

Goods and Services Taxes: The GST Council and the Public Interests

SYNOPSIS

Article 279A of the Constitution of India as amended by the Constitution (101st Amendment) Act, 2016 provides for the constitution of a "Goods and Services Tax Council". It is expected that Parliament and the State Legislatures would enact central and state statutes to levy central, state and integrated goods and services taxes in accordance with the "recommendations" to be made by the Council. The statutes are expected to provide for the repeal of many statutes levying CENVAT, State VATs and some other indirect taxes which would be "subsumed" in the new levies. The Council is constrained by the constitutional norm of "harmony" in recommending the "structure" of the new levies and by the goal of evolution of a "harmonized" *national* market. We examine whether the constitution, mandate and procedure of the GST Council as envisaged in Article 279A would be conducive to 'the State' being able to serve the public interests.

HARMONY AS THE NORM TO GUIDE THE GST COUNCIL

Unlike the establishment of a Union-States Council by invoking Article 263 of the Constitution of India, the constitution of the Goods and Services Tax Council (GST Council) by invoking Article 279A is not required to be preceded by a determination by the President that such constitution would serve the public interests. This is presumably since the focus of the deliberations in the GST Council would be limited to "goods and services tax" as a *specific "matter"* of legislative competence referred to in Chapter I of Part XI of the Constitution on "*legislative relations*" between the principal constituents of the Union of States that is designated "India". It is not to extend to a *general "subject"* of social relevance/concern implied by and referred to in Article 263 in Chapter II of that Part on "*administrative relations*" between such principal constituents. A *plan* of lawmaking has however to rely on a "road-map" which would guide the lawmakers in collectively traversing the *political and governance spaces* intervening between every relevant subject of social concern and every relevant matter of legislative competence.

In formulating its recommendations, the GST Council would have to note that lawmaking by Parliament and every State Legislature has to comply *inter alia*, with the following stipulation made by the People of India in Article 37 of the Constitution so as to ensure that the institution of 'the State' recognized by them vide Articles 12 (and 36), discharges its duty of applying the Principles referred to therein:

"37. Application of the principles contained in this Part.—The provisions contained in this Part shall not be enforceable by any court, but the principles (*Directive Principles of State Policy*) therein laid down are nevertheless fundamental in the *governance* of the country and it shall be the *duty* of the State to apply these principles in *making laws*". (Italics and matter in brackets added)

The *Directive Principles of State Policy* specify many norms for 'the State' to adhere to and many goals to strive for in serving the interests of the People (i.e., *the public interests*). They include the norms of (securing and protecting) a "*just*" *social order* and of (allocation of the resources of the community of Indians *optimally* so as to "best" subserve) the *common good* referred to in Articles 38 and 39 as extracted below:

"38. State to secure a social order for the promotion of welfare of the people.—(1)
The State shall strive to promote the *welfare* of the people by securing and protecting as effectively as it may a *social order* in which *justice*, social, economic and political, shall inform all the *institutions* of the *national life*.
(2)...(italics and emphasis added)

"39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—
(a)...
(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve *the common good*;
(c) that the operation of the economic system does not result in the *concentration of wealth and means of production to the common detriment*
(d)...
(e)...
(f)..."(italics added)"

The specifications also stipulate goals for 'the State' to strive for by overcoming uncertainties. They include the goals of *promoting welfare* and *preventing concentration of the wealth of the nation to the common detriment*. In what follows we assume that if unrevealed monetary values of *incomes* generated in the economy create *unaccounted* wealth for specific individuals (whether citizens or aliens) within or outside India, such creation leads to concentration of the *wealth of the nation* to the common detriment.

It may be seen from Article 38 that the most critical provision enacted in the Constitution relates to "*institutions*". The provision is consistent with the ethos based on the concept of "*Dharma*" well-recognized in India. Dharma is expected to guide the conduct of individuals interacting as actors in an institution and as such is relatable to North's "*rules of the game*" which are expected to regulate the "*games*" played by the primitive elements embedded in an institution. It is important however to distinguish between the individuals as actors in an institution and the primitive elements embedded in an institution. Thus individuals interacting as actors in 'the Society', 'the State', 'the Market' and 'the Bureaucracy' may be common to all those institutions. On the other hand the primitive elements embedded in those institutions would differ from institution to institution.

The primitives of the institution of 'the Society' may, subject to the dharma of applicable *morals*, be thought of as *communications* as suggested by Niklas Luhmann. The primitives of the institution of 'the State' may, subject to the dharma of *coordination of policy and action* and of *mutual non-interference between Branches* in accordance with the Constitution, be thought of as legislative, administrative and interpretative *acts* relating to the reformulation (by lawmaking) and implementation of the State Policy (which is evident by an accurate interpretation of the law in force). The primitives of the institution of 'the Market', subject to the dharma of *protection of the privacy of the information* possessed by every market-participant, may be thought of either as the *terms of contracts* negotiated and/or entered into with each other (or avoided) by actual and/or potential market participants, whether or not any such contract is based on *incomplete* information (i.e., subject to *bounded rationality*) or on information *asymmetry*(e.g., subject to *adverse selection* caused by *hidden information* during negotiations or subject to *moral hazard* caused by *hidden action* during subsequent governance); or as the "*types*" and "*signals*", whether or not revealed to each other *truly* by market participants. The primitives of the

institution of 'the Bureaucracy', subject to the dharma of *accountability to the Constitution and functional anonymity*, may be thought of as *decisions* taken (or not taken) accurately (or at all) either by exercising the *mandates to act officially* "in the name of" the relevant Head of the Executive (i.e., the President or a Governor) or by exercising powers within well-defined *territorial or functional jurisdictions to act* in accordance with the provisions of constitutionally valid law in force and with the enduring principles of *administrative law* and of *natural justice*.

Articles 12 and 36 of the Constitution recognize 'the State' as an institution in which Parliament, Government of India, State Legislatures, State Governments and all other entities exercising legal authority are embedded. Institutions, as theorized by Douglass North, help reduce *uncertainty* in life. According to the Preamble to the Constitution to which Article 38 significantly relates, *national life* is the life of individuals who recognize themselves as Indians and live in a *fraternal national community* without jeopardy to the unity and integrity of the *nation* on the one hand and to the dignity of every individual on the other. Many institutions including '*the State*', '*the Market*' and '*the Bureaucracy*' if they are able to function as institutions of national life would have to function *harmoniously* and simultaneously in order that the goal of welfare referred to in Article 38 is promoted by minimizing uncertainty.

If such harmony is prevalent, every entity embedded in each such institution would be able to play its *game* in accordance with the respective rules of the game applicable to the institution without there being any contradiction between multiple rules of the games relating to various institutions which would all have to function *in concert*. If the social order is "just" (that is to say, fair), the People legitimately expect that such harmony in the simultaneous functioning of multiple institutions would prevail without any obvious contrivance. The People have therefore stipulated a duty for the institution of 'the State' to secure and protect such a fair social order *at all times* (and not merely *in transit* when law relating to a specific matter is expected somehow to get amended in multiple steps gradually over a period of time).

In what follows we assume that justice as *fairness* (as envisaged by John Rawls) would prevail in the social order if the revenues accruing from taxes levied on the *incomes* of the individual and corporate suppliers are *commensurate* with the revenues accruing from taxes levied on the flow of the *values of goods and services*. We do so consistent with the portrayal by Richard A. Musgrave of an economy as consisting of the flow of the monetary values of goods and services supplied and the *balancing* reverse flow of the monetary incomes of the suppliers. We note that every supplier and the corresponding recipient of supply subjectively attribute *inherently differing monetary values* to the *same* goods and/or services supplied as functions of the respective information about his/its "*type*" (representing his/its endowments, preferences etc) *to which he/it alone is privy*; and that the better-informed party in any contract would be able to realize an "information rent" which would be a source of additional income to that party. The revealed income of the better-informed party, which would relate to the amount of monetary consideration mutually "agreed to" by the parties and vouched in the supply-voucher or to the unit *prices* vouched therein, would not include the amount of monetary value realized as information-rent.

Article 279A of the Constitution has been inserted by the Constitution (101st Amendment) Act, 2016 neither in chapter I on "*Legislative Relations*" (*where Articles 246A and 252 relevant to the main deliberations in the GST Council find place*), nor in Chapter II on "*Administrative Relations*" of Part XI relating to "*Relations between the Union and the States*", but in Chapter I on "*Finance*" in Part XII relating to "*Finance, Property, Contracts and Suits*".

In reformulating the State Policy (referred to as "**reform**" in short), the Government of India as the "key-stone" authority embedded in 'the State' and responsible for **coordination of policy and action focused on "subjects" of social relevance**, has thus accorded priority to the **distribution** (through an instrument designated "**apportionment**", without adequate reference to the **accountability requirements** stipulated in Articles 266 and 283 in Part XII and to the provisions as to **legislative competence** made in Article 246A in Part XI) of the proceeds of various goods and services taxes levied on **values added** (i.e., payable by availing "**input**" **GST credit**)/ paid/collected/ recovered respectively to the Union and every State. It has not accorded priority to the **mode of levy** of those taxes- including a **procedure** which could, *similar to procedures in civil and criminal proceedings* in courts in every State, be applicable **concurrently** for the administration of, and compliance with, the various central and state GST statutes- in accordance with Part XI. It avoids the possibility of building on the **central-cum-state composite legal jurisdictions of 'the Bureaucracy'** which have been in force for six decades and have been well-understood as instruments of 'the State' for **coordination of policy and action** by market-participants. Subject to restrictions on the legislative competences of the States (*though not including any restriction as to "floor" rates of SGST*) in the amended Article 286, the inserted Article 279A provides as under:

"279A. (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called *the Goods and Services Tax Council*.

(2) The Goods and Services Tax Council shall consist of the following members, namely:—

(a) the Union Finance Minister..... Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance..... Member;

(c) the Minister in charge of Finance or Taxation or any other Minister *nominated by each State Government*.....Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall *make recommendations to the Union and the States* on—

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be *subsumed* in the goods and services tax;

(b) the **goods** and **services** that may be subjected to, or exempted from the goods and services tax;

(c) *model* Goods and Services Tax Laws, *principles of levy*, **apportionment** of Goods and Services Tax levied on **supplies** in the course of inter-State trade or commerce under article 269A and the *principles that govern the place of supply*;

(d) the *threshold limit* of **turnover** below which goods and services may be exempted from goods and services tax;

(e) the **rates** including **floor rates** with **bands** of goods and services tax;

(f) any *special rate or rates for a specified period*, to raise additional resources during any natural calamity or disaster;

(g) *special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand*; and

(h) any **other matter** relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend *the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.*

(6) ***While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.***

(7) One-half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the *procedure in the performance of its functions.*

(9) *Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—*

(a) *the vote of the Central Government shall have a weightage of **one third** of the total votes cast, and*

(b) *the votes of all the State Governments taken together shall have a weightage of **two-thirds** of the total votes cast, in that meeting.*

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a Member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute —

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States,

arising out of the recommendations of the Council or implementation thereof.’’.(italics and emphasis added. 'Apportionment' relates to Articles 269A and 270 but not to Article 246A)

According to <https://caclub.in/govt-notifies-constitution-of-gst-council/>, the GST Council has been constituted on 16 September 2016 by invoking Article 279A vide SO 2957 (E) dated 15 September 2016. The formal order constituting the GST Council is not available on line Gazette of India. Earlier the Empowered Committee of State Finance Ministers (ECSFM) had been used by the Hon'ble Minister of Finance as a sounding board to identify strategies for transition to GST regimes. The ECSFM studied *best practices* relating to goods and services taxes levied in many other countries but ***did not bring out any report or Discussion Paper*** which would have improved the following approach in its *First Discussion Paper* which relied on an innovative instrument designated "integrated goods and services tax" (IGST) based on a modified version of the ***Viable Integrated Value Added Tax*** (VIVAT) suggested by Michael Keen and Stephen Smith for adoption in the European Economic Community (EEC) but ***not*** implemented therein:

"The Empowered Committee has accepted the recommendations of the Working Group of concerned officials of Central and State Governments for adoption of IGST model for taxation of inter-State transaction of Goods and Services. The scope of IGST Model is that Centre would levy IGST which would be CGST plus SGST on all inter-State transactions of taxable goods and services with appropriate provision for consignment or stock transfer of goods and services. The inter-State seller will pay IGST on value addition after adjusting available credit of IGST, CGST, and SGST on his purchases. *The Exporting State will transfer to the Centre the credit of*

SGST used in payment of IGST. The Importing dealer will claim credit of IGST while discharging his output tax liability in his own State. *The Centre will transfer to the importing State the credit of IGST used in payment of SGST.* The relevant information will also be submitted to the Central Agency which will act as a clearing house mechanism, verify the claims and inform the respective governments to transfer the funds." (Italics added)

Consequently the ECSFM did not find even an honourable mention in the Statement of Objects and Reasons in support of the Bill which led to the enactment of the Constitution (101st Amendment) Act,2016. Even though reference to "integrated goods and services tax" originally made in the Constitution (122nd Amendment) Bill,2014 was subsequently omitted in enacting the 101st Amendment Act,2016, the "IGST model" referred to by the ECSFM may still underlie the reform expected to follow the 101st Amendment Act,2016. It is however possible for the GST Council to be influenced by the suggestions made by the public finance expert Sijbren Cnossen on the basis of *his study of the best practices in many countries.*

On its constitution subsequent to the enactment of the 101st Amendment Act 2016, the GST Council (which would be taken as the "successor" of ECSFM's strategy) *however became an Entity formally embedded in the institution of 'the State' recognized in Article 36.* As such notwithstanding the lack of necessity for any constitutional requirement of a prior determination by the President that the constitution of the GST Council would serve the public interests, *the Council would have to enable 'the State' to comply with the stipulation made in Article 37 and to serve the public interests-*

(a) by securing and protecting a "*just*" social order through an appropriate "structure" of the levy of multiple taxes *collectively designated in the singular as "goods and services tax"* and by being aided by such supportive recommendations that *the institution of 'the Market'* is able to function, ideally without having to sub-classify business-to-business and business-to-consumer transactions legally as inter-state, intra-state etc with reference to inter-state geographical borders, as an *institution of national life harmoniously* along with other institutions of national life including '*the State*' and '*the Bureaucracy*' for purposes of *promoting welfare* as stipulated in Article 38 by minimizing uncertainties;

(b) by avoiding, as stipulated in Article 39, *concentration of wealth and means of production to the common detriment* by "nudging" the market-participants by appropriate incentives-

(i) to reveal to each other private information as to their "types" *truthfully*; and

(ii) to *avoid mis-invoicing* and to vouch invariably and truthfully the particulars of the supplies made in domestic and international transactions in *supply vouchers recognizable throughout the nation as evidence of supplies made in any State or Union Territory*; and

(c) in the *absence of centralized planning* relying on transparent input-output analytics, to identify and make possible inter-sector linkages, by-

(i) ensuring *optimal allocation of resources* so as to best *subserve the common good* as stipulated in Article 39 in a *decentralized* manner by enabling the institution of 'the Market' to do so through the instrument of unit *prices* of goods and services "discovered" from time to time by balancing supply and demand while continually recognizing the possibilities of inter-sector linkages in the economy for investors to take informed risks and create such linkages; and

(ii) *minimizing*, while duly preserving the *privacy of the information* respectively possessed by every one of them, *price-distortions (not limited to cascading of indirect tax levies alone)* which imply avoidable *transaction costs* and are undue *participation-constraints* for actual and *potential* market-participants to take risks and to make investments.

The norm of harmony implies that GST Council would have to ensure that 'the State' functions without having to "compensate" any Entity embedded in it monetarily at the expense of the People; and that the institution of 'the Bureaucracy' does not function disparately as "central" or "state" institutions or as "direct tax" and "indirect tax" institutions without any coordination.

This paper goes on to examine if there are alternative interpretations of the requirement as to harmony which would constrain the deliberations in the GST Council and if the manner in which the GST Council has been constituted, the mandate entrusted to the Council by the Constitution and the procedure which the Council is expected to follow would be conducive to the institution of 'the State' being able to serve the public interests to the extent described above.

CONTRIVED HARMONY AND THE QUESTION OF COMPENSATION

As regards the "structure" of GST regimes, two other interpretations of the principle of harmony referred to in Article 279A may be thought of. Firstly, it is to be noted that Kelkar Committee (whose report triggered interest in the instruments of "goods and service taxes") observed in its Report of 2004 that the *buoyancy* of the yield of central excise revenues was a low 0.75 only. Among various measures it suggested to preserve ***budget balance*** as stipulated in the law relating to fiscal responsibility and budget management was a "*Grand Bargain*" which the Union may strike with the States to *share* political space so as to enable transition from regimes for the levy of CENVAT (i.e., excise duty and service tax) at the "origins" of production/provision, to the levy of "goods and services taxes" (GST) at "destinations". If the focus is on budget-balance which led the Kelkar Committee to recommend various initiatives including a Grand Bargain by the Union with the States to transit to destination-based GST regimes from the origin-based CENVAT regimes, it may be thought appropriate to interpret a "harmonized structure of GST" as implying a "structure" of GST which *ensures optimality in the rates of GST to serve the public interests and balance in the assignment of GST revenues among the Union and the States to help each of them to avoid worse budget-imbalance*s in transit and thereafter.

However, if the focus was to be limited to improve the buoyancy of CENVAT revenues by "extending" the CENVAT regime *somehow* to the retail suppliers from whom consumers receive their goods and services, a "harmonized structure of GST" may have to be interpreted as a structure in which the ***Harmonized System of Tariff Nomenclature*** stipulated in treaty law for levy of taxes on international trade would be extended to apply for goods supplied within the country also.

Let us consider the above alternative approaches to ascertain a constitutionally valid meaning of "harmony". Section 19 of the Constitution (101st Amendment) Act,2016 provides as under:

"Parliament may, by law, *on the recommendation of the Goods and Services Tax Council*, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for such period which may extend to five years."(italics added)

Neither Article 279A nor any other provision in the Constitution as amended by the 101st Amendment Act however makes any reference to compensation payable by the Union to "loss-making" States in case any such State experiences loss of revenues in the transit from pre-GST regimes to post-GST regimes. If it invokes the legislative competence it gave itself *vide* section 19 of the Constitution (101st Amendment) Act,2016 and proceeds to enact a law to levy cess and

apply the proceeds of the cess to pay compensation to States identified by some criterion as "loss-making", Parliament would fail to comply with Article 245 which provides as under:

"Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." (italics and emphasis added).

This would be so since there is no provision in the Constitution to enact any law as would enable distribution of the proceeds of cess in the manner envisaged in the amended Article 270.

Since the amended Constitution does not confer any specific legislative competence on the matter of providing compensation to "loss-making" States by levying cess, the Parliament would have to exercise the legislative competence vested in it *vide* the "residuary" Entry 97 in the Union List in the Seventh Schedule. The amended Article 248 however reads as under:-

"248. (1) *Subject to Article 246A*, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists." (italics and emphasis added)

The requisite legislative competence of Parliament derived from the residuary Entry 97 is thus subject to Article 246A *which does not provide that Parliament may enact law to provide for payment of transition-to-GST-related compensation payable to States identified as "loss-making" and to levy cess on CGST and IGST tax-bases to be earmarked for expenditure to be incurred by the Government of India on the payment of such compensation.* It follows therefore that Parliament does not have any legislative competence to invoke the residuary Entry 97 in the Union List to enact law to provide for the levy of a cess on CGST and IGST tax-bases to meet the expenditure on account of transition-to-GST-related compensation payable according to that law to such States as are judged to be "loss-making". Thus, Article 246A disables Parliament from enacting law to levy cess earmarked to pay "compensation" to select States by underwriting their losses in transiting to GST Regimes while allowing other States to keep their gains.

Assuming mis-invoicing of domestic and international transactions is effectively prevented by efficient governance, if "harmony" is construed with reference to budget-balances at multiple levels, *compensation implies disharmony.* On the other hand if it is argued that Article 279A envisages merely the extension of the Harmonized System of Tariff Nomenclature and is unrelated to budget-balance considerations, it is to be noted that the Constitution (101st Amendment) Act, 2016 was enacted in pursuance of the Constitution (122nd Amendment) Bill moved in 2014 by the Hon'ble Minister of Finance, Government of India with the following recommendation of the President as stipulated in Article 274:-

"[Copy of letter No. S-31011/07/2014-SO(ST), dated the 18th December, 2014 from Shri Arun Jaitley, Minister of Finance to the Secretary-General, Lok Sabha.]

The President, having been informed of the subject matter(i.e., " *Central and State goods and services tax (to) be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.*") of the proposed Bill, recommends under clauses (1) and (3) of article 117, read with clause (1) of article 274, of the Constitution of India, the introduction of the Constitution (One Hundred and Twenty-second Amendment) Bill,

2014 in Lok Sabha and also the consideration of the Bill." (Matter in brackets in italics and emphasis extracted from the Statement of Objects and Reasons and added for information)

As already noted, Articles 12 and 36 of the Constitution recognize the *institution* of 'the State' in which Parliament (including the President), Government of India, State Governments and other public authorities are embedded. ***Compensation presupposes wrong-doing; and we cannot assume that the President who is embedded in 'the State' did any wrong to any other Entity embedded in 'the State' in recommending the introduction of the 122nd Amendment Bill since he was only acting according to the Constitution which defines the rules of the game for the Entities embedded in the institution of 'the State'.***

At any rate, the goal of a "harmonized national market" referred to in clause (6) of Article 279A, would have to be interpreted only with reference to the institution of 'the Market' having to function as an institution of national life in harmony with other institutions of national life including 'the State' and 'the Bureaucracy'; and as such with reference to ***the Directive Principles of State Policy*** discernible from-

- (i) the provisions of Article 38 which specify the norm of a ***"just" social order*** and stipulate the goal of ***welfare***; and
- (ii) to the provisions of clauses (b) and (c) in Article 39 which specify the norm of optimal allocation of resources to best sub-serve ***the common good*** and stipulate the goal of ***avoidance of concentration of the wealth and means of production to the common detriment.***

CONSTITUTION, MANDATE AND PROCEDURE OF GST COUNCIL AND PUBLIC INTERESTS

Though not enacted in Chapter II on "Administrative Relations" in Part XI, from clause (2) of Article 279A it is evident that the GST Council is a composite organ of the Executive Branches of the Union and the States. The output of the deliberations of the GST Council would be "recommendations" to the Executive Branches of the Union and the States. It would be for the governments of the day to lead the Parliament and the State Legislatures respectively to enact statutes to levy SGSTs, CGST and IGST by invoking Article 246A which provides as under:

"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

Explanation.—The provisions of this article, 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." (italics and emphasis added)

For the first time since the commencement of the Republic, Parliament and State Legislatures would have to enact such statutes without invoking any Entry enumerated in the Union List or State List in the Seventh Schedule. Lawmaking would be constrained by the challenge of *the absence of a definition of the critical term "supply"* used by the People in enacting Articles 246A and 279A (*supra*) and clause (1) of Article 269A, clause (12A) of Article 366 and the amended Article 286 extracted below:

“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 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.

.....

"286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the *supply* of goods or services or both where such *supply* takes place—

(a) outside the State; or

(b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a *supply* of goods or services or both [*takes place*] in any of the ways mentioned in clause (1).

"366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

...

(12A) “*goods and services tax*” means any tax on *supply* of goods, or services or both except taxes on the *supply* of the alcoholic liquor for human consumption”

..... (italics and emphasis added. *Words omitted by the 101st Amendment Act, 2016 retained within square brackets to help understanding*)

The GST Council would have to get over the challenge of recommending a working definition of the term "supply". This would have to be the first of the "other matters" referred to in sub-clause (h) of clause (4) of Article 279A and *would, in view of its legal significance, have to have precedence over all other matters on which the GST Council would have to deliberate*. The GST Council would have to *take care to see that the Union does not acquire any legislative competence to define the term "supply" unless Article 274 is suitably amended to read as under to secure the subsidiarity interests of the States in the same manner in which the interests of the States in the definition of the term "agricultural income" have been secured:*

"274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression “agricultural income” as defined for the purposes of the enactments relating to Indian income-tax, *or of the expression "supply" as defined for the purposes of the enactments relating to goods and services taxes* or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression “tax or duty in which States are interested” means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State." (italics and emphasis added)

Ideally the definition of the term "supply" ought to comply with the *Law of Parsimony* popularly known as "*Occam's Razor*", be simple enough for the actual and potential market-participants to understand without professional help and be precise in referring to-

- (i) to the *property rights* in goods and the *contractual rights* in services which get exchanged according to the terms of an underlying contract relating to a "transaction" from a supplier to a recipient, both of whom, having incurred the requisite "transaction costs" as market-participants, *take their rights seriously* and would welcome any act of 'the State' which would have helped them to *minimize the transaction costs*; and
- (ii) to the *movement of goods* from one place of business to another *without transfer of property rights* to ensure *accountability in compliance* with the law.

The definition may however have to take into account the provisions relating to central consignment tax and the definition of "tax on sale or purchase of goods" inserted respectively in Article 269 (including Entry 92B in the Union List) and in clause (29A) of Article 366 by the amendment made in 1982 *which somehow have not been omitted by the 101st Amendment Act, 2016*, even though it omitted Article 268A relating to concurrent service taxes inserted by the amendment made in 2003 and clause (3) of Article 286. It is however possible for the GST Council to recommend the omission of those provisions from the Constitution and to have a simple definition of the expression, "*supply of goods and services*" in the Constitution.

Similarly, unless the GST Council recommends the omission of the clause referred to below, it may also have to take into consideration the following definitions of "goods" and "services" in clauses (12) and (26A) of Article 366:

"(12) "goods" includes all materials, commodities, and articles

(26A) "services" means *anything* other than goods" (italics and emphasis added)

The above definitions, *which could have been avoided since levy of GST is not to distinguish between goods and services*, do not refer to any "right" of any market-participant at all. They have been defined presumably since the GST levies are expected to be merely extensions of CENVAT levies on goods and services as the "essential core" of supplies "*conceived of as incidents owing to unilateral acts (similar to "removal" and "distribution" relevant to CENVAT law) of the suppliers of goods and/or services and not conceived of as bilateral acts of exchange of rights from suppliers to the corresponding recipients*. Such bilateral acts were referred to as "*transactions*" in the Statement of Objects and Reasons in support of the Constitution (122nd Amendment) Bill, 2014 which led to the enactment of the 101st Amendment Act, 2016. *From the recommendation made by the President in pursuance of Article 274 read with the said Statement of Objects and Reasons in support of that Bill we are led to assume that the subject matter of the Bill made known to the President was that the new GST levies were to be levies on supplies of goods and/or services made in pursuance of transactions*. The subject-matter of the Bill is not referred to in the Statement as levy of GST on "goods" and/or "services" *per se*. The Statement refers to "goods" only in the context of strategies related to pre-GST levies and does not refer to "services" at all.

In a sense, every government of the day serving the People at the national or sub-national level in the Republic, just as Odysseus, would after GST Regimes become operational, be in an uncharted ocean of conflicting statutory interpretations if the constitutional norm of "harmony" is not interpreted with reference to the Directive Principles of State Policy enacted by the People in Part IV of the Constitution. On the one side would be the Scylla of the collective interpretations of the members of the Council on what "harmony" implies leading to *GST Council recommendations* (which may or may not be disputed in *proceedings before the adjudicating mechanism* referred to in clause (11) of Article 279A; and may or may not be acted upon by Parliament and the State Legislatures which are in any case *independent* of the

Executive Branches). On the other side, there would be the Charybdis of the multiple *interpretations of legal provisions by Courts* on whether or not a given provision of any central or state GST statute conforms to the norm of harmony in the light of the myriad facts and circumstances of the cases brought before them. ***The restraint of Article 37 on the courts would not apply unless the principle of "harmony" in clause (6) of Article 279A is so interpreted as to relate to the Directive Principles of State Policy referred to in Part IV of the Constitution.***

The *non-obstante* clause in the beginning of Article 246A throws the baby of a possible ***concurrent procedure*** for the compliance with, and the well-coordinated administration of, the central and state GST statutes (subject to a possible amendment of the Concurrent List and insertion of an Entry similar to the Entries relating to *criminal procedure* and *civil procedure* in that List), along with the bath-waters of Articles 246 and 254. That non-obstante clause thus disables the evolution of ***a unique central-cum-state GST Regime as an integrated instrument of 'the State'*** in the manner implied by the use in the Constitution of the designation of "goods and services tax" ***in the singular***, to the *set* of multiple taxes consisting of CGST, IGST and many SGSTs. This would make the Goods and Services Tax Council function as a Goods and Services Taxes Council oriented merely to ensure uncoordinated ***rules*** by central government and by state governments by ***dividing the political space*** for purposes of clause (1) of Article 246A "horizontally" or "vertically" between the Union and the States. It would be ineffective in ensuring ***purposeful governance*** of a ***unified GST Regime*** which would enable 'the State' to coordinate policy and (legislative and executive) action ***to serve the public interests without jeopardy to the national income and to the wealth of the nation.*** The GST Council may however make a recommendation to enable the making of procedural law which may apply "concurrently" to compliance with and the administration of central and state GST statutes.

The mandate of the GST Council has been specified in clause (4) of Article 279A (*supra*). The mandate is to make recommendations to "the Union and the States" on some matters "relating to" goods and services tax referred to in various sub-clauses of clause (4) and in clause (5) of Article 279A, namely-

- (i) the inclusion of specific pre-GST central and state taxes in the set of levies to be discontinued by the *repeal of the relevant statutes* {sub-clause (a) of clause (4)};
- (ii) the sets of ***goods and of services on which goods and services taxes may not be leviable*** (i.e., "exempt") and the sets of goods and of services on which goods and services taxes may be leviable, *presumably irrespective of the other aspects of the transactions leading to the "supplies" of such goods and/or services*{sub-clause (b) of clause (4)};
- (iii) Model provisions of statutes which would be *expected* to be followed by the States in enacting legislation to levy SGSTs {sub-clause (c) of clause (4)};
- (iv) The *principles* of the *set* of levies designated ***in the singular*** as "goods and services tax" (including principles for the determination of *the place of supply* in case of supply in the course of inter-state trade or commerce) *presumably consistent with the Directive Principles of State Policy and other provisions in the Constitution* {sub-clause (c) of clause (4)};
- (v) a completely new legal-cum-constitutional protocol designated "***apportionment***" of IGST, *presumably expected to be consistent with the provisions as to accountability in Articles 266 and 283* {sub-clause (c) of clause (4)};
- (vi) specification of a "***threshold***" in terms of the "***turnover***" of a supplier if the CGST and SGST on goods and/or services supplied by him/it are to be not leviable

presumably including differing definitions of "turnover" in the central and state GST statutes so as to avoid levy of SGST on CGST and levy of CGST on SGST {sub-clause (d) of clause (4)};

(vii) *rates* of levy of CGST/IGST/SGSTs with lower and upper bounds (that is to say *floor rates* and *rate-bands*) and specification of *special rates* for temporary periods to meet special contingencies such as natural calamities {sub-clauses (e) and (f) of clause (4)};

(viii) *special provisions* relating to some States, presuming that such special provisions would be possible {sub-clause (g) of clause (4)};

(ix) *the date on which levy of goods and services tax on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel may commence* {clause (5)}; and

(x) any *other* matter relating to goods and services tax which would logically include **a further amendment of the Constitution** in order to redefine legislative competences to enact such central and state statutes as may be recommended by the Council. {sub-clause (h) of clause (4)}

As for (x) above, the provisions enacted in sub-clause (h) of clause (4) of Article 279A as inserted in the Constitution would have to be interpreted by resort to the principle of *noscitur-a-sociis*. **The definition of "goods and services tax" in clause (12A) of Article 366 and the provisions in clauses (4) and (5) of Article 279A do not refer to compensation at all.** As such if sub-clause (h) of clause (4) of Article 279A is interpreted by resort to the principle of *noscitur-a-sociis*, it is evident that **"compensation" is not one of the matters on which the GST Council is empowered to make recommendations.** The mandate of the GST Council thus excludes any duty to make recommendations as to transition-to-GST-related **"compensation"** in spite of an *extra-constitutional provision* in section 19 of the Constitution (101st Amendment) Act, 2016.

The main mandate of the GST Council relates to the definition of "goods and services tax" in clause (12A) of Article 366 and the "concurrent" legislative competence of the Union and the States provided for in clause (1) of Article 246A notwithstanding anything provided in Articles 246 and 254 **but without reference to Article 252**. In the absence of any restriction by way of floor rates of SGST in Article 286, the constitutional protocol specified in Article 252 would be relevant if a law is to be made by Parliament specifying a rate (or even a "floor" rate) of SGST applicable in common in every State. A reference had been made in Article 279A to "integrated goods and services tax" (the "IGST" coined by the ECSFM) originally in the 122nd Amendment Bill, 2014 but *presumably because it was difficult to define the term in the Constitution*, the reference was simply omitted in enacting the 101st Amendment Act, 2016. The Council would be expected mainly to recommend **"apportionment"** of the proceeds of IGST between the Union and the States.

It is remarkable to note that the suggestions made by the ECSFM have not been acknowledged as relevant in the Statement of Objects and Reasons in support of the 122nd Amendment Bill which has been enacted as the 101st Amendment Act, 2016. The apportionment referred to in sub-clause (c) of clause (4) of Article 279A would however logically be subject to the provisions of law relating to **"use"** of input CGST/IGST/SGST credit **as envisaged by the ECSFM** in its First Discussion Paper (referred to *supra*). The constitutional protocol of "assignment" referred to in Article 266 according to Article 270, would be **one-way**, viz., from the Union to every State and **year-wise**. On the other hand, the combined (and fuzzy) legal-cum-constitutional protocol of "apportionment" referred to in Articles 269A and 279A would be **two-way** viz., from the Union to every State and also from every State to the Union; and **particulars-**

of-transaction-wise. The particulars therein would have to include those *truly* identifying the *place of supply* and the *destination of supply* and the *parties to the transaction*.

As already noted, Article 246A restricts the legislative competence of Parliament in the manner provided in Article 248. However, that Article does not-

- (a) formally disable Parliament and the State Legislatures from levying any goods and services tax *otherwise than by applying ad valorem rates* and *otherwise than on a value-added basis* by allowing the "use" of input GST credit in computing the GST payable out of the GST due; or
- (b) refer to any "use" of input GST credit at all in *ensuring accountability of the tax bureaucracy to the Constitution through protocols of credits to, and of debits against, the relevant Consolidated Funds*.

Apart from declaring that some moneys would "not form part of" the Consolidated Fund of India or the Consolidated Fund of a State, Article 270 does not provide any link between the legal protocol of "apportionment" referred to in Articles 269A and 279A on the one hand and the constitutional protocol of "assignment" referred to in Article 266 on the other. Nor does the reference to "use" of some credits have any constitutional basis since there is no reference to "use" of input GST credit in Articles 246A and 266 at all as assumed in drafting Articles 269A and 270.

If the IGST model referred to in the First Discussion Paper brought out by the ECSFM (*supra*) is any guide, "apportionment" merely means the *division* of the *ad valorem* percentage rate of IGST leviable on any good or service into the *ad valorem* rate of CGST and the *ad valorem* rate of SGST applicable *somehow* in common in every State. The GST Council would, on the basis of acceptable assumptions, have to have expert projections of-

- (i) tax revenues (net of input GST credits and of assignments *from* the relevant Consolidated Funds; and inclusive of assignments *to* the relevant Consolidated Funds) which would accrue to the Union and every State by levies of CGST, IGST and SGST (leviable at a rate which is applicable in common in every State); and
- (ii) tax revenues (net of input CENVAT/VAT credits; and in case of the Government of India, net of assignments to the States from the Consolidated Fund of India; and in case of States, inclusive of assignments from the Consolidated Fund of India) which would cease to accrue to the Union and every such State when identified pre-GST central and state indirect taxes and the central sales tax (administered subject to use of statutory Forms not printed under the authority of Government of India) would cease to be levied.

Logically only after considering and accepting the projected estimates of revenues, the Council would have to recommend a rate or rates of IGST which would enable the Union and every State to avoid diminution in revenues if possible and divide the rate or rates of IGST appropriately between rate of CGST and a common rate of SGST. This would result in *multiple* central and state tax bureaucrats collecting CGST, IGST and every applicable SGST *from the same taxpayers after the political space in the Union of States is divided accordingly*. It is also important to note that in recommending division of political space between the Union and every State in specifying CGST and SGST rates, that the GST Council may have to revisit its recommendations as and when petroleum products and alcohol for human consumption get included in the GST regimes.

The constitutionality of transition-to-GST-Regimes-related "compensation" having been ruled out in this paper, the division of IGST rates into its CGST and SGST "components" would,

in case of any projected *initial* short-fall in revenues, have to ensure that the consequent *budget-imbalance*s which the Union and every State may face are not *inequitable* by applying an *arbitrary ratio* as arbitrated collectively by the GST Council. If however the GST Council recommends that the Union and the States should *unite and govern* so as to serve the public interests through an appropriately established *central-cum-state GST Regime* by building on the central-cum-state integrated jurisdictions which have been in existence for more than six decades since 1956 and are well-recognized by all market-participants, the "divide-and-rule" approach may be given up. This would be consistent with the constitutional norm of a "harmonized structure of GST", which presupposes *differences in the central and state components of the structure*. Similarly it is not difficult to conceive of a "harmonized national market" in which the participants would be able to continue to take their respective business decisions on the terms of possible contracts *whether or not the GST rates are uniform* as long as every one of the taxpayers among them is in one-to-one correspondence with a *unique central-cum-state primary GST authority* for reporting compliance periodically and with a *unique hierarchy of central-cum-state post-primary GST authorities* to correct errors in the decisions of lower authorities as he/it has been since 1956. It follows that *the constitutional norm referred to in Article 279A would have to be interpreted as procedural "harmony" and not as substantive "uniformity"*.

It would be for the GST Council to recommend an appropriate amendment of the constitution to enable central and state lawmaking to levy CGST,IGST and SGSTs so as to avoid cascading of the incidence of the levies by use of the instrument of prior-stage GST credit in collecting GST due and payable on value-added basis with due regard to the accountability provisions enacted by the People in Articles 266 and 283.

The procedure for the GST Council to arrive at its recommendations is laid down in clause (8) of Article 279A read with clause (9) of that Article, extracted below:

"(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—

(a) the vote of the Central Government shall have a weightage of *one third* of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of *two-thirds* of the total votes cast, in that meeting." (italics and emphasis added)

The functioning of the Council in accordance with the decision-rule on specific proposals in clause (9) above would have to be understood in the light of the *illustration* from the Statement of Objects and Reasons in support of the 122nd Amendment Bill extracted below:

"The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It further provided that every decision of the Council shall be taken by a majority of *not less than three-fourths of the weighted votes of the members present and voting* in accordance with the following principles:—

(A) the vote of the Central Government shall have a *weightage of one-third of the total votes cast*, and

(B) the votes of all the State Governments *taken together shall have a weightage of two-thirds of the total votes cast* in that meeting.

Illustration:

In terms of clause (9) of the proposed article 279A, the "*weighted votes of the members present and voting*" in favour of a *proposal* in the Goods and Services Tax Council shall be determined as under:—

$$WT = WC + WS$$

Where,

$$WT = WC + WS = \left(\frac{WST}{SP} \right) \times SF$$

Wherein—

WT = Total weighted votes of all members in favour of a *proposal*.

WC = Weighted vote of the Union = *i.e.*, 33.33% if the Union is *in favour of the proposal* and be taken as "0" if, Union is *not in favour of a proposal*.

WS = Weighted votes of the States *in favour of a proposal*.

SP = *Number of States present and voting*.

WST = Weighted votes of all States present and voting *i.e.*, *i.e.*, 66.67%

SF = Number of States voting *in favour of a proposal*." (italics and emphasis added)

In the above provision and illustration, the "weightage" ratio of 1:2 between the Union on the one hand and the collection of all the States on the other is arbitrary, though acceptable to the Union since any "*proposal*" on behalf of a single State or a small group of States may or may not pass muster in the Council unless a large number of States record their presence and support.

Let us assume that there is a proposal based on a resolution of a given State Legislature or on the resolutions of a few State Legislatures to empower Parliament to invoke Article 252 and to enact a *law specifying a "floor" rate of SGST at twice, or any other multiple considered appropriate by Parliament, of the corresponding rate of CGST* so that the State or States in question would be disabled from specifying any lower rate of SGST. Would such a proposal pass muster in the Council since it would be consistent with the ratio acceptable, as evident from the decision rule in clause (9) of Article 279A, to the Union and with the stipulations made in Article 252? If such proposal is favoured by the Council, the recommendations of the GST Council on "apportionment" would be automatic and an appropriate CGST rate may be recommended by the GST Council so that 'the State' is not disabled from serving the public interests. Though theoretically a State may specify a rate of SGST higher than the floor rate, it would avoid doing so in order to prevent taxpayers from leaving its territory seeking a lower tax jurisdiction in another State. The higher the multiple of CGST in specifying the "floor" rate, the more likely that SGST rates would be uniform.

Having made a recommendation on apportionment of IGST rates into its CGST and "floor"-level SGST components, the GST Council would be able to-

- (i) make recommendations for the revision of the rate of IGST from time to time after the initial commencement of GST Regime; and
- (ii) work out a "*concurrent*" *procedure* for compliance with and for administration by an appropriately *integrated central-cum-state GST hierarchy*.

Such integrated GST hierarchy may be established by creatively invoking Articles 258 and 258A. If however jeopardy to the *national* income and to the wealth of the *nation* are to be avoided, it may be necessary for the Elders in the Rajya Sabha to be convinced that a Service common to the Union and the States needs to be created by invoking Article 312 in the *national interest* for administering all the *central and state direct and indirect tax statutes*.

A PLAN OF LAWMAKING FOR A "HARMONIZED" STRUCTURE OF GST LEVIES

According to the Statement of Objects and Reasons in support of the 122nd Amendment Bill, 2014 the purpose of the reform of the mode of levy of central and state indirect taxes by transiting to the GST Regime is to **avoid "cascading" of the incidence of such taxes**. Reforms implemented by lawmaking from 1986 to 2005 by relying on the instrument of collecting central and state indirect taxes on a value-added basis had addressed the issue of cascading of the incidence of central levies in collecting central taxes and the issue of cascading of the incidence of state levies in collecting state taxes. The Central Sales Tax Act, 1956 had also disabled every State from collecting its taxes outside its territory by resort to the "*nexus principle*". In such circumstances if the purpose of reform is only to avoid cascading of the incidence of central levies (CENVAT) in collecting state taxes within the respective territory of every state, all that would have been required would be to simply amend Article 286 and stipulate that in levying state tax on sale or purchase of goods on a CENVAT assessee the "turnover" would stand modified by the formula-

$$\text{Turnover taxable under State statute} = \frac{\text{Amount of consideration inclusive of CENVAT} \times 100}{100 + \text{Rate of SGST}}$$

A variant of the above formula has been used for many years now in section 8A of the Central Sales Tax Act, 1956 and is well-understood. To take the purpose of such an elaborate amendment of the Constitution as made through the 101st amendment Act, 2016 as avoiding cascading is very modest. The regime which merely avoids "cascading" does not deserve the distinction of being called (what Sijbren Cnossen characterizes as) a "**true" GST regime**. Appropriately designed central and state GST statutes, along with other statutes, can serve a more socially relevant purpose of minimizing **all transaction costs and consequent price-distortions** including those caused by cascading of the incidence of central taxes in collecting state taxes.

Francis Bennion (*Understanding Common Law Legislation- Drafting and Interpretation*, 2001) describes the process of making or declaring law as the discovery of a path through a maze. Noting that Alexander Pope suggested a clue when he said, "...all this scene of man; a mighty maze! but not without a plan" (in *An Essay on Man, epistle i, line 1*),. Bennion exhorts the lawmaker and the interpreter: "**Discover the plan and you are on way to finding a path through the maze**".

What is the **prior** plan for enacting central and state GST statutes acceptable to the Union and the States underlying the redefinition of the legislative competences of the Union and the States as envisaged in the 101st Amendment Act, 2016? Since the GST Council has been constituted by invoking Article 279A of the Constitution to make recommendations, it follows that **the plan is yet to take shape**. In "discovering a path through the maze", if the GST Council ignores the Directive Principles of State Policy referred to in Article 37, the lawmakers would be led astray from the norms and goals of the Republic by its recommendations. The GST Council may find that the Constitution as amended does not enable Parliament and the State Legislatures to make such law as may meaningfully and efficiently address the socially relevant "subject" of "**minimizing undue participation constraints by way of transaction costs faced by actual and potential market-participants**". If so, it would be for the GST Council to recommend such

further **purposive** amendments to the Constitution as would enable lawmaking according to such **prior** plan of lawmaking to levy CGST and SGST, **if possible avoiding the fuzzy instrument of IGST**, as would be credibly and politically committed to by the members of the Council.

It is useful to remember that amending the constitution **before** the Union and the States agree on a plan of lawmaking has been purposeless in 1982 and in 2003. The central consignment tax has not been levied after the 1982 amendment and the concurrent service taxes have not been levied after the 2003 amendment. **First things first**: The political entrepreneurs serving the Union and a State for the time being and formally representing the Union and every State in the GST Council would have-

- (a) to deliberate in pursuit of their **"common" interest in serving the public interests** as a team and not in pursuit of any "lower" varied objectives of preserving current levels of tax revenues to the Union and every State **somehow**; and
- (b) to draft central and state GST statutes to the substantive and procedural provisions of which every one of them can make credible political commitment **without being constrained by the redefinition of legislative competences in accordance with the 101st Amendment Act,2016** which would not enable coordination of policy and action on the mode of levy of indirect taxes with a view to minimize all transaction costs of the actual and potential market-participants.

At any rate a further amendment of the Constitution is called for to correct the drafting error in amending Article 286 and to restore the words "takes place" omitted from clause (2) of Article 286 by the Constitution (101st Amendment) Act,2016.

"COMMON" SENSE OF LAWMAKERS SERVING THE UNION AND THE STATES

The following observations of Sir Maurice Gwyer CJ 'In the matter of *THE CENTRAL PROVINCES AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938*' reported in 1 STC 1 on the '**spirit of reasonableness and common sense**' among the interested agencies of 'the State' for **taxing the same taxpayer** continue to be prophetic and **politically significant**:-

"...The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of **taxing the same taxpayer**. In the present case, the result may well be that the Central Government will find itself unable to make such a distribution of the proceeds of excise duties under section 140 of the Act (*which was later succeeded with modifications by Article 270 in the Constitution*) as it might otherwise desire to do; but these are not matters for this Court and *they must be left for adjustment by the interests concerned in a spirit of reasonableness and common sense, qualities which I do not doubt are to be found in India as in other Federations*" (comments and emphasis and italics added).

It would be for the members of the GST Council to realize that treaty-law leading to Harmonized System of Tariff Nomenclature is relevant only for cross-border international transactions. This is so since one of the parties to the relevant contract would be beyond the reach of the authorities having jurisdiction in accordance with the municipal law made in India. We assume that it is possible for the Government of India to intelligently set the Tariff values for such transactions to be applicable in future from time to time. In case of goods and/or services supplied in the course of import into India, the Tariff values may be specified on **cif** basis; and in case of goods and /or services supplied in the course of export out of India the Tariff values may

be specified on *job* basis. Those Tariff values may be relevant to levy duties of customs outside the GST regime. The cif values may also be applied to levy GST on supplies made in the course of import into India. The GST law may provide that supplies made in the course of export out of India would be zero-rated if the supply vouchers reveal values which are not lower than the fob Tariff values.

As for domestic transactions involving exchange of property and/or contractual rights, it would be simpler to rely on the amount of monetary consideration revealed in the relevant supply vouchers as an index of value. ***If however there is only movement of goods from one place of business to another within India without any exchange of property rights, the Tariff value specified on job basis may be applied as the index of value for purposes of accountability.*** Most importantly, ***legal incentives*** would have to be provided to domestic consumers to demand and obtain true supply vouchers in an appropriate form recognizable all over India as evidence of supply vouched therein. It is imperative that in case of retail suppliers exempted from central and state registration regimes, the law would have to stipulate that supply vouchers have to be issued stating CGST and SGST-inclusive consideration ***along with a formal declaration that the consideration charged is inclusive of those levies.***

The foregoing would be the minimum requirements of an efficient central-cum-state GST Regime to be recommended by the GST Council so that there is no jeopardy to the national income and to the wealth of the nation and 'the State' is able to serve the public interests. The recommendations of the GST Council would have to enable the Union and every State to collect CGST and SGST ***from the same taxpayer*** as Gwyer CJ observed, and ***not from the same goods and/or services*** as if those levies are mere extensions of CENVAT levies. This would ensure that incomes generated by businesses and professions do not escape levy of taxes according to law and unaccounted wealth is not created.

Apart from applying the *Principle of Parsimony* in recommending provisions of GST statutes, it would be for the members of the GST Council to recall the saying "*The hidden connection is stronger than the apparent one*" attributed to the pre-Socratic Greek philosopher Heraclitus of Ephesus. A similar sentiment, "*The hidden harmony is better than the obvious*" is attributed to the well-known artist Pablo Picasso. Harmony at any rate excludes uniformity and implies ***variety needing orchestration by coordination in social systems.*** The harmony implied in Article 38 is the hidden substratum in the respective environments of the autopoietic institutions of 'the State', 'the Market' and 'the Bureaucracy', which is expected to sustain "***justice***"- the primary aim of the People of India in constituting the Republic- which would not require intervention by courts except very sparingly.

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