Freedom of Trade and Legislative Powers of Union and States

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ABSTRACT

Freedom of trade is one of the significant measures that help in strengthening a Federal State. In a country like India where geographical and language dissimilarity is existed it is very important to find the way that can unite all peoples of all regions into one nation under the same flag. The concept freedom of trade is very old and found in most of the Federal countries. India has also adopted the idea and provided constitutional provisions to implement it. In the present research paper the implementation of the idea through the constitutional provisions and provisions relating to the power of the parliament and the State Legislatures concerning the imposition of taxes are discussed to find the actual situation.

1. INTRODUCTION

The framers of the Constitution of India visualized for India a federal Constitution providing for a strong Central Government, strong enough not only to take care of its own responsibilities but to guide and coordinate the activities of the States also. The framers of the Constitution, on the one hand makes a clear demarcation of legislative subjects between the Union and the States adhering to the basic federal principle, on the other hand, it contains a large Concurrent List, embodying a typical Indian set-up, in which, ultimately, the balance tilts in favour of the Union. From a strong Centre, the framers did not mean weak States, which were allowed, in normal times, to act independently in designated and by no means insignificant areas of government. In the United States of America and in Australia the Constitution contains only the powers of the Federal Legislature. The remaining powers vested in the States. In the Constitution of Canada there are two Lists, the Union List and the State List. The Government of the India Act, 1935 classified all possible topics relating to legislation in three Lists. The Constitution of India has in this regard also, as in many others, adopted the fold List system of the Government of India Act, 1935.

List I of the Seventh Schedule called the Union List contains 97 Entries. These entries include matters of national importance. List II of the Seventh Schedule called the State List contains 61 entries, the List comprises of subjects, over which the State has exclusive power to legislate. List III of the Seventh Schedule is the Concurrent List, it comprises of 52 entries. Both Union and the States are competent to make laws in relation to these entries.

In the present paper, an attempt has been made to highlight the limitations on the legislative powers of the Parliament and State Legislature by the Freedom of Trade Clause and analysed the distribution of taxing powers and examines how far freedom of inter-State trade is burdened by taxing laws. It throws light on the conflict between the two lists and how judicial mind has responded to solve it.

2. LEGISLATIVE POWERS OF PARLIAMENT

The Constitution of India in Article 245(1) confers powers upon the Parliament of India to legislate for the whole or any part of the territory of India. Article 246(1) confers exclusive power upon Parliament to legislate with respect to matters enumerated in List I of Seventh Schedule. Further, Parliament, under Article 246(2) has also concurrent power with respect to any of the matters enumerated is List III. The Article 248 provides that Parliament has exclusive power to make law with respect to any matter not enumerated in the Concurrent List or State List. Article 249 enables Parliament to legislate with respect to a matter in the State List concerning goods and service, if the Rajya Sabha by a two-thirds of its majority declared by resolution and it is necessary in the national interest.

The life of such a legislation cannot exceed one and a half years. Parliament may also legislates with respect to any matter in the State List if a Proclamation of Emergency is in operation. Parliament may also legislate for two or more States by consent with respect to a matter in the State List. Any other State can also adopt such a legislation. Parliament can also legislates in the State field to the extent necessary for giving effect to an international agreement. In order to examine how far the freedom of trade affects the legislative powers of Parliament, the Investigator consider some of the important powers conferred by the Constitution in the Seventh Schedule, List I and List III.

3. INTER-STATE TRADE AND COMMERCE

Entry 42, List I authorizes Parliament to legislate with respect to inter-State trade and commerce. In Article 269(3) Parliament is empowered to formulate principles for determining when a sale or purchase of goods takes place
in the course of inter-State trade or commerce. Though this Article mainly deals with taxation it seems that the principle formulated in this Article would be relevant in determining the scope of the inter-State trade power.

Parliament, under this entry, may regulate inter-State trade in dangerous things or prohibit an inter-State trade agency which promotes immorality or dishonesty or spreads any evil or harm among the people of other States.

Parliament, under entry 42 List I, restricts the free flow of trade, perhaps, the Act would have to satisfy the condition of public interest laid down in Article 302, however a law passed under this entry is a valid law and is in the public interest then freedom of trade provided under Article 301 will not infringed.

This power of Parliament is also restricted by Article 303(1). It prohibits preferential or discriminatory laws. Such laws would not be validated on the ground of public interest. The only exception is that Parliament can discriminate in dealing with a scarcity of goods. It is the duty of the Judiciary to apply Article 303(1) and examine whether the power exercised under entry 42, List I, is in fact discriminatory or not; if it were satisfied that the Parliamentary legislation came with the mischief of Article 303(1), then such a law would be declared unconstitutional.

4. LEGISLATIVE POWERS OF STATES ON FREEDOM OF TRADE

Article 245(1) in Part XI of the Constitution of India provides that the Legislature of a State shall make laws for the whole or any part of the State. The legislative power of the State Legislature is thus confined to the territory of the State. The distribution of the head provided in the Seventh Schedule of the Constitution of India is subject to Article 246. Article 246 provides the manner in which the legislative heads may be distributed among Parliament and the State Legislature. Article 246(3) provides that the State Legislature has exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule. It may be noted that the State Legislature in Article 246(2) is given concurrent power over subject matters provided in List III.

Article 245, read with Article 246 along with Seventh Schedule to the Constitution of India, begins with the worlds “Subject to the provisions of this Constitution, which means that the powers granted to the Legislatures in those Articles are not sovereign powers”. Those powers are subject to the limitations provided by the Constitution. Article 301 begins with the words “Subject to the others provisions of this Part which means that this Article constitute a limitations on the legislative power of the State Legislature”. The question arises, which power of the State Legislature attracts the limitation in Article 301 is effective. The above question may be examined with reference to some of the legislative heads in List II and List III of the Seventh Schedule.

5. TRADE AND COMMERCE

Entry 26 in List II, read with Article 246(3), confers exclusive power on the State Legislature in respect of trade and commerce within the State, Subject to the provisions of entry 33 of List III. Under the entry 26 in List II, the State Legislature can:-

1) Provide for the fixation of a minimum price payable to cultivators of jute, authorize the Government to control stocking of raw jute and make it compulsory to enter into contracts for the sale of raw jute only through a Jute Board constituted under the Act. Such legislation is not ultra virus even though it may have some indirect effect upon export of raw jute in certain cases.

2) Regulate the hours, place, date and manner of sale of any particular commodity or commodities. It could, for example, state that the sale of explosive or other dangerous substances should only be in selected areas, at specified times or on specified days when extra precautions or the general safety of the public and those directly concerned could be arranged for. In the same way, it could say that there shall be no sales on a particular day or on days of religious festivals and so forth.

Provisions of Bihar Agricultural Produce Markets Act, 1960, regulating purchases and sale of products of rice milling Industry are not repugnant to Rice Milling Industry (Regulations) Act, 1958, as that Act does not deal with regulations of purchase and sale of products of such mills. The State legislation is covered by entries 26 and 28 of List II.

6. RESTRICTION ON THE POWER OF THE STATE TO IMPOSE TAX ON THE SALE OR PURCHASE OF GOODS

The power to impose taxes on sale or purchase of goods other than newspapers belongs to the State. Perhaps, taxes on imports and exports and inter-State trade and commerce and taxes on sale or purchase of goods, other than news papers, in course of inter-State trade or commerce are exclusive Union subjects. The object of Article 286, under which the State’s power to levy sales tax., has been subjected to a few restrictions, is to ensure that sales taxes imposed by the States do not interfere with import and export and inter-State trade and commerce which are matters of national importance.447 It is to regulate taxation of inter-State sale or purchase lest an indiscriminate State taxation may hamper free flow of trade and commerce from one State to another and thus jeopardise the economic unity of the country. Article 286, hence, with a view to keep inter-State and international trade and commerce and trade the goods and of special importance, free from haphazard State taxation, subjects the States, power to levy sales tax to the following restrictions:

a) No State can tax a sale or purchase taking place outside the State.

b) No State can tax a sale or purchase taking place in the course of inter-State trade and commerce.

c) No State can tax a sale or purchase taking place in the course of import and export.

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4 R.M.D. Chamarbaugwalla v. Union of India, AIR 1957 SC 628.

5 Article 286(1)(a)
d) Restrictions could be imposed by Parliament on the powers of State Legislature with respect to the levy of tax on sale or purchase of goods within the State where the goods are declared by Parliament, to be of special importance in inter-State trade or commerce.6

7. CONCLUSION

It is seen from the foregoing discussion that there is no doubt on the capacity of a State to tax, together with its own products, goods produced in other States, when brought into it for sale or consumption. When the inter-State transit is over and they have become part of the mass of property within the State, any goods may be taxed, no matter from where they have come. But they must be taxed alike with all other such goods in the State. The tax is general, and laid equally on all goods of the kind to be taxed, whether their State of origin be the taxing State or another.

It is seen that excise duty has nothing to do with transaction or movement of goods therefore excise duty does not violate freedom of trade. While Central sales tax is imposed on inter-State transaction and movement of goods and a State sales tax is imposed on the transaction of goods and on their movement within the State, normally both the taxes directly impede the freedom of inter-State as well as intra-State and offend against Article 301. Perhaps, Indian judiciary adopts a mere tolerant attitude towards a sale tax for the protection of government revenue.

It is seen that the levy of tax at every stage in the series of the sales of goods made with the provision of credit of input tax paid at the point of the previous purchases by a registered dealer to the other was the main phenomenon of the VAT system. Perhaps, VAT imposed on the transaction or movements of goods generally impaired freedom of trade under Article 301 and the consumers are to bear the burden of heavy price rise owing to such multiple levy of VAT, beset with, other allied elements.

It is seen that the GST literature indicates that a series of Central and State laws will be unified and designed in a unique way to simplify the existing multiple levy of tax at the Centre and the States level. It is intended to consolidate and to design a single law at the behest of the Centre. The unified Central cum State laws will cover the Central excise duty, additional excise duty, excise duty levied under Medicinal and Toiletries Preparation Act, service tax, additional custom duty commonly known as countervailing duty, (CVD), special additional duty, surcharge and cess at the Centre while value added tax, sale tax, entertainment tax, luxury tax, taxes on lottery, betting and gambling, State cess and surcharges, entry tax not in lieu of octroi at the States level.

6 Article 286(3).