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MULTIPLICITY OF TAXES AND EXCLUSION OF REVENUE-POTENTIAL COMMODITIES: HIGHLIGHTING TWO CRUCIAL ISSUES OF GST IN INDIA

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Abstract

Goods and services tax (GST) is designed to subsume all existing imposts on goods and services into a comprehensive levy and make it applicable to all supplies of goods and services. It is expected to make India a single market which will eventually boost economic growth in the country. This paper, however, points out that in reality both the basic tenets are not going to be practiced fully and, therefore, the vices that existed in the pre-GST era like multiplicity of taxes, cascading effect *etc.*, will continue to a great extent even in the GST regime. Possibilities for the levy of certain taxes on goods and services besides GST cannot be ruled out. Similarly, by excluding the supply of petroleum products and potable liquor from GST net, the economic impact of GST will be considerably reduced. This paper also proposes alternative schemes for resolving these issues.

I Introduction

GENERAL ORIENTATION of the goods and services tax (GST) in India is very obvious; subsume all existing taxes and duties on goods and services[1] into a comprehensive GST and apply it uniformly on the supply of goods or services in the course of business with a seamless input tax credit (ITC) mechanism across the board. In the case of intrastate supply, the levy would be by the Union and the states concurrently while it would be exclusively by the Union when the supply is in the course of interstate or international trade or commerce. The Constitution (One Hundred and First Amendment)

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1 Central excise duty, additional excise duty, excise duty levied under the Medicinal and Toiletries Preparation Act, service tax, additional customs duty, special additional duty of customs, union surcharges and cesses, VAT /sales tax, entertainment tax (unless it is levied by the local bodies), luxury tax, taxes on lottery, betting and gambling, state cesses and surcharges in so far as they relate to supply of goods and services and entry tax are the taxes and duties.

Act, 2016[2] (hereinafter Amendment Act) and its forerunner in 2011[3] have generally acknowledged these precepts. The comprehensive GST is primarily intended to eliminate the complexities associated with the multiplicity of levies and the corresponding effect of cascading of tax. It has also envisioned decreasing compliance cost, reducing the evasion level, plugging revenue leakages and improving the efficiency of collection which altogether might give a boost to the domestic economy. It has been pointed out that the implementation of a comprehensive GST across goods and services is expected, *ceteris paribus,* to increase India s GDP somewhere within a range of 0.9 per cent to 1.7 percent. [4] Integration of all taxes and duties on goods and services into a single levy and applying it to the supply of all goods and services are the fundamental principles of the GST. However, from the provisions/clauses of the Amendment Act, it is discernible that in practice these principles will not be fully followed and at the operational level there will be some serious aberrations from these fundamental tenets. Neither all taxes and duties on goods and services will be merged into a single levy nor will GST be applicable to supply of all goods or services. Every projection of economic growth and claims of simplification of procedures, elimination of multiplicity of taxation and consequent cascading effect *etc.*, are based on the splendid ideas of merger of all taxes and duties on the goods and services into a single levy and the extensive application of such a tax on the supply of all goods and services. It is evident that such an ideal situation is not going to be created under the GST regime in India. On the contrary, some of the important levies on goods are not going to be subsumed under GST and they will be allowed to operate simultaneously with the GST and some of the most revenue prominent goods are proposed to be excluded from the GST net. These are the two main flaws in the proposed GST scheme in India which is going to reduce the scope and benefits of the reform. For a full-fledged GST, granting optimal economic and commercial advantages to the

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2 Received the assent of the President of India on Sept. 8, 2016.

3 The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011.

4 National Council of Applied Economic Research, *Moving to Goods and Services Tax in India: Impact on India s Growth and International Trade* (Dec., 2009). However, this claim has been negated by Goldman Sachs, which estimated that the GST, as proposed, would add only about zero to half a percentage point to the annual GDP growth of India. See Puja Mehra, Modi Govt. s Model for GST May Not Result in Significant Growth Push *The Hindu*, Sept. 7, 2015.

exchequer, trade and industry, and the consumers, it is imperative that these issues are properly addressed and the deficiencies are appropriately cured.

Two important aspects of the forthcoming GST, *i.e.*, non-integration of all levies of goods and services and exclusion of certain commodities from the GST net are examined in this paper. The constitutional directives with regard to taxation are explained and the taxes and duties on goods and services under the Indian Constitution are listed out. Those imposts which are not going to be merged with GST and simultaneously operate with GST are elucidated and the repercussions of such exclusions are examined. Possible suggestions to overcome the adverse implications of these problems are also made in the concluding part.

II Constitutional requirements for taxation and a unique scheme for GST

Article 265 of the Constitution of India mandates that [n]o tax shall be levied or collected except by authority of law. It has been succinctly declared that without the backing of a valid law enacted by a competent legislature, no government is eligible to levy or collect any tax. While interpreting the scope and legal connotation of article 265, the Supreme Court in *K.T. Moopil Nair* v. *State of Kerala*[5] held:

> Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof

Taxing subjects for the Union and the states are allotted through specific entries in the legislative lists of the seventh schedule to the Constitution. In the constitutional scheme of taxation, specific entries in the appropriate legislative lists of the seventh schedule is mandatory for enabling the legislatures to enact laws for the levy and collection of tax. A general entry in the legislative list does not grant power to the law making bodies to enact a statute for levying tax on that subject. In *M.P. V. Sundararamier & Co* v. *State*

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5 AIR 1961 SC 552; See also, *Chhotabhai Jethabhai Patel* v. *Union of India,* AIR 1962 SC 1006 and *Ujjam Bai* v. *State of U.*P, AIR 1962 SC 1621.

of Andhra Pradesh,[6] it was held that in the scheme of our Constitution a general entry does not include the power of taxation. There can be general entry and taxing entry on a single subject[7] but no legislature will be competent to enact a taxing statute unless a specific legislative entry is given in the appropriate list of the seventh schedule. The legislative power is demarcated and distributed between the Union and the states under article 246 and the territorial jurisdiction of the laws made by different legislatures are regulated by article 245.[8] The residuary power of legislation is vested with the Parliament under article 248 read with entry 97 of the Union list.[9]

The distinctive feature of the tax entries in the legislative lists of the seventh schedule is that they are mutually exclusive and operate independently.[10] There is no area of taxation that is being held simultaneously by the Union and the states. In *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar*[11] it was held:

> A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the states. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the states mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise.

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6 AIR 1958 SC 468.

7 For example, the Constitution of India, schedule VII, list I, entries 42 and 92A.

8 For details, see *State of Bombay* v. *R. M. D. Chamarbaugwala,* AIR 1957 SC 699.

9 For the interpretation of principles regarding residuary power of legislation especially in relation to taxation, see *Union of India* v. *H.S. Dhillon,* AIR 1972 SC 1061.

10 Although double taxation is permissible, the event of taxation must be different and distinct. See *State of Bombay* v. *United Motors (India) Ltd.*, [1953] SCR 1069; *Bengal Immunity Co. Ltd.* v. *State of Bihar* [1956] 2 SCR 603; *Tata Iron and Steel Co.* v. *S. R. Sarkar,* AIR 1961 SC 65; *Radhakisan Rathi* v. *Addl. Collector*, AIR 1995 SC 1540. Double taxation can happen especially when a subject which in one aspect and for one purpose falls within the power of a particular legislature may in another aspect and for another purpose falls within another legislative power. For detailed analysis of the aspect theory of interpretation see *Federation of Hotel & Restaurant Association of India* v. *Union of India,* AIR 1988 SC 1291.

11 [1983] 3 SCR 130. See *State of West Bengal* v. *Kesoram Industries Ltd.* (2004) 10 SCC 201 wherein the Supreme Court has summarised the principles.

The above principles were reiterated by the Supreme Court in *Godfrey Phillips (I) Ltd.* v. *State of U.P.*[12] and it further clarified that taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.

However, the structure of GST as proposed by the Amendment Act has not been constructed on these general principles of taxation under the Indian Constitution such as specific legislative entry and mutually exclusive power *etc.*, which have so far been treated as the touchstones for the constitutional validity of a fiscal statute. The Amendment Act, on the contrary, provides concurrent taxation by the Union and the states on the same event and tax base. Neither any specific entry regarding GST is provided in any of the legislative lists nor has the Amendment Act inserted any such entry in them. Instead, the Amendment Act has inserted a specific article in the Constitution to grant legislative powers to the Union and the states to levy GST.[13]

In the GST regime, the Union and the states[14] will concurrently levy central GST (CGST) and state GST (SGST) on intrastate supply of goods or services while Union will have exclusive power to levy Integrated GST (IGST) on interstate supply and also on supply in the course of import into the territory of India.[15]

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12 (2005) 2 SCC 515.

13 Art. 246A reads thus: 246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce. shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

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

14 Including union territory with legislature.

15 Art. 269A reads thus: 269A. (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government

III Taxing powers of the Union and the states

Entries 82 to 92C of list I and entries 45 to 63 of list II of the seventh schedule to the Constitution distributes the areas of taxation between the Union and the state governments respectively.[16] Since the scope of this paper is limited to tax on goods or services, only those levies which would have been subsumed to form GST are considered here.

The Union levies on goods or services are customs and export duties,[17] excise duties except on alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics,[18] terminal taxes on goods or passengers carried by railway, sea or air; taxes on railway fares and freights,[19] taxes other than stamp duties on transactions in stock exchanges and futures markets,[20] taxes on the sale or purchase of newspapers and on advertisements published therein,[21] taxes on the interstate sale or purchase of goods other than newspapers,[22] taxes on the interstate consignment of goods[23] and taxes on services.[24] In addition to these imposts, the Union Government is competent to levy tax on any matter that is not under the fiscal jurisdiction of the states.[25] The state levies on these areas are taxes on mineral rights,[26] excise duties on

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of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

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

(2) 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.

16 The various entries in the legislative lists are not powers of legislation but fields of legislation. See *Kesoram Industries Ltd, supra* note 11.

17 The Constitution of India, schedule VII, list I, entry 83.

18 *Id.*, entry 84.

19 *Id.*, entry 89.

20 *Id.*, entry 90.

21 *Id.*, entry 92.

22 *Id.*, entry 92A.

23 *Id.*, entry 92B.

24 *Id.*, entry 92C.

25 *Id.*, entry 97.

26 The Constitution of India, schedule VII, list II, entry 50.

alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics,[27] entry tax,[28] taxes on the consumption or sale of electricity,[29] taxes on the local sale or purchase of goods other than newspapers,[30] taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television,[31] taxes on goods and passengers carried by road or on inland waterways,[32] taxes on vehicles,[33] taxes on animals and boats,[34] tolls,[35] taxes on professions, trades, callings and employments,[36] capitation taxes[37] and taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.[38] The Union and the state governments are also empowered to levy surcharges on these taxes.

For an ideal and hassle free GST, all these imposts have been merged into a comprehensive GST. Since GST is designed as a comprehensive tax by merging all taxes currently existing on transactions involving goods and services, it is assumed that in the post GST scenario no other type of tax would be levied on goods and services. But no amendment has been made on some of the entries in the seventh schedule that deal with taxes on goods or services; thereby, allowing multiple taxes in these sectors and making way for double taxation under different entries. Of course, there is nothing in article 265 of the Constitution that prevents double taxation.[39] But the pertinent question to be posed is whether it is proper to levy GST on a transaction for which a specific taxing entry already exists in a legislative list of the seventh schedule and whether it is appropriate to levy tax on a subject given in a legislative list on which GST is being levied.

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27 *Id.*, entry 51.
28 *Id.*, entry 52.
29 *Id.*, entry 53.
30 *Id.*, entry 54.
31 *Id.*, entry 55.
32 *Id.*, entry 56.
33 *Id.*, entry 57.
34 *Id.*, entry 58.
35 *Id.*, entry 59.
36 *Id.*, entry 60.
37 *Id.*, entry 61.
38 *Id.*, entry 62.
39 *Supra* note 10.

It is, therefore, necessary to analyze various Union and state taxes and duties on goods and services and to examine the modifications made in the constitution on such levies. An attempt in this direction is made hereunder.

IV Taxes and duties on goods and services and the amendments

Entry 83 of list I deals with duties of customs including export duties. For levying customs duties the Parliament has enacted the Customs Act, 1962 (52 of 1962) and the duties of customs have been levied at such rates as specified under the Customs Tariff Act, 1975 (51 of 1975) on goods imported into, or exported from, India. Storage or stocking of imported goods is also covered by this entry.[40] The Centre is competent to levy additional duty or special additional duty under the Customs Tariff Act, 1975. No amendment has been made in entry 83 which means that the Union Government will be competent to continue with the levy of customs duty, additional duty or special additional duty during the GST regime as well. On the other hand, article 269A, stipulates that the supply of goods or services or both in the course of import into the territory of India shall be deemed to be supply in the course of interstate trade or commerce and GST shall be levied by the Union Government on such transactions.[41] When both these provisions are read together, it is evident that when goods are imported into India the Union Government shall be competent to levy customs duties as well as integrated goods and service tax (IGST) simultaneously on such import except in the case of non-GST goods which will attract only the customs duty.

Preservation of entry 83 of list I without any modification will enable the Union Government to levy customs duty and IGST concurrently on the import of goods into the territory of India. The intention to maintain non-creditable customs duty may be for regulating the foreign trade. Although ITC will be available for IGST, customs duty will be embedded in the sale price and will result in cascading of tax. As an effective tool to restrict the indiscriminate imports of goods, customs duty may be conserved. But it would be advisable if, instead of universal application, levy of customs duty is limited to the imports of those commodities which are necessarily, in the interest of national economy.

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40 *In Re : The Bill to Amend Section 20 of the Sea Customs Act* [1964] 3 SCR 787, it was held that in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers.

41 *Supra* note 15.

Entry 84 of list I provides for the duties of excise to the Union Government except on alcoholic liquor and certain narcotics.[42]

The taxable event under excise law is manufacture of saleable or marketable goods.[43] The area of excise duties is divided between the Union and the states. Except the specific items excluded in clauses (a) and (b) of entry 84, which are included under entry 51 of list II of the seventh schedule, the Union shall be competent to levy excise duty on the manufacture of any goods. In addition to the basic excise duties, additional duties of excise are also levied on specific goods. Entry 84 has been substituted as follows:

> Duties of excise on the following goods manufactured or produced in India, namely:
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> (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.

The above substitution limits the power of the Union to levy duties of excise only on these commodities when they are produced or manufactured in India. Excise duty on medicinal and toilet preparations containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics is levied by the Union but collected and appropriated by the states under article 268. These items have been deleted from entry 84 and corresponding changes have been made in article 268 also. In the GST regime no excise duty will be levied on medicinal and toilet preparation containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics. In the case of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and

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42 Duties of excise on tobacco and other goods manufactured or produced in India except

(a) alcoholic liquor for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

43 *Moti Laminates Pvt. Ltd.* v. *Collector of Central Excise*, 1995 (76) ELT 241 (SC) ; *Mcdowell and Co. Ltd.* v. *CTO,* AIR 1986 SC 649.

aviation turbine fuel (hereafter these products together will be mentioned as petroleum products) GST will be levied only from the date recommended by the Goods and Services Council Tax (GST council)[44] and till then excise duty will be levied on these products. However, excise duty as well as GST will be levied in the case of tobacco and tobacco products and no ITC will be allowed to the excise duty paid on the manufacturing of these commodities.

Terminal taxes on goods or passengers carried by railway, sea or air; taxes on railway fares and freights are allotted to the Union under entry 89 of list I of the seventh schedule. Tax on the railway passenger fare was levied in 1957 under the terminal tax on Railway Passengers Act, 1956 which was withdrawn in 1961. It was revived in 1971 and again withdrawn in 1973. No other tax was levied under this entry so far. Prior to the Constitution (Eightieth Amendment) Act, 2000, these taxes, if levied and collected by the Union, were assigned to the states under article 269.[45] The Constitution (Eightieth Amendment) Act, 2000 excluded these levies from the purview of article 269. No modification has been made in entry 89. In the GST scenario, unless specifically excluded, all services provided by way of transporting goods or passengers by railway, airlines and shipping services will attract GST. But as long as entry 89 is preserved in the list I, the Parliament will have power to levy tax under this entry as well. It is advisable to delete this entry from list I of the seventh schedule.

Entry 90 deals with taxes other than stamp duties on transactions in stock exchanges and future markets. Transactions in stock exchanges attract service tax and security transaction tax. The forward contracts are regulated by the Forward Contracts (Regulation) Act, 1952 and currently there is no tax imposed on future markets. No amendment has been made in entry 90. In the GST scenario the transactions in stock exchanges and future markets will attract GST in addition to any tax levied under this entry. It is, therefore, sensible to remove this entry from the Union list.

Entry 92 [46] of list I has been omitted. Notwithstanding the specific entry in the Union list, no central legislation has been so far made to levy tax on

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44 Explanation of art. 246A, *supra* note 13.

45 For compensating the loss suffered by the states in view of the withdrawal of tax on railway passenger fares, the Finance Commission has allotted grant in lieu of tax on railway passenger fares.

46 Taxes on the sale or purchase of newspapers and on advertisements published therein.

these activities. Unless specifically excluded under the laws, supply of newspapers and advertisements published therein will attract GST and, therefore, it is proper to delete entry 92.

The Parliament has been empowered to levy two types of taxes on the interstate transactions of goods such as tax on the sale or purchase of goods in the course of interstate trade or commerce and tax on the consignment of goods under entry 92A and entry 92B of the Union list respectively. Relevant entries read as:

> 92A. 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.
>
> 92B. Taxes on consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

Entry 92A has been inserted by the Constitution (Sixth Amendment) Act, 1956, and Central Sales Tax Act, 1956 (74 of 1956) has been enacted on the basis of it primarily to overcome the impasse created by the ruling in *Bengal Immunity Co. Ltd.* v. *State of Bihar.*[47] Although entry 92B has been inserted by the Constitution (Forty-sixth Amendment) Act, 1982, Parliament has so far not enacted any enabling statute for imposing consignment tax and until now it could not be levied or collected. Both these taxes are to be levied and collected by the Union and to be assigned to the states under article 269. No amendment has been made in these entries. Consequently the Union Government will be competent to levy central sales tax (CST) on the sale of goods in the course of interstate trade or commerce, and consignment tax on the transfer of goods in the course of interstate trade or commerce.

Article 269 stipulates that whenever goods are sold in the course of interstate trade or commerce or goods are transferred in the course of interstate trade or commerce not by way of sale, tax shall be levied on such transactions by the Union Government but the net proceeds of such tax shall be assigned to the appropriate states. Amendments have been made in article 269 to

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47 [1956] 2 SCR 603. It was held that states had no power to levy tax on the sale or purchase of goods where such sale or purchase takes place in the course of interstate trade or commerce. The states till then have taxed such transactions interpreting explanation of clause (1) of art. 286 as an enabling provision for such levy.

exclude IGST from the operations of article 269. Clause (1) reads as:[48]

> Taxes on the sale or purchase of goods and taxes on the consignment of goods except as provided in article 269A shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

GST on the interstate supply is dealt by article 269A which envisages three things:

1. Parliament shall formulate principles for determining place and time of supply of goods or of services in the course of interstate trade or commerce or in the course of import into the territory of India,
2. When such supply of goods or service takes place, Union Government shall have exclusive power to levy and collect GST on such supply, and
3. The GST so collected shall be apportioned between the Union and the states in the manner provided by the Parliament by law on the recommendations of the GST council.

When article 269 and article 269A are read together along with entries 92A and 92B of list I, the following propositions emerge:

1. Whenever goods are sold in the course of interstate trade or commerce, Union Government shall have the power to levy and collect tax on such sales and it shall be assigned to that state wherefrom it has been collected.
2. Whenever goods are consigned in the course of interstate trade or commerce Union Government shall have power to levy and collect tax on such consignments and it shall be assigned to that state wherefrom it has been collected.

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48 Explanation to art. 269 specifies that taxes on sale or purchase of goods as well as on consignment of goods shall be levied only on transactions in the course of interstate trade or commerce.

3. Whenever goods or services or both are supplied in the course of interstate trade or commerce, or in the course of import into the territory of India, Union Government shall have the power to levy and collect tax on such supplies. The tax so levied shall be apportioned between the Union and the states in the manner as may be prescribed by Parliament by law on the recommendations of the GST council.

These articles together speak about three types of taxes, CST on the interstate sale of goods, consignment tax on interstate stock transfer and IGST on interstate or international supply of goods or services or both.

Since no amendment has been made in entry 92A of list I and article 269 has been amended only to exclude IGST from its operation, CST will be continued to be levied even in the GST regime on the sale or purchase of goods in the course of interstate trade or commerce. On the interstate sale of goods there will be CST as well as IGST unless one of them is specifically excluded from the field of interstate transactions.[49] However, it is logical to presume that the levy of CST will be limited to the interstate sale of excluded goods and levy of IGST will be on the interstate supply of all other goods. In that case also it should have been better for clarity and precision if appropriate amendments were incorporated in entry 92A of list I as done in the case of entry 84 of list 1. Once the petroleum products are also brought into the GST net, article 269 and entry 92A of list I will have operation only on interstate sale of alcoholic liquor for human consumption.

For levying consignment tax the enabling statute is yet to be enacted by the Parliament. Therefore, it can be presumed that Parliament may not venture for making a law for the levy of consignment tax especially when it can levy IGST on the same transaction. Moreover, in the GST regime it has no relevance since consignment tax and IGST will be levied on the same event of interstate supply of goods. It would have been appropriate to delete entry 92B of list I and amend article 269 accordingly.

Tax on services was levied under chapter V of the Finance Act, 1994 as a residuary item under entry 97 of list I. It started with a humble beginning of three taxable services in 1994-95 and added more services into this category

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49 This can be achieved by amending the term goods under s. 2 (d) of the Central Sales Tax Act, 1956 to include only the excluded goods and by limiting the operations of the IGST law to goods other than the excluded goods.

every year subsequently by amending the Finance Act. In 2012-13, all services except those included in the negative list were made taxable. Meanwhile, the Constitution (Eighty-eighth Amendment) Act, 2003 inserted entry 92C in list I as taxes on services and article 268A. It reads:

> (1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2).
>
> (2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be
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> (a) collected by the Government of India and the States;
>
> (b) appropriated by the Government of India and the States, in accordance with such principles of collection and appropriation as may be formulated by Parliament by Law.

In spite of article 268A and entry 92C in list I, in the absence of notification of the amendment, service tax continued to be levied and collected by the Union Government under the Finance Act, 1994. Now article 268A and entry 92C in list I have been omitted. Since service tax is to be subsumed with GST, the omission is appropriate.

The residuary power of legislation vests with the Parliament under article 248 read with entry 97 of list I. Entry 97 runs as any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. Article 248 has been modified making the residuary power of legislation subject to article 246A. Since GST is a subject not enumerated in any of the lists in the seventh schedule, it must have been treated as a residuary topic on which only Parliament could legislate. Hence, the amendment is indispensable to exclude GST from the residuary power of legislation.

Entry 50 of list II allocates taxes on mineral rights to the states, subject to the Union law enacted in this regard. It runs as taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. But the Parliament had enacted the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter MM Act) under entry 54 of list I which runs as [r]egulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. The MM Act has exhaustively covered the tax on minerals and

mineral rights. In *P. Kannadasan* v. *State of Tamil Nadu*,[50] it was held that by virtue of the MM Act enacted by Parliament under entry 54 of list 1, the state legislatures are denuded of their power to levy any tax on minerals. Entry 50 had become dead letter. The court has even invalidated the rights of the states to levy cesses on mines and minerals.[51] No amendment has been made in entry 50. Since entry 50 is defunct it should have been deleted. Also, modifications should have been proposed in entry 54 of list 1 under which the Parliament has enacted MM Act which entitles the government to levy royalties on minerals when they are extracted. Royalty is [a]share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee s right to mine or drill on the land. [52] In *State of West Bengal* v. *Kesoram Industries*,[53] it was held that royalty under the MM Act cannot be equated with tax. But, the critical point is that when the royalty imposed minerals are supplied, GSTs will be levied on such supplies without any credit to the royalty already paid. This will have damaging effect in the power sector wherein coal plays a vital role.[54] It is advisable to subsume royalty with GST so that the vices of multiplicity of imposts and cascading effect of levies can be avoided.

The power to levy excise duties by the state is limited to the manufacturing of certain goods. Entry 51 of list II reads:

> Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-
>
> (a) alcoholic liquors for human consumption;
>
> (b) opium, Indian hemp and other narcotic drugs and narcotics,

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50 AIR 1996 SC 2560.

51 *Orissa Cement Ltd.* v. *State of Orissa*, AIR 1991 SC 1676.

52 Bryan A. Garner (ed.), *Black s Law Dictionary* 1330 (West Group. United States of America,7th edn., 1999).

53 *Kesoram Industries Ltd.*, *supra* note 11; See also *Orissa Cement Ltd.* v. *State of Orissa,* AIR 1991 SC 1676, where it was held that royalty was a tax. But in *Kesoram* judgment it was held that the decision in Orissa Cement case was a typographical error.

54 Coal represents over 40% of India s energy mix in 2009. Out of the total power generated in 2012, the contribution of coal based power station was 70%. Out of the total installed power capacity in the country, 56% is coal based. For more details see, International Energy Agency, *Understanding Energy Challenges in India, Policies, Players and Issues* (France, 2012).

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

When alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics are manufactured, the state government will levy excise duty on it. But when medicinal and toilet preparations containing these goods are produced, the state government will not have power to levy excise duty on such items. Countervailing duties can be levied on goods entering the state from outside if similar goods are being manufactured within the state and excise duties are being levied thereon.[55] Since no amendment has been in this entry the *status quo* will be maintained.

Entry 52 of list II is with regard to taxes on the entry of goods into a local area for consumption, use or sale therein. This entry has been deleted. Although entry tax was initially imposed in lieu of octroi, it was later used by the states primarily to protect the indigenous industries and commerce from the unhindered inflow of goods from outside the states and it has successfully resisted adverse impacts of rate wars between the states.[56] In the GST regime without the entry tax, care should be taken to have uniform rates of GST for restricting the indiscriminate influx of goods to a state and trade diversion.

Entry 53 of list II enables the state legislatures to make laws on taxes on the consumption or sale of electricity. Regarding taxation on the sale of electricity it was held in *State of A.P.* v. *National Thermal Power Corporation Ltd.*,[57] that since electricity is goods, it is covered under entry 54 also and, therefore, entries 53 and 54 must be read together and when the sale is in the course of interstate trade or commerce, provisions of entry 92A of list I will be applicable. No alteration has been made in this entry. In the GST regime, the supply of electricity, like supply of any other goods, will attract GST unless it is specifically excluded. It is, therefore, advisable to delete entry 53 from the state list and impose GST on the supply of electricity.

Under entry 54 of list II the state legislatures are competent to enact laws on [t]axes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. Entry 92A of list I deals with CST.

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55 See *Kalyani Stores* v. *State of Orissa*, AIR 1966 SC 1686; *M.M. Breweries* v. *E.T. Commissioner*, AIR 1976 SC 2020.

56 For validity of imposing entry tax see, *Jindal Stainless Ltd.* v. *State of Haryana* (2006) 7 SCC 241.

57 AIR 2002 SC 1895.

States can levy tax on all sales or purchases of goods that takes place within the territory of that state, subject to other restrictions imposed by the Constitution.[58] Entry 54 has been modified as:

> Taxes on the sale of petroleum crude, high speed diesel, natural gas, motor spirit (commonly known as petrol), aviation turbine fuel and alcoholic liquor for human consumption but not including sale in the course of inter-state trade or commerce or sale in the course of international trade or commerce of such goods.

The amendment is based on the principle of exclusion of petroleum products and alcoholic liquor for human consumption from the operations of GST. GST will be applicable on the supply of petroleum products only from the date suggested by the GST council[59] and till then; sales tax/VAT will be levied on the sale or purchase of such goods.

Article 286 imposes certain restrictions upon the powers of the states to levy tax on the sale or purchase of goods. Accordingly, no state shall impose or authorise the imposition of tax on the sale or purchase of goods where such sale or purchase takes place outside the state or in the course of import into or export out of the territory of India. Article 286 has been modified and the restriction on the states is on imposing tax on the supply of goods or services or both when the supply takes place outside the state or in the course of import into or export out of the territory of India. The question is with regard to the restriction on the levy of tax on the sale or purchase of goods that will be continuing even in the GST regime for the excluded goods. Since the taxing power of the states in respect of the excluded goods is specifically on the sale or purchase of goods, the restriction on imposing tax on the supply of goods or services , which is nothing but GST as per clause (12A) of article 366, may not be applicable on such transactions. Repercussions of such a situation demands detailed analysis.[60]

Entry 55 of list II which says taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television has been omitted. In the GST regime, advertisements

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58 It is discussed below under art. 286.

59 *Supra* note 13.

60 The issue is not analyzed here since it is outside the scope of this paper. However, the modified art. 286 might be interpreted as removing the restrictions on the powers of the states to levy ST or VAT on the prohibited transactions.

will be considered as services and, therefore, taxable and hence this amendment is in order.

Taxes on goods and passengers carried by road or on inland waterways is a subject granted to the states under entry 56 of list II. In *A.S. Karthikeyan* v. *State of Kerala*,[61] it was held that this tax is imposed directly on goods and passengers, though it need not be directly collected by the state from the passengers or persons transporting the goods. While terminal tax is levied on goods or passengers for a specific destination, tax under entry 56 can be levied irrespective of destination. Looking at the nature, it is a levy on the services provided by the transporters or carriers. No amendment has been in this entry. In the GST regime this tax does not have any relevance and entry 56 should have been, therefore, deleted.

Entry 57 of list II allocates taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of list III to the states. Entry 35 of list III is mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied. When these entries are read together it means that while the matter of the principles on which taxes on mechanically propelled vehicles are to be levied falls under entry 35 of list III, the question of taxes on vehicles, whether mechanically propelled or not is within the scope of entry 57 of the state list.[62] On the basis of this entry, the states have enacted motor vehicles taxations Acts. No modification has been made in this entry and in the GST regime, there will be taxes on motor vehicles and GST on services provided by such motor vehicles. Of course, at present service tax is levied in addition to the motor vehicle tax. It should have been advisable if taxes on vehicles were also subsumed under GST so that the vehicle operators who offer services would have been eligible for ITC for the tax paid on the motor vehicles.

Entry 58 of list II allots Taxes on animals and boats to the states and they are competent to levy tax on any type of animals or boats. It was held in *Panduronga Timblo Industries* v. *Union of India*,[63] that there is no reason to confine the term boats in this entry to boats which are exclusively propelled

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61 AIR 1974 SC 436.

62 *Bolani Ores Ltd.* v. *State of Orissa*, AIR 1975 SC 17; *Government of A. P.* v. *Road Rollers Owners Welfare Association* (2004) 6 SCC 210.

63 AIR 1992 SC 1194.

by oars. No amendment has been made in this entry. As said in the case of entry 57 of list II, in the GST regime taxes can be levied on boats *per se* and also GST on the services offered by the boats. In the case of animals also the situation will be same. In fact, these taxes do not make any significant contribution to the states revenue and as a process of cleansing the legislative lists by deleting irrelevant and trivial fiscal subjects, it should have been sensible to delete this entry and integrate the levy with GST.

The state governments are entitled to levy tolls under entry 59 of list II. They are empowered to levy toll under section 2 of the Indian Tolls Act, 1851. It is an amount levied upon any road or bridge constructed or repaired at the expense of the government. In *Hansraj and Sons* v. *State of J&K* [64] it was held:[65]

> [T]hough tolls are of different types and may be levied in different situations, it ordinarily means the amount which the government, or a local authority or a person duly authorised by the government may collect for passage of carriages and vehicles over a road or bridge. This meaning is by no means exhaustive. Where provision for levy and collection of tolls is made under the legislative enactment or a subordinate legislation then the levy is to be governed strictly according to the provisions of the statute or rules or any other instrument, as the case may be.

At present, toll on national highways is being levied and collected in accordance with the provisions of the National Highways Act, 1956 and rules made thereunder. Although the state governments have been empowered to levy tolls at the rates as they think fit, having regard to the compensatory nature of the levy, the rate of toll must bear a reasonable relationship to the providing of the benefit.[66] The question is about the nature of tax/fee levied as toll. It is a tax/fee for the service provided and hence within the ambit of GST. No amendment has been made in entry 59 of list II.

From the above discussion it can be discerned that there are multiple taxes and duties on transportation of goods or passengers like terminal taxes

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64 AIR 2002 SC 2692.

65 *Id.*, para 23.

66 *State of U.P.* v. *Devi Dayal Singh,* 2000 (3) SCC 5.

on goods or passengers carried by railway, sea or air, taxes on railway fares and freights, taxes on goods and passengers carried by road or on inland waterways, taxes on vehicles, mechanically propelled or not, taxes on animals and boats, and tolls. Maintaining multiple taxes on a crucial sector like transportation will not be complimentary to fiscal reformation. It will surely have adverse impacts on the economic activities and demands immediate attention of the policy makers. It should have been advisable if necessary modifications were made in the legislative lists of the seventh schedule to the Constitution for subsuming all these taxes into GST.

Entry 60 of list II, mentions taxes on professions, trades, callings and employments. On the question whether this entry includes tax on services in *All India Federation of Tax Practitioners* v. *Union of India*[67] it was held: [68]

> Entry 60 is a taxing entry. It is not a general entry. Therefore,tax on professions *etc.* has to be read as a levy on professions, trades, callings *etc.*, as such. Therefore, entry 60 which refers to professions cannot be extended to include services. Therefore, professions will not include services under entry 60.

Article 276 immunes the tax on professions, trades, callings and employments from the challenge of it being a tax on income. Clause (1) of article 276 reads:

> Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

No amendment has been made in entry 60 of list II or in article 276. Therefore, unless specifically excluded, taxes under entry 60 of list II and GST will be levied simultaneously on the professions as well as on the services provided by the professionals respectively.

Entry 62 of list II is with regard to [t]axes on luxuries, including taxes on entertainments, amusements, betting and gambling The entry is modified as [t]axes on entertainments and amusements to the extent levied and collected

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67 (2007) 7 SCC 527.

68 *Id.* at 528.

by a Panchayat or a Municipality or a Regional Council or a District Council. Taxes on luxuries, betting and gambling are omitted as these taxes have been subsumed in GST. Taxes on entertainments and amusements will be continued to the extent they have been levied and collected by a local self government.

It is evident from the above discussion that even in the GST regime various types of taxes and duties on goods and services will prevail and such levies will not be considered for ITC. This will result in multiple taxes on goods and services and consequent cascading of tax. Necessary clauses should have been included in the Amendment Act for deleting many legislative entries in the lists of seventh schedule to the Constitution that allocates taxing subjects on goods and services to the Union and the states. Some of these parallel powers can however, be addressed effectively by making appropriate provisions in the GST law(s). In such cases care should be taken to incorporate adequate provisions in the subordinate legislations.

V Goods excluded from GST and the impact thereupon

Since the initial rounds of discussions on GST, the states have expressed serious anxieties about the possible revenue fall if transactions of petroleum products and alcoholic liquor for human consumption are made subject to general rates of GST in place of sales tax (ST) or value added tax (VAT) with higher rates that are being presently levied on them.[69] The apprehensions of the states are not unfounded. VAT/ST collections from petroleum products account for around 30 percent of the total VAT/ST collections of the states. Presently, the rate of VAT/ST levied by states, range from 0.1 per cent to 33.2 per cent for petrol and from 9.2 per cent to 25 per cent for diesel. Of the total indirect tax collection of Centre and states put together, taxes on petroleum products account for around 33 percent.

Tax revenue from alcoholic liquor is significant for some states as the manufacture of liquor is subject to state excise duty and its sale is subject to VAT. State excise duty on alcohol and intoxicants alone contributed over 15

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69 See, Empowered Committee of State Finance Ministers, The First Discussion Paper on Goods and Services Tax In India (Nov. 10, 2009). This was the same situation when VAT was introduced in 2005. Many states preferred to keep the sale or purchase of these goods outside VAT and continued to tax them under general sales tax with a higher rate. *Available at*: http://www.empcom.gov.in/WriteReadData/UserFiles/file/Discussion%20Paper/first_dis.pdf (last visited on Aug. 30, 2016).

per cent of states own tax revenue in 13 out of the 30 states/union territories in 2012-13.[70] Considering the apprehension of the states about the dent in revenue if these goods are brought under GST, it was decided to exclude petroleum products and alcoholic liquor for human consumption from the base of GST. Appropriate amendments have been made in the Constitution to keep these goods outside the GST net. In the case of petroleum products the exclusion will be till the time the GST council decides otherwise[71] and in the case of alcoholic liquor for human consumption, the prohibition is unconditional and permanent.

Alcoholic liquor for human consumption has been unconditionally excluded from GST. Clause (12A) of article 366 defines GST as any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption.

GST on the supply of petroleum products will be levied only from the date recommended by the GST council. Till then the manufacturing of these goods will attract excise duties and ST/VAT will be levied on intrastate sales and CST will be levied on interstate sales. Also, no tax will be levied on interstate supply of these goods not by way of sale. Levy of GST in the case of supply of tobacco and tobacco products will be in addition to the excise duty charged on the manufacturing of such goods. Subject to the explanation to article 246A, GST will be levied on the supply of all goods and services except alcoholic liquor for human consumption and petroleum products unless they are specifically excluded in the GST laws.

Three types of taxes are mainly levied on the transactions of alcoholic liquor for human consumption. They are state excise duties and ST/VAT under entry 51 and under entry 54 of the state list respectively and CST under entry 92A of the Union list.[72] In the case of petroleum products ST/VAT and CST are levied in addition to Union excise duties. When VAT was introduced in India in 2005, many states preferred to keep petroleum products and alcoholic liquor for human consumption out of the operation of VAT and

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70 Reserve Bank of India, *State Finances, A Study of Budgets of 2013-14* (2014), para 2.50

71 *Supra* note 13.

72 In addition to the above, some state wise exclusive levies are also imposed on alcohol. In Kerala, the exclusive levies are warehouse license fee, shop rental/kist, and gallonage fee.

continued to tax them under the general sales tax law. The reason for the exclusion was said to be the apprehension about the possible fall in the revenue if VAT with ITC was levied on the sale or purchase of these goods. Moreover, since alcoholic liquor for human consumption was being considered as a sumptuary item, there were no popular oppositions against any hike in the tax on it and for every state government it was a definite item to depend upon to make up the budgetary deficits. Many states, over time, brought alcoholic liquor for human consumption under VAT with special rates and facility for ITC.

It can be seen that there was no unanimity among the agencies that were directly related to the formulation of the principles of GST with regard to the exclusion of certain commodities from the GST net. The first discussion paper on goods and services tax in India recommended for keeping the alcoholic liquor for human consumption outside the GST. It said: [73]

> Alcoholic beverages would be kept out of the purview of GST. Sales Tax/VAT can be continued to be levied on alcoholic beverages as per the existing practice. In case it has been made Vatable by some States, there is no objection to that. Excise Duty, which is presently being levied by the States may not be also affected.

Regarding GST on petroleum products it has opined that: [74]

> As far as petroleum products are concerned, it was decided that the basket of petroleum products, *i.e.* crude, motor spirit (including ATF) and HSD would be kept outside GST as is the prevailing practice in India. Sales Tax could continue to be levied by the States on these products with prevailing floor rate. Similarly, Centre could also continue its levies. A final view whether Natural Gas should be kept outside the GST will be taken after further deliberations.

On the other hand, the task force of the Thirteenth Finance Commission on goods and services tax recommended a dual levy of GST and excise on the entire range of emission fuels like high speed diesel (HSD), motor spirit

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73 The Empowered Committee of State Finance Ministers, *supra* note 69.

74 *Id.* at 45.

(MS) and aviation turbine fuel (ATF) with no ITC. It also recommended that the industrial fuel like crude oil should be subjected only to GST with the benefit of ITC.[75] In the case of alcoholic liquor the task force recommended dual levy of GST and excise with no ITC.[76]

Seventy-third report of the Standing Committee on Finance on the Constitution (One Hundred and Fifteenth Amendment) Bill, 2011[77] observed that such specific exclusion of goods need not be provided in the Constitution as it would needlessly make the GST regime very rigid[78] and hence such provisions must be deleted.

Apprehensions of the trade and industry in keeping the petroleum products and alcoholic liquor outside the GST net have been pointed out by the trade bodies to the empowered committee of the state finance ministers. Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Indian Industry (CII). Petroleum Federation of India (PetroFed), International Spirits & Wines Association of India (ISWAI) and Confederation of Indian Alcoholic Beverage Companies (CIABC) have represented before the EC that the petroleum products and alcoholic liquor for human consumption should be kept under the ambit of GST and specific levies could be imposed by the Centre and the states to address their revenue concerns. It was requested that in case it was decided not to bring these commodities immediately under GST then these products should not be constitutionally debarred from bringing them under GST. It was apprehended that the exclusion of specific goods by way of constitutional amendment would dilute the flexibility for the levy of GST on these products in future, even if the Centre and the states were to reach a consensus later. It would also remove flexibility to cover these goods in stages as their subsequent inclusion would require another constitutional amendment which could be a long drawn process.[79]

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75 Thirteenth Finance Commission, Report of the Task Force on Goods and Services Tax (Dec. 15, 2009) para 2.29, *available at*: http://fincomindia.nic.in/writereaddata/html_en_files/oldcommission_html/fincom13/discussion/report291209.pdf (last visited on Aug 30, 2016).

76 *Id.,* para 2.32.

77 Seventy Third Report of the Standing Committee on Finance (2012-2013), The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011 (Aug. 2013).

78 *Id.*, para 13.

79 *Ibid.*

The principle issue of keeping certain goods outside the GST net is that for the supply of such goods, there will be no credit for the taxes paid on the inputs for manufacturing these goods or on the previous purchase unless they are included in VAT with ITC. In that case also the levies like excise duty will not be credited. Similarly, when these goods are used as inputs for manufacturing other commodities, the tax paid on these goods will not be eligible for set off. The impact will be double-edged. Tax paid on the inputs used in the industries manufacturing these commodities will remain embedded in the final products and the tax embedded in the final products will be transferred to the industries without any input tax setoff where these goods are used as raw materials. In the instant case the power and the fertilizer sectors will be most affected since petroleum products are massively used in these sectors.

In the case of alcoholic liquor, absence of the ITC will affect the industry as a whole.[80] It was opined by Vijay L. Kelkar, ex-chairman of the Thirteenth Finance Commission that [t]o the extent, petroleum and electricity are kept out of GST; the cascading effect of commodity taxation will increase. This will add to the economic distortions and hence impact economic growth. A lower economic growth will lead to lower growth in GST collections.[81] It is obvious that the problems of GST on these commodities have not been solved by omitting them from the GST list; on the contrary it has only helped to increase the complexities in the GST system.

VI Dual taxation An alternative strategy

In order to resolve the issues related to the exclusion of goods from GST net, two problems are to be addressed. Loss of revenue to the states if these goods are subject to revenue neutral rates (RNR) of GST and the disadvantageous situations of the trade and industry in keeping these commodities without the benefit of ITC. This can be taken care of in two ways; either treat them as special category of goods in the GST laws with

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80 For further reading see, Sacchidananda Mukherjee and R. Kavita Rao, Exploring Policy Options to Include Petroleum, Natural Gas and Electricity Under the Goods and Services Tax Regime in India Working Paper No. 2014 136 (National Institute of Public Finance and Policy, New Delhi). They have strongly argued that even if the petroleum products are included in the GST system, there will not be much impact on the price as well as the revenue.

81 *Supra* note 77 at para 74.

special rates or apply the general RNR of GST upon the supply of these goods with ITC and allow the states to levy ST simultaneously without ITC. For the interstate supply of goods, IGST also can be levied. In the former case the problem will be related to the ITC for the petroleum products. Rates of GST on many products, where petroleum products are the raw materials, will be comparatively lower than the rates of these goods. It may lead to a situation where the input tax is more than the output tax and, therefore, no ITC will be applicable. It can result in a loss of revenue to the states as no tax will be received on the sale of the final product.[82]

In the case of alcoholic liquor for human consumption, this problem will not arise since it is mainly used as an end product, directly supplied to the consumers. Grievances of the industry about non-receipt of ITC also can be hereby addressed.[83] Second alternative of dual taxation of GST and ST on these goods will be a better choice. On account of the GST, the industry will be able to avail credit for the input tax and that will be a great help to the manufacturing sector of these commodities. Simultaneously, the states will be able to levy ST on the intrastate sales of these goods at a rate that will make good the loss of revenue on account of GST. There will be greater flexibility for the states to re-fix the rates of ST as and when necessary.

The pertinent question in relation to the second alternative is whether, GST and ST can be levied on them simultaneously? Whether it is constitutionally valid to levy more than one tax on the same transaction at a time? What is the true position of constitutional provisions on double taxation? Judicial rulings in this area make the subject very explicit.

In *Arvinder Singh* v. *State of Punjab,* [84] the Supreme Court has held:[85]

> [T]here is nothing in Art.265 of the Constitution from which one can spin out the constitutional vice called double taxation. (Bad

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82 On the other hand the Union Government will be benefitted from such a situation. Instead of excise duty, which is the only levy now available to it, it will be able to receive part of the GST at higher rates.

83 The Union Government will be immensely benefitted. At present no tax is received by the Union on account of alcoholic liquor whereas if they are brought into the GST net it will be able to garner a considerable sum by way of CGST.

84 AIR (1979) SC 321.

85 *Id.*, para 5. This position has been reiterated in *Sri Krishna Das* v. *Town Area Committee, Chirgaon* (1990) 3 SCC 645 and *Radhakishan Rathi* v. *Additional Collector* (1995) 4 SCC 309 .

> economics may be good law and vice versa). .If on the same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist.

In *Municipal Council, Kota* v. *Delhi Cloth and General Mills Co. Ltd.*,[86] the Supreme Court opined:[87]

> Though taxation of the same thing under different names is nonetheless double taxation in popular sense, the expertise exposition of the topic seem to also lean in favour of the revenue, in that the legislature has been considered to possess the power to levy one or more tax or rates of tax on the same taxable event and since in these areas large latitude and wide discretion has always been allowed to the State to choose its own method or kind of tax or mode and purpose of levy and recovery, unless there is any prohibition in the Constitution or the very law enacted by the legislature itself prevents such a thing happening no infirmity can be said to vitiate such a levy.

The constitutional position has been made very clear. There is nothing to prevent the legislatures from levying more than one tax on the same event at a time.

In fact in the present case the event of levies are also different. GST is levied on supply of goods under article 246A whereas ST is levied on sale or purchase of goods under article 246 read with entry 54 of the state list of the seventh schedule. Hence, it will be perfectly legal and valid to levy GST and ST on the supply/sale or purchase of petroleum products and alcoholic liquor for human consumption simultaneously. It can be seen that same stand has been taken in the case of tobacco and tobacco products. Excise duty as well as GST will be levied on these items. It appears that the dual taxation will be capable to take care of the issues that have resulted from excluding petroleum products and alcoholic liquor for human consumption from the GST net.

VII Conclusion

It is evident that the GST scheme has not fully succeeded in eliminating the problems of multiplicity of taxes and consequent cascading effects rampant

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86 (2001) 3 SCC 654: JT 2001 (3) SC 75.

87 *Id.*, para 22.

in the indirect tax sectors related to goods and services. In some areas the GST has been proposed to be levied in addition to the taxes and duties prevailing on the supply of goods or services and in some cases the power to impose levy on the transactions involving goods and services are conserved over and above the GST. A cursory view of the taxing entries in the various lists of the seventh schedule, pre and post GST will reveal this fact clearly.

The Amendment Act should have been utilised to cleanse the legislative lists in the seventh schedule to the Constitution so that obsolete, redundant and irrelevant taxing entries should have been deleted. Certain primary areas of infrastructure like power and crucial sectors of economic activities like transportation have not been seriously considered and, therefore, the economic benefit that should have been resulted from the fiscal reform might not be available to the fullest extent. The claims of simplification of taxes, elimination of cascading, reduction of compliance cost and resultant economic growth will not be realised unless these issues are properly addressed. Another detrimental aspect of the GST scheme is the exclusion of petroleum products and alcoholic liquor for human consumption, which are of great revenue potential to the states, from the GST net. Lion s share of states own tax revenue flows from these commodities and GST scheme should have been designed to encompass the transactions of these products also.

The Amendment Act has given different treatments to the supplies of these goods which are surely not in conformity with the spirit of GST. An alternative scheme like dual taxation which takes care of the concerns of the states as well as of the industry should have been evolved. The compromises with regard to the levy of various taxes on goods and services and exclusion of certain revenue prominent commodities will undoubtedly reduce the efficacy of the single most important fiscal reform in the country.[88]

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88 Arun Jaitley, the Finance Minister of India, after introducing the Amendment Bill in Lok Sabha on Dec. 19, 2014, declared it as the single most important tax reform.