

Effect of retention of Article 366(29A) in the Constitution after GST

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Indirect Taxes Committee

Background of Article 366(29A):

The Constitution (Forty-sixth Amendment) Act, 1982 inserted¹ clause (29A) in Article 366 of the Constitution. The clause read as under:

(29A) "tax on the sale or purchase of goods" includes-

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;*
- (c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;*
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;*
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;*

The amendment introduced fiction by which six types of transactions were brought to tax as sale of goods. Each one of the sub-clauses of article 366(29A)

¹ W.e.f.02.02.1983

introduced by the 46th Amendment was a result of ruling of the Courts which was sought to be neutralized or modified. Sub-clause (a) is the outcome of *New India Sugar Mills Ltd. v. Commissioner of Sales Tax*¹. Sub-clause (b) is the result of *State of Madras v Gannon Dunkerly and Co.*². Sub-clause (c) is the result of *K. L. Johar and Co. v. Deputy CTO*³. Sub-clause (d) is consequent to *A. V. Meiyappan v. CCT*⁴. Sub-clause (e) is the result of *Joint Commercial Tax Officer v. Young Men's Indian Association*⁵. Sub-clause (f) is the result of *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*⁶

Preparation for GST:

The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011, proposed to delete clause (29A) in Article 366. However, the bill which was introduced later and which led to enactment of the Constitution (One Hundred and First Amendment) Act, 2016 did not delete that clause.

The issues came up for discussion before the Select Committee of Rajya Sabha to whom the aforesaid Bill, as passed by Lok Sabha on 6th May, 2015, was referred. Before the committee, some experts opined that in view of Article 246A empowering both Centre and States to levy tax on supply of goods and services, clause (29A) of Article 366 may be considered for deletion as this would become redundant. However, the Committee decided to retain the said Article 366(29A). No discussion/rationale for this is recorded in the report of the committee.⁷

Fallout of retention of the clause (29A):

Schedule II of the CGST Act, 2017 classifies certain supplies as 'goods' or 'services'. Out of the matters listed in clause (29A) of Article 366, which deems certain transactions as sale of goods, GST law treats (i) works contract (ii) transfer of right to use goods and (iii) supply of goods, being food etc. as part of any service, as service. Paragraph 5(f) dealing with transfer of right to use goods and paragraph 6 (b) dealing with supply of goods, being food etc. as part of any service, the words used in the clause are almost identical to the words contained in clause (29A) which is apparent from use of words "for cash, deferred payment or other valuable consideration". Further, so far paragraph

¹ [1963] 14 STC 316 (SC); [1963] Supp 2 SCR 459 and *Vishnu Agencies (P.) Ltd. v. Commercial Tax Officer* AIR 1978 SC 449; [1978] 42 STC 31 (SC). Covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale.

² [1959] SCR 379; [1958] 9 STC 353 (SC) – Works contracts

³ [1965] 2 SCR 112; [1965] 16 STC 213 (SC) - hire-purchase where the title to the goods is not transferred, yet by fiction of law, it is treated as a sale

⁴ [1967] 20 STC 115 (Mad) - The title to the goods remains with the transferor who only transfers the right to use the goods to the purchaser.

⁵ [1970] 1 SCC 462; [1970] 26 STC 241 (SC) – Supplies by clubs to its members

⁶ [1978] 4 SCC 36; [1978] 42 STC 386 (SC) and *State of H. P. v. Associated Hotels of India Ltd.* [1972] 29 STC 474 (SC); [1972] 1 SCC 472 – Supply of food and beverages in hotels and restaurants

⁷ Presented to the Rajya Sabha on 22nd July, 2015

6 (b) is concerned, copying of words “in any other manner whatsoever” from sub-clause (f) in clause (29A) has the effect of even sale of packaged eatables and beverages over the counter labelled as supply of service.

Treatment of these transactions as ‘service’ under GST law, is in direct conflict with clause (29A) in Article 366.

Due to absence of definition of ‘supply’ in the Constitution, the task of defining the term has been left on legislature.. This leads to a situation where sub-sect is brought in before the sect itself. If we do not treat clause (29A) as sub-sect of clause (26A) then the two clauses are independent and the GST legislation is in conflict with Constitution.

Is clause (29A) is repealed by implication:

Though under the GST law, levy of tax is on ‘supply’, the law recognises concept of ‘sale’. It is settled law that a service cannot be subject matter of sale. However right to receive service can be bought and sold.¹

‘Supply’ in section 7 of the CGST Act includes supply in the form of ‘sale’. In other words it can be said that ‘tax on supply’ includes ‘tax on sale’. ‘Tax on sale’ has been given an inclusive meaning under Article 366(29A) of the Constitution. If that is so, for taxing transactions listed in clause (29A) requirement of bifurcating between ‘goods’ and ‘services’ and then applying applicable rate of tax will continue. Such an interpretation will lead to anarchy in taxation.

Some experts are of the view that Article 366(29A) of the Constitution being a definition clause only, its role is limited to define the phrase used elsewhere in the Constitution. Entry 54 in State list empowers States to levy “taxes on the sale or purchase of goods.....” When that entry has been modified restricting its applicability to sale of specified goods, clause (29A) became redundant.

To make the scheme of GST workable despite clause (29A) in article 366 being there in the Constitution, it should be assumed that the said Article gets repealed by implication. Repeal by implication has been dealt with by at least two judgments of the Supreme Court.² In *State of Orissa and another v M.A. Tulloch and Co.*, [1964] 4 SCR 461, the Court considered the question as to whether the expression “repeal” in Section 6 of the General Clauses Act would be of sufficient amplitude to cover cases of implied repeal. The Court stated:

“The next question is whether the application of that principle could or ought to be limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. The entire theory underlying implied repeals is that there is no

¹ Division Bench of the Karnataka High Court in *Bharti Airtel Limited v Dy Commissioner of Income Tax* [2015] 372 ITR 33 (Karn); 2014-TIOL-2113-HC-Kar-IT; TS-722-HC-2014(Kar) Judgment dated August 14, 2014

² As quoted in *Fibre Boards (P) Limited, Bangalore v Commissioner of Income Tax, Bangalore* [2015] 376 ITR 596 (SC); 2015-TIOL-178-SC-IT two members bench judgment dated August 11, 2015.

need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word 'repeal' in the later statute." (at page 483).

Similarly in *Ratan Lal Adukia v Union of India*, [1989] 3 SCC 537, the Supreme Court held that the substituted Section 80 of the Code of Civil Procedure repealed by implication, insofar as the railways are concerned, Section 20 of the self-same code. In so holding, the Court stated:-

"The doctrine of implied repeal is based on the postulate that the legislature which is presumed to know the existing state of the law did not intend to create any confusion by retaining conflicting provisions. Courts, in applying this doctrine, are supposed merely to give effect to the legislative intent by examining the object and scope of the two enactments. But in a conceivable case, the very existence of two provisions may by itself, and without more, lead to an inference of mutual irreconcilability if the later set of provisions is by itself a complete code with respect to the same matter. In such a case the actual detailed comparison of the two sets of provisions may not be necessary. It is a matter of legislative intent that the two sets of provisions were not expected to be applied simultaneously. Section 80 is a special provision. It deals with certain class of suits distinguishable on the basis of their particular subject matters." (at para 18).

For repelling the apprehension that principals applied in interpretation of law cannot be applied with the same brush while interpreting the Constitution, a reference may be made to *Keshsvananda Bharati v State of Kerala*¹ and *I.R. Coelho v State of Tamil Nadu*² wherein the Supreme Court held that indeed the Constitution is law, in its ordinary sense too; however, it is also a law made by the people as a nation, through its Constituent assembly, in a foundational and a constitutive moment. Written constitutions seek to delineate the spheres of actions of, with more or less strictness, and the extent of powers exercisable therein by, various organs of the State. Such institutional arrangements, though political at the time they were made, are also legal once made. They are legal, inter alia, in the sense that they are susceptible to judicial review with regard to determination of vires of any of the actions of the organs of the State constituted. The actions of such organs are also justiciable, in appropriate cases, where the values or the scheme of the Constitution may have been transgressed.The essential features.....that give the Constitution its identity, cannot be

¹ [1973] 4 SCC 225

² [2007] 2 SCC 1

changed by the amending powers of the very organs that are constituted by it. Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constitution Assembly.¹ Earlier in *Good Year India Limited v State of Haryana & Anr.* AIR 1990 SC 781² Para 17 the Supreme Court held that Principles of interpretation of a statute are not foreign and altogether irrelevant for the purposes of interpreting a constitutional provision and/or a specific Legislative Entry.

It is interesting to note that officers in Department appears to be of the view that clause (29A) is active and can be used for interpreting provisions of GST law. In circular number 35/9/2018-GST dated 5th March, 2018, wherein the Department has reiterated its understanding in erstwhile service tax law about taxability of transactions between members of a joint venture applicable for taxation under GST also, they have claimed to have drawn strength from the provisions in sub-clause (e) of clause (29A) of article 366³. The reliance is strange as sub-clause (e) is all about supply of goods, whereas circular attempts to clarify levy of tax in the name of services. It will not be out of place here to note that the effect of sub-clause (e) is still unsettled and the matter is pending before a larger bench of the Supreme Court.⁴

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¹ As quoted in *GVK Industries Limited v Income tax officer* [2017] 48 STR 177 (SC) – Five members Bench judgment dated March 01, 2011 – para 25 & 26

² [1990] 188 ITR 402; [1990] 76 STC 71.

³ Sub-clause (e) talks about supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration. Para 7 in schedule II of the CGST Act, 2017 declares that “supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration” shall be treated as supply.

⁴ *State of West Bengal and others v Calcutta Club Limited* [2016] 96 VST 20 (SC)