

Power to tax

A] In order to secure justice, liberty and equality to its citizens and to promote fraternity among them [Preamble], Constitution of India empowers Union and States to levy taxes. This power, however, is not absolute and is subject to several restrictions embodied in the Constitution itself. Article 265 cogently briefs the restrictions in following simple words: No tax shall be levied or collected except by authority of law.

B] A tax could only be imposed by a law which is in conformity to the criteria laid down in the relevant Articles of the Constitutions [Singh M.P., Shukla's Constitution of India, Eastern Book Centre, 2010 p.778]. These are:

- a) the law should be one within the legislative competence of the legislature, being covered by the Legislative List assigned to it by the Constitution,
- b) the law should not be one prohibited by any particular provision of the Constitution, for example, Articles 276, 285, 286, 289, etc.,
- c) the law or the relevant portion thereof should not be void under Article 13, i.e., in conflict with the fundamental rights incorporated in Part III of the Constitution, and
- d) the law should not violate any other constitutional limitations such as Article 301 and 304.

C] Article 245 specifies the territories of Union and States with respect to their law making power. Union may make laws for the whole or any part of the territory of India whereas a State may make laws for the whole of any part of the State.

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D] Article 246 specifies the subject matters on which Union and States may make law. The subject matters have been enlisted in Schedule VII of the Constitution and are arranged in three lists. List I commonly referred to as Union List enumerates the subject matters on which Union is empowered to make laws. List II commonly referred to as State List enumerates the subject matters on which States are empowered to make laws. List III commonly referred to as Concurrent List enumerates the subject matters on which both Union and States are empowered to make laws.

E] Article 246A specifies the law making power of Union and States with respect to goods and services tax. One should note that laws made under Article 246A may not be constrained by Article 246 which specifies the subject matters of legislation vide Schedule VII or Article 254 which resolves the conflict of laws made by Union or State over the subject matters specified in Schedule VII.

F] State legislature has also been empowered to authorise local bodies such as Panchayat and Municipality to tax and appropriate such taxes. Article 243-H says that the Legislature of a state may by law authorise a Panchayat to levy, collect and appropriate such taxes, duties tolls and fees in accordance with such procedure and subject to such limits. Article 243-X says that the Legislature of a state may by law authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits.

G] Distribution of legislative powers between Union and States on taxing matters inter alia reflects the preponderance of Union over States even after introduction of Article 246A for Union has exclusive power of taxation on supply of goods and services

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taking place in the course of inter-state trade or commerce. Again, Entry 97 of List I gives a sweeping power to Union to legislate on any subject matter not enumerated in List II and III [Union of India v. H.S.Dhillon AIR 1972 SC 1061]. Besides this, Article 248 gives exclusive power to Union to legislate over residuary matters except on the matter of taxation of goods and services tax under Article 246A. Article 249 empowers the Union to assume legislative authority over a subject in List II in the national interest provided the Council of States resolves for a year by 2/3rd majority in this regard. Article 250 declares that during Proclamation of Emergency the Union have power to make laws with respect to matters in the State List. Article 251 clarifies that Article 249 and 250 does not take away the legislative competence of the state on the matters of List II or state goods and service tax but in case of any inconsistency between the laws made by the Union and the State during the operational period of the resolution or proclamation under these Articles the laws made by the Union shall prevail and the laws made by the State shall be inoperative. Article 252 empowers the Union to legislate over the subject matters in the State List if two or more states consent in this regard through a resolution to this effect by all the Houses of legislatures in those states. Non-consenting states may also adopt such legislation afterwards by ratification through a resolution to this effect by their Houses of legislatures. Such enactments may be amended or repealed by the Union only, through the consent of states concerned, however. Article 253 gives overriding power to Union to make any law for giving effect to international agreements and judgments. On the matters of Concurrent List Article 254 gives prominence to the law made by the Union over that of the State.

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H] The reason for such preponderance is the colonial legacy as is evident from the fact that the lists under the seventh schedule of the Constitution are replica of the Government of India Act 1935 wherein the Union government of British in India tilted the balance of fiscal power towards itself. The British Government in India knew that if the states became self sufficient then their freedom can not be contained. The Free India took the same presumption, though in a different perspective, that fiscal autonomy of State may engender balkanisation of Indian Territory. Needless to say that such presumption overloaded the citizens of India and led to their exploitation by the Union as well as States. The suffering gets multiplied when the Union and States starts encroaching upon each others power and through colourful legislation both of them impose tax on the same subject matter. Doctrine of pith and substance has been pronounced by courts to resolve such confusions but it has neither acted as deterrent for the legislature nor made the executive hesitant. Promulgation of goods and services tax, however, has reduced this suffering to the extent of elimination of same goods or services being taxed earlier in full by Union as well as States.

I] Apart from the territorial and subjective demarcation between Union and States with respect to their taxing powers, mentioned above, and the delineated power to tax on supply of goods and services certain restrictive stipulations have been provided on them whereby they are not allowed to encroach upon each others power.

J] Article 276 empowers state legislature to tax on profession, trades, callings and employment up to Rs.2500 per annum even though taxing power on income is prima facie vested with the

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Union. This Article, however, does not limit in any way the power of the Union to tax income.

K] Article 285 and 289 mutually exempts the property of Union and State from being taxed by each other. Article 285 says that the property of the Union shall be exempt from all taxes imposed by a state or by any authority within a state. Article 289 says that the property and income of a state shall be exempt from Union taxation. Both these Articles, however, are concerned with taxes directly either on income or property and not with taxes which may indirectly affect income or property [Re Sea Custom Act S.20(2) AIR 1963 SC 1760].

L] By Article 286 a state is restricted to impose tax on the supply of goods and services taking place outside the state or taking place in the course of import or export.

M] By Article 287 a state is restricted to impose tax on electricity consumed by or sold to the Union or its railways.

N] By Article 288 a state is restricted to impose tax in respect of any water or electricity stored, generated, consumed, distributed, or sold by any authority established by the Union for regulating or developing any inter-state river or river-valley.

O] Article 301 gives freedom of trade, commerce and intercourse throughout the territory of India. The tax laws are not outside the purview of Article 301 [Atiabari Tea Co. v State of Assam AIR 1961 SC 232]; though this stands qualified by the recent judgement of Supreme Court to the extent that it is discriminatory. Article 302 empowers the Union to impose restrictions on such freedom in the public interest but Article 303 restricts the Union and States to make any territorial discrimination or preferential treatment of one state over the

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other except to deal with by the Union a situation of food scarcity. By Article 304 a state may impose tax on goods imported from other states so far it does not discriminate the goods so imported with the goods manufactured or produced in that state and it may impose reasonable restrictions in the public interest provided previous sanction of the Union is obtained.

P] On the expenditure side the lower house (or the House of the People) has been preferred to charge or to appropriate the tax proceeds [Article 114 & 198]. This preference may be for the reason that the state may run its business without any obstruction. Another reason for preference is that directly elected people are assumed to be more responsible and sensitive towards their electorates. But in practice this exclusivity makes the money bill vulnerable to the subjectivity of the majoritarian rule.

Q] None of the above said constitutional limitations, however, makes Union and States fiscally responsible. The plenary power to tax, not being *coterminous* with the power to spend, leads to wastages and corruptions and for the sake of development one has to face ordeals of multiple exploiters in place of one monarch. Adding to this woe is the point that the protection against imposition and collection of taxes save by authority of law is a legal right, not a fundamental right [Ramjilal v. The Income Tax Officer, Mohindergarh AIR 1951 SC 97].

R] Moreover, in a recent judgement [Jindal Stainless Ltd. V State of Haryana AIR 2016 SC 5617 = (2017) 12 SCC 1] the Supreme Court has diluted the protection against taxes by upholding that power of levying tax whether high or low is an attribute of sovereignty subject only to constitutional safeguards. It is, however, respectfully submitted that the court might have got the leaning of sovereignty from the Cooley's definition – 'taxes are

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the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs’ – but it preferred public needs than the proportional contributions which may lead to injustice with the contributors especially when the masses are wooed through freebies.

S] In forming the presumption that levy of tax is in the public interest [AIR 2016 SC 5617 p.6048], the court might have also relied on the argument proffered by Chief Justice Marshall in M’Culloch v State of Maryland 17 US 316 in the year 1819 that in imposing a tax the legislature acts upon its constituents and it is, in general, a sufficient guard against erroneous and oppressive taxation [AIR 2016 SC 5617 p. 6036]. But it is respectfully submitted that the social ethos of 1819 cannot be compared with the ethos of 2016 where the synergetic power and aspirations of 545 far exceeds the power of their electorates because of the executives emanating from the legislatures with regular history of absence of a strong opposition and presence of majoritarian rule [The Power to Tax: Analytic Foundations of a Fiscal Constitution by Geoffrey Brennan and James M. Buchanan, 1980].

T] In AIR 2016 SC 5617 though the court removed the judicially imposed exception to compensatory tax from the freedom of trade, commerce and intercourse under Article 301 but through obiter it established that since it is difficult to trail the tax collected to its spending over the avowed purposes the state is free to spend the tax as per the priorities of the legislatures-cum-executives. It is, however, respectfully submitted that proliferation of wastages as well as corruption is due to this lack of trail. If a citizen who is being taxed may not even know that

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how his contribution has been utilised then of what use is the right to information which has been held as sacrosanct under the constitution [People’s Union for Civil Liberties v Union of India AIR 2004 SC 1442]. And in a state where technology has enabled to trail an individual voter to the extent of finger print and retina then why the organs of the state hesitate to be trailed.

U] As an epilogue it will not be out of place to repeat the beautiful words of Justice V.R. Krishna Iyer [as mentioned in Commentary on the Right to Information Act by Dr. J.N. Barowala, Fourth Edition, Universal Law Publishing p.19] “... some things require to be done immediately so that the credibility of the Indian community in the changed ethos of open Government may be created”.