

GST: Constitutional Perspective

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Position pre-1950

- ▶ Entry 48 of List II of Seventh Schedule of the Government of India Act, 1935–
 - ▶ Taxes on the sale of goods.
- ▶ Sales tax was a state subject. A state could make law for that state.
- ▶ No entry in the List I (Union List) for tax on sale of goods.
- ▶ Further, no restriction on states' power to levy tax on sale of goods.
- ▶ State sales tax law will say it will levy tax on sale within the state.
- ▶ Each state sales tax law had its own definition of sale within the state.
- ▶ A transaction of sale having some nexus with the state was defined as sale within the state.

Position pre-1950

▶ The King v. Dominion Engineering Co. Ltd. (AIR 1947 PC 94)

“5. In imposing a sales tax one of the difficulties which confront the Legislature lies in the selection of the point of time at which the tax shall attach and become due. In the case of an ordinary retail sale for cash across the counter of a shop, the stages of agreement, appropriation of the goods to the contract, delivery, payment of the price and passing of the property are all practically simultaneous. But in more complicated transactions for the sale of goods to be produced or manufactured these stages may be spaced in time in various ways.”

- ▶ In across the counter sale, there is no complexity as all the elements of a sale are within the state.
- ▶ However, complexity arises where different elements of sale are situated in different states.

Position pre-1950

- ▶ Consider a sales transaction where –
 - ▶ Seller is in Maharashtra
 - ▶ Buyer is in Uttar Pradesh
 - ▶ Agreement is entered in Madhya Pradesh
 - ▶ Goods are within Gujarat
 - ▶ Payment is made in Madras.

Suppose sale tax law of each state defined a sale as within the state if, (a) seller is in the state or (b) buyer is in the state or (c) Agreement is made in the state or (d) Goods are within the state or (e) payment is made within state.

One single sale can be taxed by each of the above five states.

Position pre-1950

- ▶ Further, in case where –
 - ▶ Goods are sold/imported from London to Maharashtra – Purchase Tax could levied by Maharashtra state on import of goods on the purchaser under the Bombay Sales Tax Act.
 - ▶ Goods are sold/exported from Maharashtra to London – Sales Tax could levied by Maharashtra state on export of goods on the seller under the Bombay Sales Tax Act.

Constitutional Provisions (as introduced)

- ▶ Entry 54 of List II–
 - ▶ Taxes on sale or purchase of goods.
- ▶ No entry in List I (Union List) for levying tax on sale of goods.

Constitutional Provisions (as introduced)

- ▶ Article 286 – Restriction as to imposition of tax on the sale or purchase of goods
 - 1) No law of a State shall impose, ~~or authorise the imposition of~~, a tax on the sale or purchase of goods where such sale or purchase takes place
 - a) outside the State; or
 - b) in the course of the import of the goods into, or export of the goods out of, the territory of India

Constitutional Provisions (as introduced)

- ▶ *Explanation to clause (1) of Article 286–*
 - ▶ ~~For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the state in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that state, notwithstanding the fact that under general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another state.~~

Constitutional Provisions (as introduced)

▶ Article 286 (2) -

- ▶ ~~Except in so far as parliament may by law otherwise provide~~, no law of a state shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce.

Interpretation of Article 286

- ▶ *State of Bombay v. United Motors (India) Ltd: (1953) 4 S.T.C. 133 (S.C.)*
 - ▶ Sub-clause (a) and the explanation in clause (1) of article 286 prohibited the taxation of a sale involving inter-State elements by all States.
 - ▶ However, the State in which the goods were delivered for the purpose of consumption therein, can tax that sale even though it is inter-State sale.
 - ▶ For example, seller of Bombay sells goods to a buyer of Bihar for consumption in Bihar. This is an inter state sale. In this case, seller of Bombay will be subjected to Sales Tax levied by Bihar State under Bihar Sales Tax Act.
 - ▶ **This is because Supreme Court said that by virtue of fiction of explanation to Article 286(1), such sale will be treated as a local sale in Bihar, though otherwise it is an inter-state sale.**

Interpretation of Article 286

- ▶ *Bengal Immunity Company Ltd. v. State of Bihar: (1955) 6 S.T.C. 446 (S.C.) overruled United Motors on this point.*
 - ▶ The State of Bihar cannot impose Sales Tax on out of State dealers. This is because sales has taken place in the course of inter- State trade or commerce. This is so even though the goods have been delivered as a direct result of such sales for consumption in Bihar.
 - ▶ A transaction may be inside the state as per Sub-clause (a) and the explanation in clause (1) of article 286 still, it can in the course of inter-state trade or commerce as per clause (2) of article 286. Such a sale cannot be taxed by consumption state.
 - ▶ Thus, a single transaction may be covered by more than one provision of Article 286(1)(a) or 286(1)(b) or 286(2).
 - ▶ **Each prohibition is an independent prohibition. Unless, all of them are overcome, state cannot tax a sale.**

Consequences

- ▶ Sale involving inter-state elements – No state legislature was able to levy sales tax
- ▶ Consider a sale transaction -
 - ▶ Suppose A in Maharashtra wants to sell the goods to C in Maharashtra,
 - ▶ A in Maharashtra will first sell the goods to B in Delhi,
 - ▶ B in Delhi will in turn show sale to C in Maharashtra,
 - ▶ Thus, parties were able to evade local sales tax by artificially converting even an intra-state sale into two inter-state sale and not paying any sales tax at all.

6th Constitutional Amendment Act, 1956

- ▶ Substituted Entry 54 of List II –
 - ▶ Taxes on the sale or purchase of goods ~~other than newspapers~~, subject to the provisions of entry 92A of List I
- ▶ Inserted Entry 92A in List I –
 - ▶ Taxes on the sale or purchase of goods ~~other than newspapers~~, where such sale or purchase takes place in the course of inter-State trade or commerce.
- ▶ Inserted clause (3) in the article 269 –
 - ▶ Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-state trade or commerce.

6th Constitutional Amendment Act, 1956

- ▶ Article 286 as amended by 6th Constitutional Amendment Act, 1956
- Restrictions as to imposition of tax on the sale or purchase of goods
- 1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods, where such sale or purchase takes place -
 - a) outside the State; or
 - b) in the course of the import of the goods into, or export of the goods out of, the territory of India

.....
 - 2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

Central Sales Tax Act, 1956

- ▶ Section 3 -

When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce

- ▶ Section 4 -

When is a sale or purchase of goods said to take place outside a State

- ▶ Section 5 -

When is a sale or purchase of goods said to take place in the course of import or export

Central Sale Tax Act, 1956

- ▶ Section 6 - Liability to tax on inter-State sales (Charging Section)
 - ▶ Every dealer shall be liable to pay tax under this act on all sale of goods effected by him in the course of inter-state trade or commerce.
- ▶ Section 9 – Levy and collection of tax and penalties
 - ▶ The tax payable by any dealer under this act on inter-state sale is assessed, collected and retained by the despatching state.
 - ▶ “Origin based tax”

Central Sale Tax Act, 1956

- ▶ Thus, Central Sales Tax, 1956 is an act to –
 - ▶ Define inter-state sales,
 - ▶ Define inside/outside the state sale,
 - ▶ Define sale in the course of import/export,
 - ▶ Levy tax on inter-state sale, and
 - ▶ Provide which state to collect and retain tax on inter-state sale.

Some Points Worth Noting

- ▶ Article 269(3): Parliament will define inter-state sale (Section 3 of CST Act, 1956)
 - ▶ No State legislature can tax inter-state sale because Entry 54 of List II is subject to Entry 92A of List I
 - ▶ Parliament alone can tax inter-state sale (Entry 92A of List I) (Section 6 of CST Act, 1956)
- ▶ Article 286(2): Parliament will define inside the state sale and outside the state sale (Section 4 of CST Act, 1956)
 - ▶ Parliament will not levy tax on outside the state sale
 - ▶ State Legislature can levy tax on inside the state sale (Entry 54 of list II)

Some Points Worth Noting

- ▶ Article 286(2): Parliament will define sale in the course of import or export (Section 5 of CST Act, 1956)
 - ▶ State Legislature cannot tax sale in the course of import or export because of restrictions under Article 286(1)(b)
 - ▶ Parliament also cannot levy sales tax on sale in the course of import or export as Parliament can levy tax only on inter-state sale under Entry 92A of List I (If we do not consider Entry 97 of List I)

Overlap

- ▶ Goods sold from Maharashtra to London (F.O.B. Bombay) –
 - ▶ Property passes in Maharashtra – Therefore, sale inside Maharashtra.
 - ▶ Movement of goods out of the territory of India – Simultaneously, sale in the course of export.
 - ▶ Therefore, Maharashtra cannot levy tax because of restrictions under Article 286(1)(b)

Overlap

- ▶ Goods sold from London to Maharashtra (C.I.F. Bombay) –
 - ▶ Property passes in Maharashtra – Therefore, sale inside Maharashtra.
 - ▶ Movement of goods into the territory of India – Simultaneously, sale in the course of import.
 - ▶ Therefore, Maharashtra cannot levy tax because of restrictions under Article 286(1)(b)

Overlap

- ▶ Sale of an identified car by a seller in Maharashtra to a buyer in Gujarat
 - ▶ Ascertained goods – Property passes in Maharashtra. Therefore, sale within Maharashtra.
 - ▶ Require movement of goods to Gujarat – Simultaneously, inter-state sale.
 - ▶ Section 4 of CST Act is subject to section 3 of CST Act. Therefore, Maharashtra cannot levy local sales tax. CST will be assessed, collected and retained by Maharashtra.

Therefore, the cliché that the place of passing of property is not relevant in context of section 3 and 5 of CST Act, 1956.

Constitution (101st Amendment) Act, 2016

Constitution (101st Amendment) Act, 2016

- ▶ 286. Restrictions as to imposition of tax on the sale or purchase of goods
 - 1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place -
 - a) outside the State; or
 - b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India
 - 2) Parliament may by law formulate principles for determining when a supply of goods or services or both takes place in any of the ways mentioned in clause (1).

Constitution (101st Amendment) Act, 2016

- ▶ 246A. Special provision with respect to goods and services tax.
 - 1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
 - 2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Constitution (101st Amendment) Act, 2016

▶ 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

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

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

Position in Pre-GST Regime

- ▶ **Position in pre-GST regime**
 - ▶ Parliament could, and States Legislature could not, levy tax on inter-state sale. However, CST is assessed, collected and retained by the despatching state by virtue of section 9 of CST Act.
 - ▶ Neither Parliament nor State Legislature could levy tax on sale in the course of import or export.
- ▶ Power to levy Central Sales Tax is under Article 246(1) read with Entry 92A of List I of Seventh Schedule of the Constitution.
- ▶ Article 269 is not the source of power to levy Central Sales Tax. It only provides for assignment of revenue to the states.

Position in GST Regime

- ▶ Issue in post-GST regime – Whether Parliament can levy tax on supply in the course of import?
 - ▶ Article 286 does not bar Parliament from levying tax on supply in the course of import.
 - ▶ Power to levy tax on sale in the course of import – Whether under Article 246A(1), 246A(2) or Explanation to 269A(1)?

Position in GST Regime

- ▶ Transition from VAT to GST -
 - ▶ Earlier, there was no provision to tax sale in the course of import.
 - ▶ Substantive provision is required in the Constitution itself to tax supply in the course of import under GST regime.
- ▶ Lack of precision in drafting the Constitution (One Hundred and First Amendment) Act, 2016 on this aspect.

Position in GST Regime

- ▶ Statement of Objects and Reasons of Integrated Goods and Services Tax Act, 2017 -
 - ▶ “Presently, **article 269** of the Constitution empower the Parliament to make law on the taxes to be levied on the sale or purchase taking place in the course of inter-state trade or commerce. Accordingly, Parliament has enacted the Central Sales Tax Act, 1956 for levy of central sales tax on the sale taking place in the course of inter-state trade or commerce. The central sales tax is collected and retained by the exporting states.”
- ▶ The above extract shows the error in conceptual understanding. This is the cause of imprecision in drafting the Constitution (101st Amendment Act), 2016.

Position in GST Regime

- ▶ Article 269A forms part of -
 - ▶ Section '*Distribution of Revenues between the Union and the States*' of Part XII – Finance, Property, Contracts and Suits.
- ▶ Article 269A provides for apportionment of GST collected on inter-state supplies between the Union and the States.
- ▶ Article 269A is, therefore, not the source of power to levy GST on import of goods or services.

Position in GST Regime

▶ Government's View–

- ▶ Power to levy tax on intra-state supply – Article 246A(1).
- ▶ Power to levy tax on inter-state supply – Article 246A(2).
- ▶ Power to levy tax on supply in the course of import – Article 269A(1).

This gives an impression that there is no article which permits tax on supply in the course of export.

Position in GST Regime

- ▶ Our View –
 - ▶ Power to levy tax on supply in all cases is under Article 246A(1).
 - ▶ Article 246A(2) does not give power to Parliament to levy tax on inter-state supply. Rather it bars state from levying tax on inter-state supply.
 - ▶ Article 269A(1) provides for apportionment of GST collected on inter-state supplies between the Union and the States. It is not source of power for levy of IGST on inter-state supply.
- ▶ Total lack of precision and elegance expected of such important articles in the Constitution.

Integrated Goods and Services Tax Act, 2017

Inter-state Trade or Commerce

- ▶ 269A. Levy and collection of goods and services tax in course of inter-state trade or commerce
 - ▶ (5) Parliament may, by law, formulate the principles for determining the **place of supply**, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.”
- ▶ Place of supply will be decided by Parliament.
- ▶ This is a new provision, not found in the Constitution for levy of sales tax.

Integrated Goods and Services Tax Act, 2017

▶ 5. Levy and collection -

- 1) ~~Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:~~

- Referable to Article 246A(1) and /or 246A(2) and/or 296A(1).

Inter-state Supply

▶ 7. Inter-state supply

- ▶ (1) **Subject to the provisions of section 10**, supply of goods, where the location of the supplier and the place of supply are in–
 - (a) two different States;
 - (b) two different Union territories; or
 - (c) a State and a Union territory,shall be treated as a supply of goods in the course of inter-State trade or commerce.

- ▶ (3) **Subject to the provisions of section 12**, supply of services, where the location of the supplier and the place of supply are in–
 - (a) two different States;
 - (b) two different Union territories; or
 - (c) a State and a Union territory,shall be treated as a supply of services in the course of inter-State trade or commerce.

- Referable to Article 269A(5).

Intra-state Supply

- ▶ 8. Intra-state supply –
 - ▶ (1) **Subject to the provisions of section 10**, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:
 - ▶ (2) **Subject to the provisions of section 12**, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply:

- Referable to Article 286(2) read with 286(1)(a).

Import of Goods and Services

- ▶ Is an inter-state supply [Section 7 of IGST Act]
 - ▶ (2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.
 - ▶ (4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.
- ▶ Not an intra-state supply [Proviso to Section 8(1) of the IGST Act]

Provided that the following supply of goods shall not be treated as intra-State supply, namely:–

 - (ii) goods imported into the territory of India till they cross the customs frontiers of India; or

- Referable to Article 286(2) read with 286(1)(b).

Export of Goods and Services

- ▶ 7. (5) Supply of goods or services or both,-
 - ▶ (a) when the supplier is located in India and the **place of supply is outside India;**
...
shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.
- ▶ 11. Place of supply of goods,-
 - ▶ (b) exported from India shall be **the location outside India.**
- ▶ Section 7(5)(a) enables taxation of supply in the course of export.

Supply in the Taxable Territory

- ▶ 7. (5) Supply of goods or services or both,–
...
 - ▶ (c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,
shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.
- ▶ No definition of “Supply ... in the taxable territory” under the Act.
- ▶ This phrase is not to be confused with place of supply in taxable territory.

Supply in the Taxable Territory

- ▶ Section 7(5)(c) is required for –
 - ▶ Clandestine removal – Once supply is proved, no need to further prove whether it is an intra-state or an inter-state supply.
 - ▶ Goods imported on lease and later outrightly purchased by the importer.
 - ▶ Goods imported and sold in exhibition in India.

Supplies in Territorial Waters

Supplies in Territorial Waters

- ▶ Section 9 of IGST - Notwithstanding anything contained in this Act –
 - (a) where the location of the supplier is in the territorial waters, the location of such supplier; or*
 - (b) where the place of supply is in the territorial waters, the place of supply,*

shall, for the purposes of this Act, be deemed to be in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

- ▶ Explanation to Section 25 of the CGST Act—

Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

- States can levy SGST on supplies made in the territorial waters.
- Centre can levy CGST on supplies made in the territorial waters.

Supplies in Territorial Waters

▶ Section 2(114)

- ▶ “Union territory” means the territory of—
 - ▶ (a) the Andaman and Nicobar Islands;
 - ▶ (b) Lakshadweep;
 - ▶ (c) Dadra and Nagar Haveli;
 - ▶ (d) Daman and Diu;
 - ▶ (e) Chandigarh; and
 - ▶ (f) **other territory**.

▶ Section 2(81)

- ▶ “other territory” includes territories other than those comprising in a State and those referred to in sub-clauses (a) to (e) of clause (114)

Supplies in Territorial Waters

- ▶ In our view, under the Constitution, territorial waters forms part of Union territory. The issue is pending before the Hon'ble Supreme Court.
- ▶ Section 9 is enacted only to remove/overcome this doubt.
 - ▶ Article 286(2) is not relevant as the transaction is not in the course of import/export.
- ▶ Section 9 applies only to territorial waters and not Exclusive Economic Zone (EEZ). Therefore, EEZ will be part of other territory only. Supplies made within EEZ will be leviable to CGST + UTGST.



Distribution of Revenue

Distribution of Revenue (Pre-2000)

- ▶ Article 268 – Duties levied by Union but collected and appropriated by the States
 - ▶ Will go directly to the States.
 - ▶ Stamp Duty
 - ▶ Excise Duty on medicinal and toilet preparations containing alcohol
 - ▶ Easy to identify the sole state entitled to collect and retain the revenue.

Distribution of Revenue (Pre-2000)

- ▶ Article 269 – Taxes levied and collected by the Union but assigned to the States
 - ▶ Collected all over the country by the Union
 - ▶ Distributed in accordance with the law made by the Parliament
 - ▶ Entire revenue would go to the States
 - ▶ For example
 - ▶ Succession Duty
 - ▶ Estate Duty
 - ▶ Central Sales Tax (added in 1956)

Distribution of Revenue (Pre-2000)

- ▶ Article 270 – Taxes levied and collected by the Union and distributed between the Union and the States
 - ▶ Based on recommendations of the Finance Commission
 - ▶ President passes, say, Distribution of revenue order, 2015
 - ▶ Personal Income Tax
- ▶ Article 272 – Union duties of Excise – Share of this tax will be paid to the states as per the law made by the Parliament
 - ▶ In practice, distribution though as per the law made by Parliament is based on recommendations of the Finance Commission
 - ▶ For example - The Union Duties of Excise (Distribution) Act, 1979

Collected by Union and retained by Union (Pre-2000)

- ▶ Illustrative List -
 - ▶ Customs Duty
 - ▶ Corporate Income Tax
 - ▶ Gift Tax
 - ▶ Wealth Tax
 - ▶ Service Tax (since 1994)
 - ▶ Interest Tax
 - ▶ Hotel Receipts Tax
 - ▶ Expenditure Tax

Distribution of Revenue (Pre-2000)

- ▶ Article 271 – Surcharge on duties or taxes referred to in Article 269 and 270
 - ▶ Surcharge will be exclusively for the purpose of Union

Constitution (Eightieth Amendment) Act, 2000

[Practically effective from 01.04.1996]

- ▶ Article 268 and 269 – Practically no change.
- ▶ Article 272 – Union Duties of Excise (Repealed)
- ▶ Article 270 – All central taxes formed one central pool and distributed between the Union and the States as per the recommendation of the Finance Commission

Illustrative List -

- ▶ Income Tax including corporate income tax
- ▶ Wealth Tax
- ▶ Customs Duty
- ▶ Excise Duty
- ▶ Service Tax

14th Finance Commission recommended that the States' share in the Net Proceeds of Union Tax revenue will be 42%. (Operational Period – 2015-2020)

Constitution (Eightieth Amendment) Act, 2000

- ▶ Article 271 – Surcharges on duties and taxes referred to in Article 269 and 270
 - ▶ Surcharge is solely for the purpose of Union.
 - ▶ Need not be distributed to the states.
- ▶ Cess – Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. State of Gujarat – AIR 1967 SC 1916
 - ▶ Levied in addition to the tax for special purpose.
 - ▶ Education cess on Excise Duty, Customs Duty, Service Tax, Income Tax.
 - ▶ All retained by Center and not shared with States.

Constitution (One Hundred and First Amendment) Act, 2016

- ▶ Article 271 – Surcharge on certain duties and taxes for the purpose of Union
 - ▶ Except on Goods and Services Tax under Article 246A.
 - ▶ Thus, surcharge on GST for the purpose of Union is not possible.

- ▶ Cess on GST –
 - ▶ Sugar Cess
 - ▶ Kerala Flood Relief Cess

Constitution (One Hundred and First Amendment) Act, 2016

- ▶ 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

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

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

Distribution of GST

- ▶ SGST – States will collect and retain
- ▶ UTGST – Center will collect and retain
- ▶ IGST on inter-state supply will be shared between Center and States as per law made by the Parliament and not on the recommendation of Finance Commission. (Section 17 of IGST Act)
- ▶ CGST and Center share of IGST will be distributed to the States on the recommendation of Finance Commission.

Integrated Goods and Services Tax Act, 2017

- ▶ 17. Apportionment of tax and settlement of funds
 - ▶ Once the credit chain is snapped, IGST revenue is distributed between Center and States
 - ▶ Section 17(1) – 50% of IGST will be apportioned to Center.
 - ▶ Section 17(2) – 50% of IGST will be apportioned to State **where such supply takes place.**
 - ▶ Section 17(2) is the legal basis for the popular statement that GST is a “consumption based tax”.

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (1) All taxes and duties shall be levied and collected by the Government of India and distributed between the Union and States on the recommendation of Finance Commission.

Apportionment of IGST is not covered by Article 270(1).

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (1A) The tax collected by the Union under clause (1) of article 246A shall also be distributed between the Union and the States in the manner provided in clause (2).

- CGST will be shared with the states as per the recommendations of the Finance Commission.

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (1B) The tax levied and collected by the Union under clause (2) of article 246A and article 269A, which has been used for payment of the tax levied by the Union under clause (1) of article 246A, and the amount apportioned to the Union under clause (1) of article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).

- Center portion of IGST will be shared with the states as per the recommendations of the Finance Commission.

Summary: Distribution of Revenue

- ▶ Article 269A - Levy and collection of goods and services tax in course of inter-State trade or commerce
 - ▶ Clause (1) - IGST (including IGST collected at the time of import of goods) apportioned as per method prescribed under section 17 of the IGST Act.
 - ▶ Finance Commission has no role in apportionment of IGST.
- ▶ Article 270 – Distributed of taxes between the Union and the States as per the recommendation of Finance Commission
 - ▶ Clause (1) - All central taxes (except those referred to in articles 268, 269, 269A and surcharges and cesses)
 - ▶ Income Tax
 - ▶ Basic Customs Duty
 - ▶ Excise Duty on Non-GST products
 - ▶ Clause (1A) - CGST collected by the Union under Article 246A(1)
 - ▶ Clause (1B) - Central portion of IGST
 - ▶ Clause (1B) - Amount of IGST which has been used for payment of CGST

IGST on Imported Goods :

Duty of Customs or Tax on Supply

Taxable Event

- ▶ Tax can be levied on occurrence of taxable event –
 - ▶ Excise duty is a tax on **manufacture** of goods, and not on goods per se.
 - ▶ Sales tax is a tax on **sale** of goods, and not on goods per se.
 - ▶ Customs duty is a tax on **importation** of goods, and not on goods per se.
 - ▶ Octroi is a tax on **entry of goods into local area**, and not on goods per se.

Likewise, GST is a tax on **supply** of goods or services, and not on goods or services per se.

IGST on Import of Goods and Services

- ▶ IGST on Import of Services –
 - ▶ No doubt is a taxable inter-state supply.
- ▶ IGST on Import of Goods –
 - ▶ Is it a Duty of Customs or Tax on Supply.
- ▶ Entry 83 of List I –
 - ▶ Duties of Customs including export duties.
- ▶ Section 12 of the Customs Act, 1962 –
 - ▶ Except as otherwise provided in this Act or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

Relevance of the Issue

- ▶ Schedule II of the CGST Act –

- ▶ Para 5 - Supply of Services

The following shall be treated as supply of services

...

(f) Transfer of right to use any goods for any purpose.

Relevance of the Issue

▶ Goods taken on lease

- ▶ Domestically – A in Bombay supplies a photocopier on lease to B in Delhi. The transaction will be treated as inter-state supply of services. IGST will be payable as supply of services
- ▶ Imported –
 - ▶ Basic Customs Duty (Section 12 of Customs Act) – Import of goods even though no transfer of property in goods.
 - ▶ IGST levied under proviso to section 5(1) of IGST Act read with section 3(7) of Customs Tariff Act –
 - ❑ If duty of Customs – IGST to be paid on full intrinsic value. Further, IGST to be paid on supply of services by way of lease.
 - ❑ If tax on supply – No tax payable at the time of import. IGST payable only once on supply of service.

Relevance of Issue

- ▶ Machine exported and re-imported after repair –
IGST levied under proviso to section 5(1) of IGST Act read with section 3(7) of Customs Tariff Act –
 - ▶ If tax on supply – IGST payable only on repair charges.
 - ▶ If duty of customs – Subject to any exemption, IGST will be payable on full intrinsic value.

Understanding of Government

- ▶ Initial understanding of the government was that IGST payable at the time of import is a tax on supply.
- ▶ Notification for Exemption for goods and services imported by SEZ unit or developer -
 - ▶ Exercise of power under IGST Act - Notification No. 15/2017-Integrated Tax (Rate) dated 30.06.2017
 - ▶ Rescinded vide Notification No. 17/2017 -Integrated Tax (Rate) dated 05.07.2017
 - ▶ Exercise of power under Customs Act - Exemption for Import of Goods (Notification No. 64/2017-Customs dated 05.07.2017)
 - ▶ Exercise of power under IGST Act - Exemption for Import of Services (Notification No. 18/2017 - Integrated Tax (Rate) dated 05.07.2017)
- ▶ Government now believes that IGST paid at the time of import of goods is a duty of customs and is issuing notification for import of vessel/ rigs/ aircraft on lease basis accordingly.

IGST on imports: Tax on Supply

- ▶ Whether Constitutional provisions support the understanding of the Government?
- ▶ Our View: IGST paid at the time of import of goods is a tax on supply and not duty of customs on import.

Import of Goods

▶ **Proviso to Section 5(1) of IGST Act**

- ▶ Provided that IGST on **goods imported into India** shall be levied and collected in accordance with provisions of Sec 3 of Customs Tariff Act on value as determined under said Act at the point when custom duty is levied on the said goods under section 12 of the Customs Act, 1962.

▶ **Section 3(7) of the Customs Tariff Act**

- ▶ Any article which is imported into India shall, in addition, be **liable to integrated tax** at such rate, not exceeding forty per cent as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be.

Why confusion? – Absence of word “supply” in proviso to section 5(1) of the IGST Act.

CVD & SAD subsumed in GST

- ▶ The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014

Statement of Objects and Reasons

- ▶ 2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for—
 - (a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

Conclusion

▶ Reason for Understanding of Government:

- ▶ Government's only contention, to say that IGST paid at the time of import of goods is a duty of custom, is absence of the word "supply" in proviso to section 5(1) of IGST Act.

▶ Answer:

- ▶ The absence of word "supply" is due to lack of imprecision and cannot lead to such a conclusion. Such imprecision is also found in other provisions of the GST Laws. For example -
 - ▶ Section 11(1) of CGST Act – "exempt ..., goods or services"
 - ▶ Section 12(1) of CGST Act – "liability to pay tax on goods"
 - ▶ Section 13(1) of CGST Act – "liability to pay tax on services"
 - ▶ Section 49(9) of CGST Act – "paid the tax on goods or services"

Conclusion

- ▶ If IGST on import of goods is duties of customs, it will be distributed as per the recommendations of Finance Commission under Article 270(2) read with 270(1).
- ▶ Section 17 of the IGST Act specifically provide for sharing of IGST on import of goods. [Article 269A(1)]
- ▶ Accordingly, IGST on import of goods is shared with the states as per the formula applicable to GST. It is not being shared on the basis applicable to duties of customs.



THANK YOU!