Court in *Tika Ramji* and affirmed in *Deep Chand*.[19] They are:

- Whether there is direct conflict between the two provisions;
- Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

[18] Tika Ramji v Uttar Pradesh, AIR 1956 SC 676.

[19] Deep Chand v Uttar Pradesh, AIR 1959 SC 648.

- Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

25. It may be argued that the second of these is addressed through the opening words of clauses (1)-(3) of Article 246. The third is addressed through clauses in some of the entries in the legislative lists, which make the power of the State expressly subject to the overriding power of the Parliament. However, it is the first of these which is the most important in the context of Clause 2 of the Amendment Bill.

26. The case of a direct conflict is addressed primarily through Article 254, which reads:

> 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 specified in Part A or Part B of the First Schedule 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.

27. The highlighted phrase in Article 254(1) can be interpreted in two ways- it may either qualify the entire subsection preceding it, i.e., laws passed by the State, the Parliament and existing laws, or it may qualify only existing law. The absence of a comma after 'existing law' suggests, on a strictly literal reading of the provision, that it qualifies only existing law. Hence, on this reading, it would appear that a repugnance between any State law and Central law, which both were competent to enact would be dealt with by section 254(1). However, this interpretation leads to two anomalies. *First*, it gives no explanation

for why only existing laws are treated differently from State laws and Central laws. *Secondly*, as discussed earlier, it has the effect of rendering parts of Article 246 otiose.

28. The other interpretation, which reads 'with respect to one of the matters enumerated in the Concurrent List' as qualifying the entire subsection preceding it stands on firmer ground, not least by virtue of enjoying the support of the Supreme Court's decision in *Vijay Kumar Sharma*.[20] In the *locus classicus* on this issue, the Court held,

> ... whenever repugnancy between the State and Central Legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. The test for determining the same is the usual one, namely, to find out the dominant intention of the. two legislations. If the dominant intention, i.e. the pith and substance of the legislations is different, they cover different subject matters. If the subject matters covered by the legislations are thus different, then merely because the two legislations refer to some allied or cognate subjects they do not cover the same field. The legislation, to be on the same subject matter must further cover the entire field covered by the other. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation. But such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). Both the legislations must be substantially on the same subject to attract the Article.

29. There are three aspects to the Court's approach that merit mention. *First*, the Court unequivocally adopts the view that laws which relate to entries in different legislative lists or even to different matters in the Concurrent List cannot conflict. *Secondly*, only conflicts relating to the same matter in the Concurrent List are to be resolved by the scheme in Article 254. *Finally*, other conflicts, if any, can be resolved by the application of the doctrine of pith and substance. This interpretation of Article 254(1) has been affirmed by the Court recently in *Bharat Shantilal Shah*,[21] where it observed,

> Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words,

[20] Vijay Kumar Sharma v State of Karnataka (1990) 2 SCC 562.

[21] Maharashtra v Bharat Shantilal Shah, 2008 (12) SCALE 167.

> the question of repugnancy arises only in connection with subjects enumerated in Concurrent List.

30. It is difficult to take issue (apart from the strictly literal argument mentioned earlier) with the Court's interpretation of the scope of Article 254(1). However, what this interpretation does is to narrow the scope of the concept of repugnance such that no mechanism is available for conflicts between provisions of laws which need resolution have no mechanism to look to. The Court suggests that the doctrine of pith and substance may be used. This is a line adopted even very recently by the Court in *Girnar Traders*,[22] where it observed,

> The schemes of the MRTP Act and the Land Acquisition Act do not admit any conflict or repugnancy in their implementation. The slight overlapping would not take the colour of repugnancy. In such cases, the doctrine of pith and substance would squarely be applicable and rigours of Article 254(1) would not be attracted.

31. However, with respect, it is submitted that the above observations, if read literally, blur the concepts of competence and repugnance. Pith and substance is a concept employed to determine the competence of a legislature to pass a law, not to resolve a conflict between two laws which both legislatures had the competence to enact. When a legislative body passes a law which relates to several entries, some of which do not fall within its sphere of competence, the concept of pith and substance dictates that if the law deals in pith and substance with entries within its legislative competence, it shall not be struck down for incidental incursions into other entries. This is fundamentally different from the case of repugnance, which often deals with factual conflicts between laws. Hence, the Court in *Vijay Kumar Sharma*, like the Court in *Girnar Traders*, should be understood as saying only that when there are factual conflicts, the first step is to ask whether either of the two legislative bodies was incompetent to pass the law in question. However, if, after applying the doctrine of pith and substance, one concludes that both bodies were competent, there needs to be some other mechanism for resolving the conflict. Asking the Court to again look at pith and substance does not solve the problem.

[22] Girnar Traders v Maharashtra, (2011) 3 SCC 1.

32. The solution to this conundrum flows from the opening words of clauses (1)-(3) of the Article 246. Using the hierarchy provided there, factual repugnance between Central and State laws could be resolved. This was the position adopted by the Supreme Court in *J.B. Educational Society*[23] where the Court observed that conflicts between Central laws and State laws are possible in two contexts:

> First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1). Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation.

33. The same approach is adopted earlier by the Court in *State of West Bengal* v. *Kesoram Industries Ltd*.,[24]

> While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I. In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in List III and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

34. However, the solution, though handy, is far from satisfactory. This is because, as mentioned earlier, Article 246 deals with the *power* to pass a law, not the conflict between such a law and another law which another legislative body had the power to enact. The result of relying on Article 246 to resolve factual repugnance would ideally be that the State does not have the power to pass the law, in which case it will have to held void in entirety. This is different from the consequences of repugnance under Article 254 which merely renders the law void only to the extent of the repugnancy. Matters can be

[23] Andhra Pradesh v J.B. Educational Society, (2005) 3 SCC 212.

[24] State of West Bengal v. Kesoram Industries Ltd., MANU/SC/0038/2004.

improved by reading in 'to the extent of repugnancy' into Article 246. However, that still does not solve the conceptual inelegance of shuttling from competence (Article 246) to repugnance (Article 254) and back to competence (Article 246), which would be necessary in every case where there is a factual repugnance between laws which do not deal with the same matter in the Concurrent List.

35. Inelegant though that may be, it is the position of law settled in India today, and has been affirmed repeatedly by the Supreme Court, with all its decisions expressly or impliedly accepting this reading of Article 254.[25]

36. In sum, the current scheme relating to conflicts between Central and State laws is as follows-

- The Court must first look to determine whether both the Centre and the State had the competence to pass the respective laws. This inquiry is to be carried out using Article 246 read with the legislative lists, which are to be read harmoniously, and by using the doctrine of pith and substance.
- If there is a factual conflict between the two laws, the Court must assess whether the laws deal with the same matter in the Concurrent List. If they do, then the Court must resolve the repugnance in accordance with Article 254.

  If the laws do not deal with the same matter in the Concurrent List, then the Court cannot use Article 254. Then reliance must be placed on Article 246, and the hierarchy provided therein must be used to either reconcile the conflict, or give priority to the Central law over the State law.

37. It is against this backdrop that Clause 2 of the Amendment Bill needs to be examined.

[25] Zaverbhai Amaidas v Bombay, MANU/SC/0040/1954; M. Karunanidhi v Union of India, MANU/SC/0159/1979; Tika Ramji v Uttar Pradesh, MANU/SC/0008/1956; Prem Nath Kaul v Jammu & Kashmir, MANU/SC/0017/1959; A.S. Krishna v Madras, MANU/SC/0035/1956; M/s. Hoechst Pharmaceuticals Ltd. v Bihar, MANU/SC/0392/1983.

(ii) *The Proposed Scheme under Clause 2*

38. Under the proposed Clause 2 of the Amendment Bill, the applicability of Article 246 and Article 254 has been done away with to the power of the Centre and the State to make laws with respect to goods and services tax. Further, in their place, no alternative mechanism has been introduced. Now, given the scheme proposed in the **Empowered Committee's First Discussion Paper**, it appears that an irreconcilable conflict between Centre and State laws is unlikely. However, the hypothetical possibility of such a conflict cannot be ruled out and needs to be provided for. The primary reason is the use of the phrase 'with respect to' in Article 246A. This phrase, also used in Article 246, has been interpreted by the Supreme Court in *Ujagar Prints*[26] to mean that the law must, in pith and substance, deal with the matter mentioned. In the words of the Court,

> The expression 'with respect to' in Article 246 brings in the doctrine of "Pith and Substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially `with respect to' the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic.

39. On this interpretation, laws other than purely goods and services taxes could be passed by the Parliament and the States under Article 246A. While the charging provisions themselves may not conflict with one another, there is a very real possibility of the machinery provisions conflicting, for which there needs to a mechanism in place. Further, the use of 'exclusive' in the *proviso* does not address this issue either, since it only means that the State legislature does not have the power to pass laws with respect to inter-State trade and commerce; but does not provide a mechanism for a State law that incidentally but irreconcilably encroaches on that field.

40. There are potentially three ways in which the proposed amendment can be modified in order to address this anomaly: (i) make the proposed Article 246A subject to both Articles 246 and 254; (ii) introduce a mechanism for resolving conflicts within Article 246A; and (iii) make the proposed Article 246A subject only to Article 254, suitably amended. We shall now consider each of these in turn.

[26] Ujagar Prints v Union of India, (1989) 3 SCC 488.

Option 1: Removal of the non-obstante clause in entirety

41. This would be the simplest solution to the anomaly, and would mean that the scheme outlined in the section above would apply even to Central and State GST laws. However, though simple, this option is at odds with the entire model of GST sought to be introduced. Retaining Article 246 would mean additional limitations on the State and Centre's power to tax with respect to matters which may fall under List I and List II respectively. While amendments to the legislative lists, and the decision of the Supreme Court in *State of West Bengal* v. *Kesoram Industries Ltd.*[27] may mean that such a limitation is more hypothetical than real, retaining Article 246 would nevertheless be a marked departure in principle from the overall scheme proposed. Especially since the problem identified with the current draft is not one of competence but repugnance, making such a wholesale change to the scheme of the GST appears unadvisable.

Option 2: Introduce a mechanism to resolve the conflict in Article 246A

42. The second alternative is to introduce a conflict-reconciliation mechanism similar to Article 254 in Article 246A. This mechanism could be to provide that the law passed by Parliament shall override the law passed by the State legislature to the extent of the conflict, adopting the language currently used in Article 254. However, that would leave unaddressed the possibility of a conflict between a GST law and another law passed by the Centre or the State, with respect to a matter enumerated in any of the legislative lists. Given the breadth of the meaning of 'with respect to' in Article 246A, that is real possibility. Another mechanism will have to be put in place for resolving such a conflict, possibly providing that a Union law which the Parliament was competent to enact shall override the State GST law, and that a Union GST law shall override a State law which it was competent to enact. As is clear from this discussion, this solution is complicated and unclear, and would also involve a reassessment of the extent of legislative power to the be granted to the States with respect to the GST legislations. The existence of two conflict-reconciliation mechanisms is thus complicated and hence undesirable.

[27] State of West Bengal v Kesoram Industries Ltd., MANU/SC/0038/2004.

Option 3: Remove the reference to Article 254 in the non-obstante clause

43. The third, and it is submitted, most advisable alternative is to remove the reference to Article 254 from the non-obstante clause in Article 246A. This would mean that while the Centre and the State legislatures retain the competence to pass GST laws on any supply of goods or services, in cases of irreconcilable conflict between the provisions of any such laws, or between the provision of one such law and a non-GST law, the scheme contained in Article 254 shall resolve the conflict. This seems the most attractive solution to the problem identified, but cannot be achieved without an amendment to Article 254. This is because of the interpretation of Article 254(1) in *Vijay Kumar Sharma*, discussed above. As a result of the narrow scope of application of Article 254, reliance on Article 246 is necessitated in cases where there is a real conflict between a Central and a State law, which are not with respect to the same matter in the Concurrent List. This will be the case for GST legislation, meaning that the limitation on the applicability of Article 254, combined with the non-applicability of Article 246 will leave the problem identified above unaddressed. Thus, amending Article 254 to increase its scope beyond that identified by *Vijay Kumar Sharma* is essential.

44. There are two possible ways in which Article 254 may be amended to achieve the desired result. *First*, by deleting the comma after 'Parliament is competent to enact'; or *secondly*, by adding the phrase 'under Article 246 or Article 246A' after 'Parliament is competent to enact' and 'which the State Legislature is competent to enact under Article 246 or Article 246A' after 'Legislature of a State'.

(i) Deleting the comma

45. Section 107 of the Government of India Act 1935, on which Article 254 is based, was nearly identical to the current provision. The only notable difference is the absence of the comma after 'Parliament is competent to enact' in Section 107(1). Thus, Section 107(1) read-

> If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions- of this section, the Federal law, whether passed before

> or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

46. On this reading, it appears that 'with respect to one of the matters enumerated in the Concurrent Legislative List' qualifies only existing law, and not 'Provincial law' and 'Federal law with the Federal Legislature is competent to enact'. Thus, the absence of the comma makes the interpretation of *Vijay Kumar Sharma* more improbable, albeit not impossible. In fact, the Federal Court in *Lakhi Narayan Das* v. *The Province of Bihar*[28] and the Calcutta High Court in *Bir Bikram Kishore Manikya Bahadur* v. *Tafazzal Hossain*[29] interpreted Section 107 in the same way as *Vijay Kumar Sharma* interpreted Article 254. Having said that, a specific mention of the reason for deleting the comma in the Statement of Objects and Reasons should dilute the effect of this authority (which is persuasive at best), and allow Article 254 to be applied to all cases of repugnance.

47. Further, an amendment to Article 254(2) could further ensure that the legislative intent is given effect to. Article 254(2) deals with cases where State laws with Presidential assent are permitted to override Union laws with which they conflict. In that context, the provision states that only conflicts between laws with respect to the same matter in the Concurrent List are covered. In both *Taffazal Hossain* and *Vijay Kumar Sharma*, the scope of Article 254(2) was used to interpret Article 254(1), leading the Calcutta High Court and the Supreme Court, respectively, to the conclusion that Article 254(1) addresses only conflicts between Union and State laws with respect to the same matter in the Concurrent List. Hence, in addition to removing the comma in Article 254(1), it would be advisable to add an additional *proviso* to Article 254(2) to the effect that-

> Nothing in this clause shall be taken to affect the application of Article 254(1) to inconsistencies between laws passed by Parliament and the State legislatures, when those laws are with respect to different matters enumerated in the Concurrent List, or with respect to matters enumerated in the Union List and State List respectively.

[28] Lakhi Narayan Das v The Province of Bihar, [1949] FCR 693.

[29] Bir Bikram Kishore Manikya Bahadur v. Tafazzal Hossain, AIR 1942 Cal 587.

48. This addition to Article 254(2) will affirm the legislative intent behind the deletion of the comma, and will address the one of the major arguments in favour of reading down Article 254(1).

(ii) Adding an explanatory phrase

49. The clearer way of amending Article 254(1) would be to add the required phrases to Article 254(1). The proposed Article 254(1) would then read-

> If any provision of a law made by the Legislature of a State which the State Legislature is competent to enact under Article 246 or Article 246A is repugnant to any provision of a law made by Parliament which Parliament is competent to enact under Article 246 or Article 246A, 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.

50. This amendment shall have the clear effect of expanding the scope of Article 254(1) to cases of irreconcilable conflict outside of the Concurrent List, and lead to an integration of the GST into the current Constitutional scheme. Unlike the previous option, there will be no need to add a *proviso* to Article 254(2), since the amendment to Article 254(1) will be self-explanatory. However, adding that *proviso* by way of abundant caution is nevertheless an option.

51. By extending Article 254(1) to conflicts between laws not passed with respect to the same matter un the Concurrent List, the conceptual inelegance of the earlier Constitutional scheme will be addressed, and GST will be seamlessly integrated into it. Even from the point of view of the federal scheme, far from diluting the legislative powers of the States, it would have the effect of enhancing it. As seen earlier from the decisions in *Kesoram Industries* and *J.B. Educational Society*, when a State law and a Central law, not relating to the same matter in the Concurrent List conflict, the fact that the conflict is not addressed by Article 254 does not mean that the State law remains unscathed. The Court goes on to Article 246, which has the effect of nullifying the law in its entirety. This is unlike Article 254(1), which only voids the law to the extent of the repugnancy. Thus, if the concept of repugnancy in Article 254(1) is extended to include conflicts between any laws which the Parliament and State are competent to enact, the

legislative competence of States will in fact be increased, with specific provisions of State laws being rendered void in cases of irreconcilable conflict with provisions of Union laws.

II. Clause 2 – 'Imposed by'

52. Apart from the problems with the non-obstante clause, discussed above, there is another small anomaly is Article 246A as presently drafted. This is the use of the words 'imposed by'. The purpose of this phrase is not clear, and it is susceptible to the patently wrong interpretation that the power extends only to such GST laws that the Union and the States are imposing as on the date of the Constitutional amendment. Hence, we would suggest that 'to be' be added before 'imposed by'. The prospective nature of the provision will not affect the GST laws already in force, which are saved by Clause 18 of the Bill.

III. Clause 2 and Inter-State Trade and Commerce (Azad Coach)

53. The judgment in *Azad Coach*[30] would not apply to the phrase "inter-state trade or commerce". Though the language of Section 3 and Section 5 of the Central Sales Tax Act, 1956 appears to be *pari materia*, *Azad Coach* is specifically based on the interpretation of Section 5(3). The said provision was introduced as a consequence of the view of the law taken in *Mohd. Serajuddin*[31] i.e. Section 5(3) brought about an alteration in the law. The amendment was not clarificatory. Therefore, the principles contained in Section 5(3) cannot be said to flow from the language of Section 5(1), and consequently from Section 3(1). In view of the absence in Section 3, of a clause similar clause to Section 5(3), the judgment in *Azad Coach* cannot be extended to the interpretation of Section 3. The judgment in Azad Coach, thus cannot be said to bring about a change as far as trade and commerce within the territory of India is concerned.

[30] State of Karnataka v. Azad Coach Builders, (2006) 3 SCC 338; State of Karnataka v Azad Coach Builders, (2010) 9 SCALE 364.

[31] Md. Serajuddin & Others v. State of Orissa (1975) 2 SCC 47.

IV. Recommendation

54. ***On the basis of this discussion, the Hon'ble Committee may consider omitting the expression "unless the context requires otherwise" from Clause 2.***

In sum, the Hon'ble Committee may consider amending the proposed Art. 246A to read as follows-

246A. Notwithstanding anything contained in article 246, Parliament and the Legislature of every State, have power to make laws with respect to goods and services tax to be imposed by the Union or by that State respectively:

Provided that 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.— For the purpose of this article, "State'' includes a Union territory with Legislature.

In addition, we would recommend the amendment of Article 254(1) in one of the ways outlined above.

C. Clause 3 – Relationship with Article 246A

55. Article 248 deals with the residuary power of Parliament to make laws with respect to any matter not enumerated in the State List or the Concurrent List. Since the power to impose goods and services tax is not being introduced in the legislative lists, subjecting Article 248 to Article 246A is essential. Hence, the introduction of the 'subject to' clause in Article 248 is essential. However, the power to impose taxes which are not enumerated in the State List or the Concurrent List is dealt with separately by Article 248(2). Admittedly, the use of 'such power shall include' in Article 248(2) suggests that any limitation on the power in Article 248(1) will also narrow the scope of the power in Article 248(2).

56. However, by way of abundant caution, it may be advisable to introduce 'other than goods and services tax' after 'imposing a tax' in Article 248(2). The other alternative would be to remove the 'subject to' clause proposed to be added to Article 248(1), and instead add Article 248(3) to the effect that nothing in Article 248(1) or (2) shall affect the power of the State legislature under Article 246A. This would have the benefit of clarifying any remaining confusion over the relationship between Article 246A and Article 248.

D. Article 286(3) and clauses 4-8 and 13

57. Article 286(3) seeks to ensure that States do not have a free hand in taxing goods which are of national importance. Section 14 of the Central Sales Tax, 1956 lists out these goods and Section 15 thereof states the restrictions and conditions on State laws which seek to tax the transactions involving declared goods. The new provision omits existing Art. 286(3)(b) and consolidates the remaining provision. Article 286(4) states that the 286(3) would not apply to State laws which impose a goods and services tax. Given proposed Article 286(4) and in view of the fact that the existing mechanism of taxation of sale and purchase of goods is being replaced by the goods and services tax, the retention of Article 286(3) may appear to be superfluous. However, one would have to await the introduction of an appropriate goods and services tax legislation since certain areas may be carved out where 'taxation of sale and purchase of goods' is permissible outside the new scheme.

E. Is the new Art. 269A appropriately drafted (clause 9)?

58. The use of the word 'apportioned' may not be entirely appropriate. A better course is to use the term 'distribution' and 'appropriation' in sync with existing jurisprudence in the Indian context. The doctrine of apportionment has specific connotations in Constitutional Law of other countries, and the use of the term 'apportion' Article 269A, while retaining 'distribution' in Articles 270 and 272 may be incongruous and lead to potential conflicts.

59. In Explanation I, there needs to be a (,) <comma> separating "*supply of goods or of services or both*" i.e. "supply of goods, or of services, or both". In addition, it is our submission that the use of the word "both" in Explanation I needs greater clarification – it is capable of conflicting interpretations – does it refer to transactions where both goods and services are involved but are separable elements, or does it also include composite transactions. One course is to omit the word 'both' and use a more appropriate phrase.

F. Clause 17 - The Amendments to Schedule VII

60. As is well known, the legislative competence of the Centre and the State is set out in Arts. 245 and 246 of the Constitution, read with the legislative entries in the Seventh Schedule. Clause 17 of the Constitution (One Hundred and Fifteenth Amendment) Bill

["**the GST Bill**"**]** makes several amendments to the Seventh Schedule. It is important to ascertain the implications these amendments will have, and those in turn will affect the construction of Clause 14 of the GST Bill. This section is devoted to Clause 17, and the next considers Clause 14.

I. Outline of the Present Law

61. Clause 17 reads as follows:

> 17. In the Seventh Schedule to the Constitution,—
> (a) in List I — Union List,—
> (i) for entry 84, the following entry shall be substituted, namely:—
> "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; and
> (f) tobacco and tobacco products.";
> (ii) entries 92 and 92C shall be omitted;
> (b) in List II — State List,—
> (i) for entry 52, the following entry shall be substituted, namely:—
> "52. Taxes on the entry of goods into a local area for consumption, use or sale therein to the extent levied and collected by a Panchayat or a Municipality.";
> (ii) for entry 54, the following entry shall be substituted, namely:—
> "54. Taxes on the sale, other than sale in the course of inter-State trade or commerce or sale in the course of international trade and commerce of, petroleum crude, high speed diesel, natural gas, motor spirit (commonly known as petrol), aviation turbine fuel and alcoholic liquor for human consumption.'';
> (iii) entry 55 shall be omitted;
> (iv) for entry 62, the following entry shall be substituted, namely:—
> "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.''.

62. It is useful to briefly set out the context for the amendments to the legislative entries. It consists principally in three features of the structure envisaged for the GST – *first*, the conferral of concurrent legislative competence on the Centre and the States to tax the supply of goods or the supply of services, *secondly*, the elimination of the exclusive competence of the States to levy the indirect taxes it currently imposes – in the main,

sales tax (or VAT), entertainment tax, luxury tax and taxes on betting and gambling,[32] and *thirdly* the use of a separate regime for a set of exempted goods. Clause 17 of the Bill (along with Clause 14) seeks to accomplish these objectives.

63. The first entry that it is proposed to amend is Entry 84, List I, which is presently the source (read with Art. 246(1)) of the competence of the Centre to levy excise duty. The amendment has the effect that this competence is now confined to those goods that are now outside the purview of the GST regime – petroleum crude, diesel etc. We believe that this clause requires no changes, but highlight that the consequence of a closed list is that a constitutional amendment will be necessary if at a subsequent date it is felt that other goods must be outside the GST framework as well. This will apply even to goods that are closely connected with or substitutes of those enumerated in the list, for the Central Government will automatically cease to have competence to levy any tax on the manufacture of goods except those listed in the (now amended) Entry 84. That this is the consequence is clear from the use of the word "namely" in the amending clause, as to which the Supreme Court said:

> Ordinarily the word "namely" imports enumeration of what is comprised in the preceding clause. In other words it ordinarily serves the purpose of equating what follows with the clause described before. There is good deal of force, therefore, in the argument that the order restricts admission only to Anglo-Indians and citizens of non-Asiatic descent whose language is English.33

64. Clause 17(a)(ii) provides that entries 92 and 92C shall be omitted. This carries the above structure to its logical conclusion, since these entries, respectively, confer legislative competence on the Centre to levy sales tax on newspapers and service tax, both of which will now be subsumed within GST.

65. The amendments to List II are more complex. To begin with, clause 17(b)(i) proposes to add the words "*to the extent levied and collected by a Panchayat or Municipality*" to Entry 52, List II. The Empowered Group of Ministers has stated that the object is to

[32] Empowered Committee of Ministers, FIRST DISCUSSION PAPER ON GOODS AND SERVICES TAX 19 (2009).

[33] State of Bombay v. Bombay Education Society, [1955] 1 SCR 568.

eliminate State legislative competence in respect of "entry tax not in lieu of octroi."[34] It is therefore important to consider precisely what octroi means and whether the proposed formulation achieves the intended result. Moreover, the Supreme Court recently struck down as unconstitutional several State legislations passed purportedly under this entry,[35] and its reasoning has significant implications for the proposed amendment. We believe that this clause may benefit from revision, for the reasons that follow.

66. Entry 52 provides that the State Legislature may levy taxes on "*the entry of goods into a local area for consumption, use or sale therein.*" This levy is popularly referred to as octroi, and must be read in conjunction with Entry 89, List I, which provides for "*terminal taxes on goods or passengers, carried by Railway, sea or air*." The two provisions have come about in a somewhat complex pattern, which is traceable to the Government of India Act, 1919. Under s. 80A(3)(a) of that Act, the Governor General framed what came to be known as the "Schedule Tax Rules", intended for local areas, and Entries 7 and 8 of that Schedule were respectively octroi and "*a terminal tax imposed on goods imported into, or exported from a local area…*" The Supreme Court, in *Burmah Shell Oil Storage and Distributing Co.* v. *Belgaum Municipality*,[36] traced this history and observed that the Government of India Act, 1935, made one change, transferring terminal taxes to the *Federal List*. In addition, octroi was renamed as "*cesses on the entry of goods into a local area for consumption, use or sale*" and placed in the Provincial List (Entry 49). When the Constitution was enacted, the word "cess" was replaced with "tax", and the word "therein" was added to Entry 52. The remainder was incorporated without alterations.

67. As the Supreme Court noted in *Burmah Shell* (above), the reason for the omission of the word "octroi" was that terminal taxes are *also* a type of octroi. The Taxation Enquiry Commission, 1954, explained that the most difference was:

[34] Empowered Group (n 32 above).

[35] Jindal Stainless v. State of Haryana, (2006) 7 SCC 241.

[36] Burmah Shell Oil Storage and Distributing Co. v. Belgaum Municipality, AIR 1963 SC 906.

> …the requirement peculiar to octroi that, for this tax to become leviable, the goods must not only enter the area, but must be "for the purpose of consumption, use or sale therein." Usually, this requirement is sought to be satisfied by (a) the ab initio exemption of the goods which merely pass through the area, whether the exit is immediate or after an interval, or (b) by the subsequent refund of the tax collected on such goods. Exemptions and refunds, therefore, are the distinguishing features of the octroi system.37

68. In short, octroi is a tax on the *entry* of goods and is without doubt an indirect tax, whereas terminal taxes, although indirect,[38] are a tax on the *transfer* of goods. In addition, octroi cannot be levied unless the entry of goods is for *consumption, use or sale* in the local area – there is no such requirement so far as terminal taxes are concerned.[39] It was imposed directly by the municipalities, and an example is s. 73 of the Bombay Municipal Boroughs Act, 1925, which the Supreme Court considered in *Burmah*. In time, octroi was criticised as an unnecessary and cumbersome economic barrier, and the decision was taken to replace it with "entry tax". As the Allahabad High Court noted,

> Octroi used to be the most important source of revenue for ULBs in U.P. However, the collection of this tax was full of deficiencies, malpractices and caused harassment. It also imposed negative economic costs due to impediments on movement of goods carriers leading to wastage of fuel and substantial time delays. A decision was taken at the national level to abolish octroi and compensate LBs through appropriate mechanisms for loss of revenue caused. The U.P. Taxation Enquiry Committee, 1980 also recommended abolition of octroi. In the alternate, it suggested levy of entry tax on selected commodities.[40]

69. As a result, most States passed entry tax legislation. There is no substantive difference between an octroi and entry tax except that the latter is levied and collected by the *State Government* instead of the Municipalities. S. 3 of the Assam Entry Tax Act, 2001 is an example:

---

[37] Government of India, TAXATION ENQUIRY COMMISSION III (1954).

[38] At one time the Government of India took the view that it was a direct tax, a view it subsequently resiled from.

[39] *Burmah Shell* (n 5 above).

[40] IOC v. State of Uttar Pradesh, (2007) 10 VST 282.

> 3. Levy of tax.- (1) There shall be levied and collected an entry tax on the entry of goods specified in the Schedule into any local area for consumption, use or sale therein at such rate, not exceeding twenty percentum, as the State Government may, by notification, fix in this behalf and different rates may be fixed for different class or classes of specified goods and such tax shall be paid by every importer of such goods, whether he imports such goods on his own account or on account of his principal or any other person or takes delivery or is entitled to take delivery of such goods on such entry

II. ***Reasons to Reformulate Clause 17(b)***

70. We believe, for four reasons, that it is appropriate to reformulate Clause 17(b) with the use of the expression "*provided that such taxes are levied and collected by a Panchayat or Municipality*". For one, it makes it clear that the essential nature of the tax remains unchanged. *Secondly*, the use of "provided that" in preference to "to the extent that" makes it more difficult to suggest that what is not covered by Entry 52 falls within the residuary entry (Entry 97, List I). Such a question is unlikely to arise in any case because it is the intention of the GST Bill that what falls outside Entry 52 will fall within the new entry for GST. Nevertheless, we believe that it is appropriate to so revise it by way of abundant caution. *Thirdly*, it more accurately reflects the fact that competence can properly be conferred by the Constitution only on the State Legislature and not directly on the local authorities, atleast under Art. 246(3). *Finally*, it is necessary to comply with Art. 304(a) of the Constitution to sustain such a levy from a constitutional challenge (considered in more detail below), and Art. 304(a) uses the language "*the Legislature of a State*". Making it clear that the entity on which legislative competence is conferred, and the entity levying the tax, continues to be the State Legislature (albeit for the *benefit* of local authorities) will put paid to the argument that Art. 304(a) is not available to sustain the validity of such a law.

71. The second problem that arises in this context is the constitutional validity of entry tax legislation, principally on account of Arts. 301-305 of the Constitution. Art. 301 provides that trade and commerce shall be free throughout the territory of India, subject to the restrictions permitted by Arts. 302-5. In *State of Bihar* v. *Bihar Chamber of Commerce*,[41] the Supreme Court rejected an Art. 301 challenge to the constitutionality of the Bihar (Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein), 1993,

[41] State of Bihar v. Bihar Chamber of Commerce, (1996) 9 SCC 138.

although that Act was discriminatory to the extent that it exempted goods from entry tax if Bihar sales tax had been levied. That decision was overruled by a Constitution Bench in *Jindal Stainless v State of Haryana*,[42] on the basis that such legislations are not "compensatory". Subsequently, more than five High Courts have declared amended versions of entry tax legislation unconstitutional.[43]

72. In light of this, it is likely to be suggested that the Hon'ble Committee insert a non-obstante clause immunising entry tax legislation from a challenge under Art. 301. We submit, with respect, that such a course is neither necessary, nor consistent with the object of Art. 301. The rationale of Art. 301, according to the masterly analysis of a seven-judge Constitution Bench of the Supreme Court in *Automobile Transport Corporation v State of Rajasthan*, is the prevention of competition within States by the use of fiscal and other devices.[44] For example, if the State of Karnataka enacts a law that taxes goods imported from other States at higher rates than similar goods produced in its own State, it is likely to be unconstitutional as *ultra vires* Art. 301. A prominent criticism of Art. 301 is that it excessively fetters the autonomy of State legislatures, and even the Supreme Court in *Video Electronics v State of Punjab* commented that Art. 301 cannot stand in the way of equitable regional development:

> Part XIII of the Constitution cannot be read in isolation. … Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the States is as much vital as economic unity. Economic unity can only be achieved if all parts of whole of Union of India develop equally, economically … incentives and exemptions … were suggested to be absolutely necessary for economic viability and survival for these industries in these States.[45]

---

[42] Jindal Stainless v. State of Haryana, (2006) 7 SCC 241.

[43] For example ITC v State of TN, (2007) 2 CTC 577; Tata Steel Ltd. v State of Jharkhand, (2008) 3 JCR 365; Dinesh Pouches v State of Rajasthan, (2008) 16 VST 387; IOC v State of Haryana, (2009) 21 VST 10; Bharat Earth Movers v. State of Karnataka, (2007) 3 MPHT 69; Thressiamma Chirayil v. State of Kerala, (2007) 1 KLT 303.

[44] Automobile Transport Corporation v State of Rajasthan, AIR 1962 SC 1406.

[45] Video Electronics v. State of Punjab, AIR 1990 SC 820.

73. However, it is important to notice that Art. 304(a) is still available for entry tax legislation that is not discriminatory in its effect on inter-State transactions. The series of High Court decisions adverted to above struck down the legislation in question because Art. 304(a) was unavailable in those cases – the legislation, by providing that only goods not subjected to local sales tax will be subject to octroi, clearly had an adverse effect on inter-state transactions. Indeed, the Statement of Objects and Reasons did not deny that this was the intention, and the justification offered was that dealers were taking advantage of lower sales tax rates in a neighbouring State by purchasing goods in those States and transporting them into the taxing State. Needless to say, this concern of the State Governments will be of far less significance once the GST is operational, because there will be a common scheme of taxation, and the gradual elimination of arbitrage opportunities arising out of indirect taxation. We, therefore, submit that it is not appropriate to add any non-obstante clause or in any other way weaken the provisions of Part XIII.

74. For similar reasons, we believe that Clause 17(b)(iv) – "taxes on entertainments and amusements" must use the language "provided these are levied and collected by…"

75. ***Recommendations***:

a. **Substitute** "*to the extent levied and collected by…*" with "*provided these are levied and collected by…*" in clause 17(b)(i)

b. **Substitute** "*to the extent levied and collected by…*" with "*provided these are levied and collected by…*" in clause 17(b)(iv)

76. Redrafted portions of clause 17

17. In the Seventh Schedule to the Constitution,—

(a) in List I — Union List,—

…

(i) for entry 52, the following entry shall be substituted, namely:—

"52. Taxes on the entry of goods into a local area for consumption, use or sale therein, **provided these are levied and collected by** a Panchayat or a Municipality.";

…

"62. Taxes on entertainments and amusements, **provided these are levied and collected by** a Panchayat or a Municipality or a Regional Council or a District Council.''.

G. Clause 14 - The GST Definition and Amendments to Art. 366

I. An Outline of the Present Law

77. Clause 14 is the arterial provision of the GST Bill, for it defines "*goods and services tax*" and provides for the deletion of Art. 366(29A). It is useful to consider both parts of this clause together. Clause 14 reads as follows:

> **14**. In article 366 of the Constitution,—
> **(i)** after clause (12), the following clause shall be inserted, namely:—
> '(12A) "goods and services tax'' means any tax on supply of goods or services or both except taxes on the supply of the following goods, namely:—
> (i) petroleum crude;
> (ii) high speed diesel;
> (iii) motor spirit (commonly known as petrol);
> (iv) natural gas;
> (v) aviation turbine fuel; and
> (vi) alcoholic liquor for human consumption';
> (vii) clause (29A) shall be omitted.

78. Art. 366 of the Constitution contains definitions of terms that operate unless the particular context in which a provision appears requires. Although it is a usual principle of constitutional interpretation in India that terms, where appropriate, must be construed broadly, it is important to note that a number of exceptions apply. The most prominent for present purposes is that a word or phrase that has a "settled" meaning or, in other words, is a "*term of art*" is given that meaning. This proposition was established in the famous decision of the Supreme Court in *State of Madras* v. *Gannon Dunkerley*.[46] In this classic judgment, Venkatarama Aiyar J. held that the legislature is presumed to have intended a word that has attained the status of a term of art to bear that meaning. If this principle is applied to the expression "*goods and services tax*" or, more importantly, "*tax*

[46] State of Madras v Gannon Dunkerley, AIR 1958 SC 560.

on supply of goods or services", it will follow that those terms will be limited to the understanding that presently prevails. It should, however, be noted *Gannon Dunkerley* applied this principle to the meaning of "tax on the sale of goods" in Entry 54, List II, and it is not certain that "tax on supply of goods and services" is a term of art in the sense in which "sale" was a term of art. It was beyond doubt that "sale" had a legal meaning because the word had appeared in the Sale of Goods Act, 1948, and was the subject of a body of jurisprudence in English law as well.

II. Reasons to Reformulate Clause 14

79. Nevertheless, it may be useful to consider what construction the courts are likely to place on the expression "*tax on supply of goods or services*". The key word here is "*supply*" and has been used with the intention of amalgamating the variety of indirect taxes that are presently levied on a diverse set of taxable events, such as manufacture, sale, import etc. We believe that the choice of expression is appropriate, but highlight one adverse consequence that may follow. The object of Clause 14 is to amalgamate the indirect taxes presently levied under the heads highlighted above, but it is *not* to expand the category of taxable events. It is, however, possible that the use of the word "supply" has this effect.

80. To illustrate why this is the case, one may contrast "*supply of goods*" with one of the most significant categories of indirect tax it will replace – sales tax. Since the power to levy sales tax was committed to the States under Entry 54, List II, and since it constituted a significant item of revenue, it was expansively interpreted in the initial stages of the Constitution. As one of us has set out in greater detail elsewhere,[47] these attempts[48] included the levy of sales tax on the value of raw materials in a works contract. The Supreme Court eventually decided in *Gannon Dunkerley* that a "*sale*" for the purpose of Entry 54 is confined to those transactions where the *parties intend* to transfer title, and do so. As a result, further attempts of State Governments to levy sales tax on hire purchase

[47] V. Niranjan, *A Software Transfer Agreement and its Implications for Contract, Sale of Goods and Taxation* 8 JOURNAL OF BUSINESS LAW 799, 808-14 (2009).

[48] For example Khasim v State of Mysore, AIR 1955 Mys 41.

transactions,[49] food consumed at a hotel,[50] involuntary sales under a statutory obligation,[51] etc. failed. The Law Commission criticised the result in *Gannon Dunkerley* and its progeny as unduly narrow, in the following terms:

> In our view… the Supreme Court, with respect, appears to have adopted an unduly restricted interpretation of the expression 'sale'. It is true that the expression 'sale' is not defined in the Constitution- but it is a well-recognised canon of construction that words used in the three Legislative Lists should receive the widest possible interpretation, and, it was, we venture to suggest, somewhat inappropriate to have taken recourse to the narrow definition of the word 'sale' contained in the Sale of Goods Act for the purpose of interpreting that expression occurring in the State List, Entry 54…[52]

81. In an attempt to widen the competence of State legislatures, the Forty Sixth amendment to the Constitution inserted Art. 366(29A), which the GST Bill now proposes to delete. The effect of Art. 366(29A) is that the expression "*tax on the sale of goods*" includes specific transactions that the Supreme Court held fell outside the *Gannon Dunkerley* test. In *BSNL v Union of India*, Lakshmanan J., concurring, noted that each clause of Art. 366(29A) sought to overturn a specific judgment of the Supreme Court:

> The Amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase 'tax on sale or purchase of goods' occurs. This definition changed the law declared in the ruling in Gannon Dunkerley & Co. only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not neutralized. Each one of the sub- clauses of Article 366(29A) introduced by the 46th Amendment was a result of ruling of this Court which was sought to be neutralized or modified. Sub clause (a) is the outcome of New India Sugar Mills v. Commnr. of Sales Tax and Vishnu Agencies v. Commissioner of Sales Tax. Sub clause (b) is the result of Gannon Dunkerley & Co. 1959 SCR 379. Sub clause (c) is the result of K.L. Johar and Company v. C.T.O.. Sub clause (d) is consequent to A.V. Meiyyappan v. CIT 20 STC 115 (Madras High Court). Page 1128 Sub clause (e) is the result of Jt. Commercial Tax Officer v. YMIA. Sub clause (f) is the result of Northern India

[49] Johar v. Commercial Tax Officer, MANU/SC/0270/1964.

[50] State of Himachal Pradesh v. Associated Hotels of India Ltd., (1972) 1 SCC 472.

[51] New India Sugar Mills v. Commissioner of Sales Tax, 14 STC 316.

[52] LAW COMMISSION OF INDIA, Sixty First Report.

> Caters (India) Ltd. v. Lt. Governor of Delhi and State of H.P. v. Associated Hotels of India Ltd. 29 STC 474 [emphasis ours]. [53]

82. In a classic and widely cited passage, Ruma Pal J., delivering the leading judgment of the Supreme Court in *BSNL*, correctly noted that Art. 366(29A) therefore did not have the effect of nullifying *Gannon Dunkerley*. It merely provided that the six enumerated transactions could be subjected to sales tax, *although* the *Gannon Dunkerley* test is not satisfied. The significance of this conclusion is that any transaction that falls outside the express terms of Art. 366(29A) cannot be charged to sales tax unless the *Gannon Dunkerley* test is satisfied, and outside the tax context, will not attract the application of the Sale of Goods Act, 1930. Ruma Pal J. held that:

> Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. Courts must move with the times. See Attorney General v. Edison telephone Company 1886 QBD 244. But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act 1930 for the purpose of levy of sales tax [emphasis ours].

83. We believe that it may be argued that the term "supply" in Clause 14 of the GST Bill obliterates this distinction, and (theoretically) allows the Centre and the State to levy GST on any *transfer* of goods, regardless of the nature of the transfer. Without doubt, the term "*supply*" is appropriately used to cover the gamut of taxes that it is intended to subsume for GST purposes, with the result that excise duty, customs duty, entertainment tax etc.

[53] BSNL v Union of India, (2006) 3 SCC 1.

are all covered as all of these taxes constitute a tax on the supply of either goods or services. However, there are transactions which are, technically, neither a sale of goods nor supply of services and there is a risk that the use of the word "supply" in relation to goods may catch these transactions and thus *expand* taxable events, instead of merely consolidating them. An excellent illustration in a different context is Art. 5(1) of the Brussels I Regulation,[54] which divides contracts, for jurisdictional purposes, into contracts for the sale of goods (art. 5(1)(b) first indent), contracts for the provision of services (art. 5(1)(b) second indent) and *other* contracts. As Professor Briggs has noted, while the first two categories are likely to cover a large number of commercial transactions, there are contracts that involve neither the sale of goods nor the supply of services (such as intellectual property licensing, arguably distribution), and it would be unfortunate if such contracts fall within the term "*supply*" of goods in the GST Bill.[55]

84. One way to illustrate this point is to consider the jurisprudence of the Supreme Court and the High Courts on Art. 366(29A)(d) of the Constitution as an analogy. It is a close analogy because it provides that tax on sale of goods includes a tax on the "*transfer of a right to use goods*", and it has been held that "transfer" in this context, may extend beyond a transfer under the Transfer of Property Act, 1882, and cover cases where there is a shift in dominion over goods from one party to another. In other words, it is a close analogue to the word "supply". The extremely wide construction the High Courts have placed on this provision demonstrates that a similar construction of Clause 14 of the GST Bill cannot be ruled out.

85. We now turn to a few concrete examples under Art. 366(29A)(d) to amplify this point. Art. 366(29A)(d) provides that tax on sale of goods includes a tax on the "*transfer of the right to use goods*." Suppose a consultant doctor, after diagnosing a patient, writes out a prescription and charges the usual fee, is it right to say that he has "transferred the right to use" the "prescription", which indubitably constitutes goods? Ruma Pal J. held that it is not, and in our respectful submission, that conclusion is clearly correct. The reason is that

[54] Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[55] A BRIGGS AND P REES, CIVIL JURISDICTION AND JUDGMENTS ¶2.147 (2nd edn., 2008).

it falls outside the scope of Art. 366, and if it does, it may be charged to tax only if the *Gannon Dunkerley* test is satisfied, which it is not, since neither the doctor nor the patient intends to transfer title to the goods.[56] Yet, in *Great Eastern Shipping* v. *State of Karnataka*,[57] the Karnataka High Court reached a conclusion that, with respect, may be contrary to this principle. There the owner of a tug entered into a charter with the Mangalore Port Trust under which the latter acquired the right to use the tug for six months. Although this transaction does in any way resemble a sale, the Karnataka High Court held that it is a "*transfer of right to use*". It is submitted, with respect, that not only is this result contrary to the intention of the drafters of the 46th amendment, who only intended to catch transactions that avoid sales tax, but also illustrates the possibility of a similar result under Clause 14 of the GST Bill. *Ushakiran Movies* v. *State of A.P.*[58] affords another example. There Ushakiran Movies entered into a contract under which a State run television company agreed to broadcast its movies on usual terms. The High Court came to the conclusion that this transaction is subject to sales tax, because the right to use the "movie" had been transferred.

86. While other High Courts have rejected this broad construction of "*transfer of right to use*",[59] the controversy demonstrates that any dominion or control test to identify the taxable event is likely to be over inclusive. Another example is the "purchase" of software such as Windows 7 (off-the-shelf branded software). While the Supreme Court held in *Tata Consultancy Services v State of Andhra Pradesh*[60] that these contracts constitute a sale, the point was not taken in that case that the more appropriate classification is a "licence" and there is a possibility that the decision is *sub silentio* as to

[56] This transaction is, of course, presently subject to service tax and will in that sense be appropriately covered by the GST Bill, but it is illustrative of the difficulty in the concept of supply of *goods*.

[57] Great Eastern Shipping Co. Ltd. v. State of Karnataka, [2004] 1 36 STC 519.

[58] Ushakiran Movies v. State of AP, [2006] 1 48 STC 453.

[59] Saumnya Mining v. Commissioner of Taxes, [2006] 1 46 STC 343; Mohd. Wasim Khan v. Commissioner, Trade Tax, MANU/UP/0659/2006; Commissioner, Trade Tax v. Chabra Tourist Service, MANU/UP/1355/2006.

[60] Tata Consultancy Services v State of AP, AIR 2005 SC 371.

that aspect. In addition, there is significant support for the view that such transactions in fact constitute a licence in some American courts, and in the decision of Lord Penrose in *Adobe* v. *Beta Computers*.[61] If such a transaction is characterised as a licence, it would not have been taxable under *any* State sales tax or VAT legislation, and yet, may at first sight be appear to be captured by the term "*supply*" in Clause 14.

87. We believe that Clause 14 of the GST Bill should not give rise to the belief that it is now constitutionally appropriate to levy taxes on these transactions. We recognise, however, that the use of an existing term, such as "excise" or "sale" in place of "supply" is likely to be under inclusive. In the circumstances, we believe that it may be appropriate to clarify in the **Notes on Clauses** that the object of Clause 14 is not to expand taxable events but merely to consolidate indirect taxes levied on goods and services. It may be thought that there are transactions with the advance of technology that may not constitute "supply" in a narrow sense but which it is nevertheless desirable to tax. A licence is again a prime example. We believe that this concern, while undoubtedly an important one, may be addressed by defining "supply" narrowly in Clause 14, leaving Entry 97, List I as the appropriate gateway. With respect, it is our submission that it would be inappropriate to allow a consolidating measure to bring to tax transactions that are presently not taxed at all, unless they <u>independently</u> constitute a supply of services, especially because the consequence will be that both CGST and SGST can be levied on the transaction. To that extent, transactions involving the use of items that may not be goods as part of a service contract may not pose any difficulty. But there is a substantial number of transactions involving goods, falling short of a service contract (because of an inadequate personal element, or ability to specifically enforce etc.) and yet outside the purview of sales tax because no interest is transferred. The classic case is a licence of goods not involving a service – for example of software in American jurisdictions that reject the sale theory. Another is the instance Ruma Pal J. gave about a doctor prescribing medicines – while it is correct to classify that transaction as a service, it will be difficult in principle to demonstrate that it is *not* a supply of goods unless the limited scope of Clause 14 is made abundantly clear in the Notes on Clauses. Once again, if changing economic or social

[61] Beta Computers Ltd v Adobe Systems Ltd, 1996 SLT 604 CS.

circumstances require taxation of such transactions, Entry 97, List I presents the more appropriate route.

88. *Secondly*, it should be noted that the deletion of Art. 366(29A) has no effect on the meaning of "sale" or "tax on sale of goods" in Indian law, and *Gannon Dunkerley* will now govern *every* transaction that falls within Entry 54, List II. That result is as it is intended, and no change is recommended.

89. *Finally*, the expression in Clause 14 is presently "goods and services tax" means "*<u>any</u> tax on supply of goods or services…*" It is our submission, for two reasons, that it is appropriate to replace the word "any" with a plural form of the word "tax". *First*, although this is highly contextual, the word "any" has on occasion been thought to expand the scope of the provision in which it appears. For example, in *Balaganesan Metals* v. *Shanmugham Chetty*,[62] the Supreme Court made the follow observations on the scope of this word:

> 18. In construing Section 10(3)(c) it is pertinent to note that the words used are "any tenant" and not "a tenant" who can be called upon to vacate the portion in his occupation. The word "any" has the following meaning: "some; one of many; an indefinite number. One indiscriminately or whatever kind or quantity. Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute. It is often synonymous with 'either', 'every' or 'all'. Its generality may be restricted by the context;" (Black's Law Dictionary, 5th Edn.) 19. Unless the legislature had intended that both classes of tenants can be asked to vacate by the Rent Controller for providing the landlord additional accommodation, be it for residential or non-residential purposes, it would not have used the word "any" instead of using the letter "a" to denote a tenant

90. It is, of course, unlikely that a court will take the view that "any tax on supply of goods or services" has expands the scope of the provision, because it is still the case that the tax must be on *supply*. In contrast, the expression used in Art. 304(a) is "tax on goods", without qualification, and Mr. Seervai was of the view that this includes a tax on *every aspect* of goods as to which the State legislature has competence.[63] By way of abundant caution, the Hon'ble Committee may consider replacing "any tax" with "taxes on supply

[62] Balaganesan Metals v Shanmugham Chetty, (1987) 2 SCC 707.

[63] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY III 2606 (4th edn., 1996).

of goods or services…" This may also guard against the danger the previous paragraph highlighted, of construing Clause 14 as a warrant to expand taxable entities that do not exhibit the requisite categories. *Secondly*, Schedule VII presently uses this formulation consistently – for example, terminal tax is defined as "terminal taxes on goods or passengers…", consignment tax as "taxes on consignment of goods". In the absence of a compelling reason to do otherwise, we believe it promotes coherence to follow this pattern of drafting.

III. *Recommendations*

a. An addition to the **Notes on Clauses** clarifying that the object of Clause 14(i) is not to expand the range of taxable entities but merely to consolidate indirect taxes. Transactions that are neither a supply of goods nor a supply of services should fall outside Clause 14, "supply of goods" narrowly defined, and if necessary may be dealt with under Entry 97, List I.

b. Replace the words "any tax" with "taxes".

91. Redrafted portions of clause 14:

a. '(12A) "goods and services tax'' means **taxes** on supply of goods or services or both except taxes on the supply of the following goods, namely:—

…

Summary of Recommendations

- **Clause 2**

For the reasons stated above in paragraphs 16-40, the Hon'ble Committee may consider:

OPTION 1

Omitting the non-obstante clause in Clause 2 altogether.

OPTION 2

Introducing a new conflict-resolution mechanism for conflicting Parliamentary and State laws.

OPTION 3

Removing the reference to Art. 254 in Clause 2.

and

Adding the words "to be" before the phrase "imposed by" in Clause 2.

The Hon'ble Committee may also consider omitting the phrase "unless the context otherwise requires" from Clause 2.

In sum, the Hon'ble Committee may consider amending the proposed Art. 246A to read as follows-

"246A. Notwithstanding anything contained in article 246, Parliament and the Legislature of every State, have power to make laws with respect to goods and services tax to be imposed by the Union or by that State respectively:
Provided that 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.— For the purpose of this article, "State'' includes a Union territory with Legislature."

- **Suggested changes to Art. 254**

The Hon'ble committee may consider:

OPTION 1

Removing the comma in Article 254(1) after the phrase "Parliament is competent to enact" and further, adding an additional proviso to Article 254(2) to the effect that-

"Nothing in this clause shall be taken to affect the application of Article 254(1) to inconsistencies between laws passed by Parliament and the State legislatures, when those laws are with respect to

different matters enumerated in the Concurrent List, or with respect to matters enumerated in the Union List and State List respectively."

OPTION 2

Adding explanatory words to Art. 254 so that it reads:

"If any provision of a law made by the Legislature of a State **which the State Legislature is competent to enact under Article 246 or Article 246A** is repugnant to any provision of a law made by Parliament which Parliament is competent to enact **under Article 246 or Article 246A**, 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."

- **Clause 3**

On the basis of the recommendations above in paragraphs 55-56, the Hon'ble Committee may consider introducing the phrase "*other than goods and services tax*" after "*imposing a tax*" in Article 248(2).

- **Clause 9**

On the basis of the recommendations in Paragraphs 58-59, the Hon'ble Committee may consider introducing a (,) <comma> separating "supply of goods or of services or both" i.e. "*supply of goods, or of services, or both*". In addition, the committee may consider clarifying use of the word "*both*" in Explanation I.

- **Clause 17**

For the reasons outlined in Paragraphs 61-70, the Hon'ble Committee may consider substituting the expression "*to the extent levied and collected by*" with the "*provided that such taxes are levied and collected by a Panchayat or Municipality*" in both Clause 17(b)(i) and 17(b)(iv).

Redrafted Clause 17

17. In the Seventh Schedule to the Constitution,—

(a) in List I — Union List,—

…
(i) for entry 52, the following entry shall be substituted, namely:—
"52. Taxes on the entry of goods into a local area for consumption, use or sale therein, **provided these are levied and collected by a Panchayat or a Municipality**.";
…
"62. Taxes on entertainments and amusements, **provided these are levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.**''.

- **Clause 14**

  For the reasons set out in ¶¶ 77-90, the Hon'ble Committee may consider an addition to the **Notes on Clauses** clarifying that the object of Clause 14(i) is not to expand the range of taxable entities but merely to consolidate indirect taxes. Transactions that are neither a supply of goods nor a supply of services should fall outside Clause 14, under a narrow construction of "*supply of goods*", and changes if necessary may be dealt with under Entry 97, List I. The Hon'ble committee may also consider replacing the phrase "*any tax*" with the word "*taxes*".

Redrafted Clause 14

'(12A) "goods and services tax'' means **taxes** on supply of goods or services or both except taxes on the supply of the following goods, namely:—

About us and Contact Details

The Pre-Legislative Briefing Service (PLBS); prelegislativebriefingservice@gmail.com

Aims and Objectives*:*

- To provide rigorous, independent and non-partisan legal and policy analysis of Bills introduced in Parliament
- To suggest appropriate legal reform to enable bills to pass tests of constitutionality if challenged
- To suggest appropriate policy reform if the legislative policy is to be sound in principle and efficacious in practice

Project Members:

1. **V. Niranjan**, Advocate; B.A.LL.B. (Hons.), National Law School of India University, Bangalore (2010), Rhodes Scholar (2010)
   Current Status: Advocate, Madras High Court and BCL Candidate in Law, Magdalen College, University of Oxford

   Contact: niranjan.venkatesan@law.ox.ac.uk; Phone: +91 97909 25765/+44 77590 95342

2. **Shantanu Naravane,** B.A.LL.B (Hons.), National Law School of India University, Bangalore
   Current Status: BCL Candidate in Law, Corpus Christi College, University of Oxford

   Contact: shantanu.naravane@law.ox.ac.uk; Phone: +91 97663 31013

3. **Krishnaprasad KV,** B.A. LL.B. (Hons.), National Law School of India University Bangalore (2012)
   Current Status: Fourth Year, NLSIU

   Contact: krishnaprasadkv1989@gmail.com; Phone: +91 99165 89670

4. **Tanmaya Mehta,** B.A. LL.B (Hons.), National Law School of India University Bangalore (2008), BCL (Candidate), University of Oxford (2011-'12)
   Current Status: Advocate, Supreme Court of India

   Contact: tanmayamehta@gmail.com; Phone: +91 99992 55931

Disclaimer: *We have no financial or personal interest in this matter. All views contained herein reflect those held by the authors and not by the institutions they are associated with.*