

EY Tax Alert

SC holds amendments to VAT laws post introduction of GST as invalid

Executive summary

This Tax Alert summarizes a recent ruling¹ of the Supreme Court (SC). The issue involved was whether the State Government can amend Value Added Tax (VAT) laws post introduction of Goods and Services Tax (GST).

Amendments were carried out in Telangana, Maharashtra and Gujarat VAT Act post 1 July 2017. Earlier, Telangana² and Gujarat High Court (HC)³ had struck down the amendment on the ground that the existing law could only be amended to make it consistent with the changes made to the Constitution and State did not have the legislative competence post 1 July 2017. However, Bombay HC⁴ had upheld the validity of the amendment carried out in the Maharashtra VAT Act.

SC observed that Section 19 of the Constitution (101st Amendment) Act, 2016 is an incidental and transitory provision of the Constitution which has a limited life and was enacted by Parliament using its constituent power. It has the same force as a constitutional amendment, which is more than a mere Parliamentary enactment.

Further, there is no limitation on the power to amend, under Section 19. This power is not limited to bringing the existing laws into conformity with the amended Constitution. However, it is circumscribed by the time limit of one year, or until the GST law is enacted.

W.r.t situation where the Ordinance was brought before 1 July 2017, but it became Act post 1 July 2017, SC held that the State legislature no longer had the legislative competence on the date when it was actually approved as an amendment.

Accordingly, SC upheld the Telangana and Gujarat HC ruling and set aside the Bombay HC ruling.

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¹ 2023-TIOL-147-SC-GST

² 2022-VIL-461-TEL

³ 2020-VIL-182-GUJ

⁴ 2022-VIL-477-BOM

Background

- ▶ Section 19 of the Constitution (101st Amendment) Act, 2016 (CAA) provides that the provision of existing indirect tax laws, which are inconsistent with the amended Constitution shall continue to be in force until amended or repealed by a competent Legislature or until expiration of one year from such commencement, whichever is earlier.
- ▶ Amendments were carried out under Telangana, Maharashtra and Gujarat Value Added Tax (VAT) Act after 1 July 2017 i.e., after State Goods and Services Tax Act and Central Goods and Services Tax Act had come into force.
- ▶ Telangana VAT amendment was through an Ordinance on 17 June 2017, i.e., 13 days before the time granted by CAA. The ordinance sought to extend the period of limitation and permitted to re-open assessments. This ordinance, continued till the State Legislature enacted it. The Governor then assented to the law, and it came into force on 2 December 2017.
- ▶ Provisions relating to pre-deposit brought through Maharashtra VAT Amendment Act w.e.f. 15 April 2017 was read down by the Division Bench of Bombay HC. That position was sought to be reversed, through insertion of Explanation in Amendment Act 2019 retrospectively from 15 April 2017.
- ▶ Section 84A was introduced in the Gujarat Value Added Tax Act, 2003 vide GVAT (Amendment) Act, 2018, gazetted on 6 April 2018 but with retrospective effect from 1 April 2006. The effect of this amendment was to exclude the period spent during the pendency of any appeal or revision before the appellate authority or High Court, for the purpose of revision or reopening which in the interest of the revenue, was necessary to reopen.
- ▶ Telangana and Gujarat High court (HC) struck down the amendments on the ground that the states lacked legislative competence post 1 July 2017.
- ▶ Additionally, Telangana HC held that the State had a limited scope to amend its VAT Act, in terms of Section 19 of CAA only to bring conformity with the amended constitution.
- ▶ However, Bombay HC had upheld the validity of the amendment carried out in Maharashtra VAT Act.
- ▶ Bombay HC observed that post GST regime, the Centre had the power to levy tax on inter-state 'sale' of goods and the States had the power to levy tax on intra-state 'sale' of goods. In view of this finding, the Court held that the said amendments in Maharashtra VAT laws were very well within the ambit of Article 246A.

⁵ (1982) 2 SCR 272

⁶ 1964(8) SCR 217

Department's contentions

- ▶ The impugned judgments of Telangana and Gujarat HC are erroneous. HC interpretation that the expression "amend" only conferred a constricted power to bring the existing enactment in line with the amendments of the constitution, is without basis.
- ▶ Reliance was placed on SC ruling in case of A.K Roy vs UOI⁵ wherein it was held that there is no difference between the effect of an ordinance and that of a law enacted by the State legislature. The distinction lies only in the procedure adopted rather than the content or the effects of law.

Although, the ordinance was approved and brought in force on 2 December 2017, the State power to legislate has to be viewed on the date of issuance of the ordinance i.e., 17 June 2017.

- ▶ Further, the existence of a power to legislate was preserved by Section 19 of CAA. The purpose of Section 19 was to preserve both the existing law and also permit the State legislature and Parliament to amend and repeal the existing law.

The powers of competent legislature were untrammelled. The power was traceable to the amended provision of the Constitution irrespective of the fact that the relevant entries in the State list had been altered.

- ▶ Further the amendment to Section 26 of Maharashtra VAT Act, 2002 requiring a pre-deposit is not inconsistent with the Amendment. It is procedural in nature and no vested right of the assessee was taken away.

It is also not in dispute that the same is in respect of past levies prior to the introduction of Goods and Services Tax (GST) w.e.f. 1 July 2017 and therefore, even otherwise saved by Section 174 of the Maharashtra GST Act.

- ▶ State of Gujarat argued that this court in case of A. Hajee Abdul Shakoor & Co vs State of Madras⁶ have recognized the powers of states to retrospectively validate assessments even if the earlier Act had failed for the want of Presidential assent. Reliance was also placed on several other ruling⁷ where the courts have upheld the retrospective actions of a State.

Taxpayer's contentions

- ▶ The continuance of the inconsistent existing law is solely for the purpose of making them consistent, through amendments, with the amended architecture of the Constitution.
- ▶ Inference can be drawn from Article 243ZF and Article 243ZT of the Constitution which has been

⁷ 1963(2) SCR 747; 1996 Supp (3) SCR 98

couched in a manner identical to Section 19 of the CAA. The language of the aforesaid Articles and Section 19 are near *pari materia*.

Supreme court in case of *Sundergarh Zilla Adivasi Advocates Association Vs. State of Odisha*⁸ had interpreted Article 243ZF and held that the purpose of continuing with the existing law even though inconsistent with Part IX-A, was to make them consistent through necessary amendments.

Placing reliance on the above ruling makes it clear that the amending power under Section 19 is limited to making the existing inconsistent legislation consistent with the amendment.

- ▶ Similar transitional provision was introduced in Section 143(2) of the Government of India Act 1935. The provision introduced the concept of 'provisional legislation'.

Even when the Government of India Act 1935 expressly granted the power to continue the levy, the Constitution Bench of this Court in case of *Rama Krishna Ramanath*⁹ held that the power of the Provincial Legislature is very limited and cannot be used to change the incidence.

In the present case, there is no power to continue the levy and therefore, the powers under Section 19 should be interpreted in a very narrow way, i.e., limited to bringing the legislation in line with the Constitution.

- ▶ The term "amend" in Section 19 of the CAA should not be interpreted textually but rather in a contextual manner. Interpreting it contextually makes it clear that Section 19 contemplates the eventual repeal and removal of inconsistent laws from the statute books.
- ▶ Article 279A(6) specifically provides for the need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services.

The intent of harmony between the Centre and the State cannot be achieved if the power of amendment under Section 19 is used to continue inconsistent laws.

- ▶ VAT legislation cannot find its source of power in Article 246A because it requires simultaneous levy by both the State and the Center, and it contemplates the power to legislate GST which is a different type of tax.
- ▶ The intention behind Section 19 was to stipulate a timeframe for subsuming erstwhile indirect taxes and for the States to amend or repeal their laws to pave the way for the imposition of the State Goods and Services Tax (SGST). It was not intended to allow States to freely amend their legislation until the GST laws were enforced.

The States did not have the competence to freely legislate on goods other than those mentioned in Entry 54 of List II of the Constitution. The State Legislature cannot use a transitional provision to expand its legislative competence. It only had the power to amend existing laws to bring them in conformity with the new contours of Entry 54.

- ▶ Article 246A of the Constitution embodies the principle of simultaneous levy by both Parliament and the State Legislature.

The State Legislature can only exercise its taxing powers with respect to goods and services either under Article 246A, which is to be exercised along with the Parliament, or under Article 246(3) read with amended Entry 54 only with respect to the six items mentioned therein.

- ▶ Further, Bombay HC erroneously upheld the State's power to legislate Maharashtra VAT Act.

HC failed to appreciate that Article 246A of the Constitution has no relation whatsoever to the earlier sales tax laws as it specifically deals with GST which was defined under the Constitution to mean a tax on the "supply of goods and services"

- ▶ HC did not consider the fact that Article 367 of the Constitution of India makes the provisions of the General Clauses Act, 1897 applicable to the Constitution.

As regards to CAA, the power under the old Article 246 has been abridged by simultaneously amending the fields of legislation in Entry-54. In this case, there is no question of any power to legislate in respect of rest of the goods, other than the 6 presently covered by Entry-54, which survives post-amendment, even by applying the provisions of the General Clauses Act, 1897.

Supreme Court's Ruling

- ▶ Section 19 is a transitional provision and seeks to achieve three objectives. The first is to preserve the existing state and central indirect tax regime. Second, to authorize the competent legislature to amend the existing laws and third, to repeal such laws.

It was enacted in exercise of constituent power of Parliament. The mere circumstance that Section 19 of the CAA does not get added to the Constitution does not make any difference.

Section 19 has the same effects as Articles 243ZF and Articles 243ZT of the Constitution.

Apart from Section 19, there is Section 20 of the CAA which existed for a period of two years and enabled the President to issue orders for the removal of difficulties experienced in the course of implementing the amendments to the Constitution.

⁸ (2013) 6 SCR 420

⁹ 1962 Suppl. (3) SCR 70

If indeed those parts of the amendments were not enacted in the exercise of constituent power but mere legislative power, there would be no legitimacy of the power conferred upon the President under Section 20.

On an overall interpretation of the provision of CAA, SC held that Section 19 and 20 constitutes an incidental and transitory provision which has a limited life.

- ▶ Distinguishing various rulings¹⁰ basis the complexity and the nature one has to deal with in the present case, SC observed that the CAA made significant changes to the indirect taxation regime and the constitutional compact itself.

The new concept of sourcing common or concurrent powers of both State and Union was brought through Article 246A of the Constitution. However, the power to make laws could not have been sourced only from Article 246A.

Article 246A comprehends the power to impose tax on goods and services, however its operationalization could take place only through the formulation and recommendation of principles by the GST council which occurred later.

The only harmonious manner of sourcing the power to amend or repeal existing laws in relation to indirect taxation is to Section 19 of CAA and Article 246A of the Constitution. Section 19 enables existing law to continue for a limited period of time, while Article 246A creates a new concurrent power for the Centre and the States to legislate on indirect taxes.

- ▶ The term “amend” takes within its sweep the idea of correcting something, adding something, deleting, or substituting something or doing something to an existing document, enactment, or rule to make it better.

There are no limitations under Section 19 read together with Article 246A. The provision constituted the expression of the sovereign legislative power, available to both Parliament and State legislatures, to make necessary changes through amendment to the existing laws.

This power is not limited to bringing the existing laws into conformity with the amended Constitution. However, it is circumscribed by the time limit of one year, or until the new GST law is enacted.

- ▶ SC then analyzed the validity and legal effects of an ordinance by placing reliance on various judgements¹¹.
- ▶ The state of Telangana had argued that on the date when ordinance was issued the state was in possession of legislative competence.

The argument is not tenable, because the ordinance’s validity and effect might not have been suspect on the date of its promulgation; yet, on the date when it was approved and given shape as an amendment, the State legislature had ceased to possess the power. The SGST and CGST Act had come into force by then, and Section 19 of the CAA, which gave the state legislature the power to make laws on indirect taxes during the transitional period, had ceased to be effective.

- ▶ The amendments made in Gujarat VAT Act with retrospective effect after 1 July 2017 are void and without legislative competence.
- ▶ SC concluded that:
 - ▶ Section 19 of CAA and Article 246A enacted in exercise of constituent power, formed part of the transitional arrangement for the limited duration of its operation, and had the effect of continuing the operation of inconsistent laws for the period specified by it and, by virtue of its operation, allowed state legislatures and Parliament to amend or repeal such existing laws.
 - ▶ Since other provisions of CAA, had the effect of deleting heads of legislation, from List I and List II, both Section 19 and Article 246A reflected the constituent expression that existing laws would continue and could be amended. The source or fields of legislation, to the extent they were deleted from the two lists, for a brief while, were contained in Section 19. As a result, there were no limitations on the power to amend.
 - ▶ The amendments in question, made to the Telangana VAT Act, and the Gujarat VAT Act, after 1 July 2017 were correctly held void, for want of legislative competence, by the Telangana and Gujarat High Court. The judgment of the Bombay High Court is held to be in error and is set aside and the amendment to the Maharashtra Act, to the extent it required pre-deposit is held void.

¹⁰ 30 (2010) 6 SCR 29, 2015 (3) SCR 997

¹¹ 1982(1) SCR 947; 9 (2017) 5 SCR 160; 1964(8) SCR 217

Comments

- a. Taxpayers may re-evaluate the limitation period and timelines for revision and reopening of assessments under Telangana and Gujarat VAT laws in view of the SC ruling.
- b. Since the insertion of Explanation in relation to pre-deposit is rendered invalid by the Apex Court, the taxpayers in Maharashtra can reassess the requirement of pre-deposit in light of earlier Bombay HC ruling which read down the provisions.
- c. The businesses should also analyse the validity of amendments made in other State VAT and Entry Tax Act post 1 July 2017.
- d. It is relevant to note that Kerala HC had also held that amendment in Kerala VAT Act cannot be made post introduction of GST. [2022-VIL-595-KER]

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon
Temple, Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

Bengaluru

12th & 13th floor
"UB City", Canberra Block
No. 24, Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground Floor, 'A' wing
Divyasree Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru - 560 025
Tel: + 91 80 6727 5000

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

Tidel Park, 6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Ground Floor
67, Institutional Area
Sector 44, Gurugram - 122 003
Haryana
Tel: +91 124 443 4000

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jamshedpur

1st Floor, Fairdeal Complex
Holding No. 7, SB Shop Area
Bistupur, Jamshedpur - 831 001
East Singhbhum Jharkhand
Tel: + 91 657 663 1000

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

Pune

C-401, 4th floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

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