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Concept - Trade, Commerce And Intercourse

Trade, Commerce And Intercourse

The economic philosophy underlining the Constitution is the establishment of a welfare State and an economic system rooted in the fulfillment of the individual, controlled and bounded always by the values of the principles of the society in which he lived. Articles 301 to 307 deal with freedom of trade, commerce and intercourse within the territory of India subject to certain limitations.

The framers of the Constitution thought it fit to provide further specific protection to the integrity of the country with respect to traffic of people and goods and, therefore, devoted a whole part to that purpose. Part XIII of the Constitution entitled, "Trade, Commerce and Intercourse within the Territory of India," seeks to keep these activities between the states and between all other parts of the country free from legal interference. Part XIII does not discriminate between citizens and non-citizens. The rights granted under it are in the form of a prohibition on legislative and executive competence. Since the introduction of the constitution of India, the necessity of clarifying the concept of 'freedom' in the interpretation of Article 301 has been the main focus of judicial opinion and academic exercise of jurists and scholars. Atiabari case and Automobile case has settled that tax laws are not outside the domain of Part XIII of the constitution and do not come within the preview of the freedom so guaranteed by Art 301.

Position in India-

No federal Country has an even economy. Some of its constituent units may be agricultural and others may be industrial. This creates an opportunity for those constituent units that have legislative power of their own may, to serve their own selfish and parochial interest seek to

create a trade barrier either not to allow the inflow or the outflow of the goods and services. Creation of such trade barriers are prejudicial to the national interest as it hampers the economic development and growth of the economy as a whole and this is disadvantageous to all units in the long run. This was the case when all princely state at the time of pre independence, categorized into classification of Part A, Part B & C states. Therefore at the time of the drafting of the Constitution our Constitution framers took into account the situation at that time and drafted a law as Article 301 as freedom of trade commerce and intercourse as they were very much concerned with the economic unity of the Young devoted Nation. In order fully to appreciate the implications of the provisions of Part XIII of the Constitution, it is necessary to bear in mind that history and background of those provisions. The Constitution Act of 1935 (Government of India Act) which envisaged a federal constitution for the whole of India, including what was then Indian India in certain restrictions British India, which could not be fully implemented and which also introduced full provincial autonomy enacted Section 297.

The constitution makers desired the free flow of goods for trade commerce and intercourse as a sustaining force for the stability of the cultural and political unity of the federal polity, and that the country should function as the single economic unit devoid of any internal barriers. The Corresponding provision to Article 301 was Section 297 of the Government of India Act, 1935. The origins of the provision may be traced directly to the section 92 of the Australian Constitution. In the historical context section 92 of the Australian Constitution was intended to abolish the state trade barriers. But as a result of Judicial Decision it applies to both to state as well as to the Commonwealth. This was recognized in the decision of *James v Commonwealth* in which a Commonwealth Statute requiring a Licence for interstate shifting of the dried fruits, was declared unconstitutional by the Privy Council There are some significant differences between the two,

a) Section 92 is concerned with the interstate trade but Article 301 is concerned with interstate as well as intra state trade, therefore the coverage of Art.301 is broader than of Section 92 of the Australian Constitution. A reason to include both interstate as well as intra state commerce with the ambit of Art.301 may be that at times it becomes difficult to demarcate between the two as they may so inextricably mixed.

b) Section 92 makes the interstate trade absolutely free whereas Article 301 omit the word absolutely free.

Relation between 301 and 19(1)(g)

The word trade means buying or selling of the goods while the term commerce includes all forms of transportation by land air or by water. The term intercourse means the movement of goods from one place to another. Intercourse will cover all those activities which might not be included in the ambit of trade and commerce.

Article 19 (1) (g), a fundamental right confers on the citizens the right to carry any profession or carry on any occupation trade or business. The question of relationship between 301 and art. 19 are somewhat uncertain. One view that while Article 19 (1) (g) deals with the rights of the individual, whereas art. 301 provide safeguards for carrying trade as a whole distinguished from individuals right to do the same. But this view is hardly tenable. Article 301 is based section 92 of the Australian Constitution which has been held to compromise rights of individuals as well, and the same should be position in India. The Supreme Court has denounced then theory that Article 301 guarantees freedom “ in abstract and not on the individuals”.

Freedom of trade commerce and intercourse is a wider concept than that of an individual's freedom to trade guaranteed by Article 19(1) (g). Art. 19(1) (g) can be taken advantage by the citizens whereas the freedom of trade commerce and intercourse enshrined under art. 301 can be invoked by a corporation and even by State on complaints of discrimination as under Art. 303. In Emergency Art. 19(1) (g) is suspended and so the courts may take recourse to Article 301 to adjudge the validity of restriction on Trade and Commerce. There appears to be no satisfactory way to explain the relationship between the two articles.

Is taxing an impediment to trade & commerce

Tax is a compulsory Contribution and is the sovereign attribute of the State based on the Principle of No quid Pro Quo. It is a branch of Public Finance of every Economy. Taxation is collection of revenue and Public expenditure is the application of the revenue so collected. Tax is necessary for the Functioning of Every Economy of the World, without it all the duties and the obligations of the state will be undone and power unused.

Article 302 authorizes Parliament to impose restrictions in the public interest. Article 303 prohibits state preference or discrimination on regional basis, but makes an exception for Parliament in order to meet a situation of scarcity in any part of the country. Article 304 prohibits the states from making any discrimination against goods 'imported' from other states in taxing them. It only authorizes the states to impose 'reasonable' restrictions in the public interest with the sanction of the President. Article 305 removes the laws, as they existed on January 26, 1950, and later at the commencement of the Fourth Amendment, 1955, from the operation of Article 301 and 303. Article 306, now repealed, dealt with the former Native States authorizing them to levy import-export duties on the goods to and from the rest of country in accordance with the terms of their accession.

Article 307 envisages an authority appointed by Parliament to carry out the objectives of the first four Articles of this Part. No such authority has ever been constituted. Part XIII allows reasonable restrictions imposed by the states in the 'public interest.' One is strongly inclined to think that a tax is always in the public interest and, therefore, the prohibition does not apply to it.

It is also pertinent to bear in mind that all taxation is not necessarily an impediment or a restraint in the matter of trade, commerce and intercourse. Instead of being such impediments or restraints, they may, on the other hand, they also provide for improvement of different kinds of means of transport, for example, in cane growing areas, unless there are good roads, facility for transport of sugarcane from sugarcane fields to sugar mills may be wholly lacking or insufficient. In order to make new roads as also to improve old ones, cess on the grower of cane or others interested in the transport of this commodity has to be imposed.

It is the tax thus realized that makes it feasible for opening new means of communication or for improving old ones. It cannot therefore, be said that taxation in every case must mean an impediment or restraint against free flow of trade and commerce. The Supreme Court in the *Atiabari Tea Co.* case held that taxes which hampered free flow of trade and commerce contravened Part XIII and, therefore were unconstitutional. The Court qualified this decision in the *Automobile Transport* case and ruled that regulatory and compensatory' taxes did not come within the purview of Article 301. Trade and Commerce that are protected by Art. 301 are only

those activities which are regarded as lawful trade activities and not against public policy. The Supreme Court held that Gambling is not trade but *res extra commercium*. In this Case Court held that prize Competition being gambling of nature, they cannot be regarded as trade and commerce, thus violative of Art. 19(1) (g) and 301.

Later in the case of *Fatehchand v State of Maharashtra*, a question arose whether money lending is a trade and protected and subjected to restrictions under Art. 301. Supreme court keeping in regards the position of Moneylenders vis a vis the humble beneficiaries of Law, that is the marginal farmers, rural artisans, rural laborers, workers and small farmers held that the exploiting money lending to poor and weak cannot be classified as trade and Art. 301 would not apply.

What are Regulatory and compensatory taxes?

To smoothen the movement of interstate trade, commerce and intercourse, the State has to provide much facility as to the roads etc. The Concept of Regulatory and Compensatory Taxation have been evolved with a view to reconcile the freedom of trade and commerce Guaranteed by Art. 301 with a need to tax such trade at least to extent of making it pay for the facilities provided to it by the State, for e.g. a road network. The Concept of Compensatory taxation has been borrowed from Australia where it has been evolve to dilute section 92 of the Constitution.

The Concept of Regulatory and compensatory taxation has been applied by the Indian Courts to the State taxation under entries 56 and 57 of the list II. In case of **Atiabari Tea Co. v State of Assam**, a tax levied by the State of Assam on the carriage of tea by road or inland waterways was held bad for as a restriction on the freedom of trade, commerce and intercourse and was not held as a regulatory taxation or measure. In case of **G.K. Krishna v state of Tamil Nadu**, the petitioner challenged the validity of a Government notification under Madras Motor Vehicle Taxation Act, 1931, enhancing the motor vehicle taxation on omnibuses from Rs. 30 to Rs. 100 per quarter per seat. It was claimed that the taxation was neither regulatory nor compensatory and therefore was acting as a restriction on the freedom contemplated under Art. 301. The Court held that the Tax so levied on the omnibuses is not violative of the Freedom under Art. 301 and are covered under Regulatory and Compensatory taxes. The Court stated that the Regulatory

Measures such as rules of traffic, collection of toll tax or tax for use of roads and bridges or Aerodromes etc. do not operate as a barrier to trade and commerce. For a Tax to Become a Prohibited Tax it has to become a Direct Tax, the effect of which is to hinder the part of trade commerce and intercourse. Further in case of **Meenakshi v State of Karnataka**, the Court upheld the increase in the passenger tax on the vehicles of Bus Operators even though the imposition was made to compensate the loss of revenue due to abolition of Octroi. In the course of exempting the tax laws from the purview of Art. 301. The Court has even relaxed the limitation of Art. 304(a). Upholding the validity of State Notifications giving tax exemptions to or imposing lower rate of tax on certain goods made within the State, the Court held that the notifications do not violate Art. 301 and therefore do not violate Art. 304(a) also. Further in the case of *State of Mysore v H. Sanjeeviah*, section 39 of the Mysore forest Act was in question as violative of the freedom under Art. 301. It was held by the Court that the provision is invalid on the ground that it totally prohibits the movement of forest produce during the period between Sunset and Sunrise is prohibitory of right to transport Forest produce. The court held that the rule cannot be called valid because “ A rule regulating transport in its essence, certain to certain conditions devised to promote transport; such a rule aims at making the transport orderly, so that it does not harm other person carrying the same vocation, and enables transport to function for the public good”.

Relation between part XII and XIII

The power to tax is inherent in sovereignty. The sovereign State, in some cases the Union, in other cases the State, has the inherent power to impose taxes in order to raise revenue for purposes of State. Such a sovereign power ordinarily is not justifiable, simply because the State which determines, through the Legislature, what taxes to impose, on whom and to what extent.

Part XII and the Part XIII though form distinct parts in the Constitution of India, they have been hot topic of debate especially in regards to the question of extent of freedom contemplated by the Art. 301 which is very general in its meaning. The power of the State to raise finances for Government purposes has been dealt with by Part XII of the Constitution, which contains the total prohibition of levy or collection of tax, except by authority of law Art. 265. This Part also deals with the distribution of revenue between the Union and the States. It does not clearly demarcate the taxing authority as between the Union and the States and therefore had to indicate

in great detail what taxes shall be levied for the benefit of the Union for the benefit of the States and what taxes may be levied and collected by the union or for the benefit of the States and the principle according to which those revenues have to be distributed amongst the constituent states of the Union.

It is clear that this Part is not subject to the other provisions of the Constitution and the generality of the words used in Art. 301 is cut down only by the provision of the other Articles of this Part ending with Art 307. It has not been and it could not be contended that the generality of the expression used on Art. 301 do not admit of any exception or explanations not occurring in this Part itself, nor has it been contended that trade, commerce and intercourse are subject to any other fetters. It is agreed that trade, commerce and intercourse throughout the territory of India have been emphatically declared by the Constitution to be free, but there is a wide divergence of views of the answer to the question "free from what?" Taxation as such is not a restriction within the meaning of Part XIII. It is an attribute of sovereignty, which is not justifiable. The power to tax is a peculiar legislative function with which the courts are not directly concerned and that, therefore, the freedom contemplated by Art. 301 do not mean freedom from taxation and that taxation is not included within the connotation of the terms. In short, Part XII is a self-contained series of provisions relating to the finances of the Union and of the States and their inter relation and adjustments. Like Part XIII, Part XII also is not expressed to be subject to the other provisions of the Constitution. Hence, both Parts XII and XIII are meant to be self-contained in their respective fields.

Comparative studies in federal countries

The Constitution of India secures the freedom of Trade, Commerce and Intercourse within the Territory of India under Article 301, subject to reasonable restrictions & public interest ranging from Article 302- 307. It is worth mentioning that Part XIII (Article 301-307) is in addition to Articles 14 & 19.

Since freedom of trade, commerce & intercourse is inextricable to the concept of federalism; it's worthy to note similar laws in three of the most federal countries in the world- USA, Canada & Australia.

1. USA: Article 1, Section, 8 Clause 3 in US's constitution is referred to as Commerce clause in the constitution of USA, which essentially lists the power of Congress, which by necessary implication has been interpreted to have robbed the states of their power to tax interstate commerce, while the Congress has the power to regulate commerce within states (also with foreign nations & Indian Tribes). This constitutes the freedom of commerce in the United States. "Article 1 Section 8 Clause 3: The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

2. Canada: Section 121 of the Constitution Act, 1867 (formerly the British North America Act, 1867: a part of Canadian Constitution) entitles the Canadian Manufactures to have their growth, produce or manufacture free admission into any of the provinces, thereby rendering the borders of the provinces within Canada totally permeable.

"Section 121- All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

3. Australia: Section 92 of the Constitution of Australia ensures that the Trade, Commerce & interstate intercourse via internal carriage or ocean navigation shall be absolutely free except for imposition of Uniform duties of Customs. However newly created states have an additional liability regarding the above for a period of two years. It appears that Section 92 also extends to Exclusive Economic Zone (and possibly Continental Shelf) of Australia.

"Section 92: On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

4. India: The Constitution of India secures the freedom of Trade, Commerce and Intercourse within the Territory of India under Article 301, subject to reasonable restrictions & public interest ranging from Article 302- 307. It is worth mentioning that Part XIII (Art. 301-307) is in addition to Articles 14 & 19.

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Freedom of Trade, Commerce And Intercourse: The GATT/ WTO

Articles 301 & 304 (a) rings a bell or two regarding a well- known concept in International trade i.e. Regional Trade Agreements or Free trade Agreements (RTA or FTA) & National treatment. The GATT- WTO regime has put in place a well-organized system of free trade/ trade without barriers amongst member Nations.

To understand the above, we must first understand the concept of Most-favored-nation followed by WTO.

Most-favoured-nation treatment (MFN) (GATT Article I, GATS Article II and TRIPS Article 4) is the principle of not discriminating between one's trading partners, meaning that no member state would discriminate between members by favouring/ disfavouring any of the member State to distort competition (by varying taxes etc.).

Regional Trade Agreements (RTAs or FTAs) falls as an exception to MFN Treatment. This exception allows a member state signatory to a particular RTA to lower the Tariff barriers like taxes for other members of RTA, even though the other WTO members have to face these higher Tariff barriers/ taxes.

National Treatment mandates every member state not to treat the imported goods any less favourably than domestically produced goods after they have been imported in domestic market. National Treatment is in place to counter Non- Tariff barriers in world trade (e.g. technical

standards, security standards etc.) discriminating against imported goods.

Now what Articles 301 & 304(a) and following articles embody is the fusion of two of the above concepts- Regional Trade Agreement & National Treatment. The Constitution mandates that the trade commerce & intercourse between all the states in territory of India be allowed to flow as smoothly as possible except where public interest demands otherwise. Now this practically makes territory of India akin to a FTA area comprising of all the Indian states. Also the Principle of National Treatment is very well assimilated in Article 304 (a) whereby the goods imported in any Indian State would be given the same treatment as the goods produced/ manufactured domestically, thereby not facing any hurdle/ barrier/ discrimination.

Article 301 promises that there shall be no hindrance for conducting meaningful trade, commerce and intercourse throughout the territory of India subject to the authorized restrictions U/A 302-307.

Art. 302 confers power on Parliament to restrict Freedom u/a 301 in public interest from one state to another or within any part of the territory of India. Here to curtail the freedom all that is needed by parliament is to justify the law in public interest.

Article 303 (1) restricts the legislative powers (including sub- delegation) of Parliament & State Legislatures to give preferential treatment to any state by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule (re: Article 246). It must be highlighted that this restriction on legislative power does not extend to freedom of intercourse, hence, weakens the Freedom of intercourse throughout the Indian Territory.

Article 303 (2), bends a little in favour of Legislative Powers of parliament. Parliament is allowed to make/ authorize any discriminatory law {as per Art. 303 (1)} if it is declared by such law that it is necessary to do so for dealing scarcity of goods in any part of India. This power is very sweeping as it only requires a declaration in the law itself that the law is necessitated by scarcity of goods, without going into the reality of it. The Essential Commodities Act, 1955 is probably justified under this Article.

Article 304, again bends in favour of Legislative powers of States. It supersedes Article 301 & 302. Art. 304 (a) allows the States to impose tax on goods imported from other States/ Union territories, to which similar goods manufactured in that State are subject. But this should not be done in a manner so as not to discriminate between goods- imported or manufactured. Besides this clause deals with taxes on goods only. One peculiar point to note is that, Union Territory has appeared for the first time in this Chapter. And to the disadvantages of Union Territory, while the goods originating from Union Territories can be taxed by other states, no such corresponding power has been conferred upon the Union Territories to protect its domestic manufacturers.

Though **Art. 304 (a)** seems a fair power conferred on states to create a level playing field for Domestic manufacturers by subjecting all competitors to same tax regime in the same market, thereby keeping it competitive, Art. 304 (b) on the other hand is quite sweeping in nature. It authorizes the State Legislatures to impose reasonable restrictions in the public interest on the freedom of trade, commerce or intercourse with or within that State. Hence, the only requirements needed to curtail the Freedoms under Art. 301 is that the law should be in Public Interest and impose reasonable restrictions.

However, under Article 304 (b) there is a bit of hierarchal- procedural hiccup for the States in form of Presidential assent, which also acts as a leash on its legislative power. Without previous sanction of the President, no Bill/ amendment can be introduced/ moved in the Legislature of a state.

Article 305 upholds existing laws as valid irrespective of Articles 301 & 303, unless otherwise directed by the President. Article 305 was amended by the Constitution (Fourth Amendment) Act, 1955 and it was added that laws made before the Amendment will also be saved despite Article 301. Furthermore Article 301 will not come in the way of the laws enacted by Parliament & State Legislatures under Article 19 (6) (ii) { which itself was amended by Constitution (Fourth Amendment) Act, 1955 }, which includes restricting freedom on practice any trade & profession to the extent of State Monopoly of any trade, business, industry or service under the State's power.

This amendment was brought in light of the question raised in *Saghir Ahmed v. the State of U.P.* as to whether an Act providing for a State monopoly in a particular trade or business conflicts

with the freedom of trade and commerce guaranteed by article 301, though the Supreme Court left the question undecided.

Article 306 dealt with the Power of Part B States of the First Schedule to impose restrictions on trade and commerce, which was repealed by the Constitution (Seventh Amendment) Act, 1956. Article 307 envisages National/ Inter-state authority for carrying out the purposes of articles 301, 302, 303 and 304, and conferring of corresponding powers and duties under parliamentary law. Observing closely, I wonder if the word ‘authorizing’ in Article 303 refers to the Authority contemplated under this Article. At present no such Authority is in existence in India.

Conclusion

It is very clear by now that any direct tax acting as a restraint to freedom so contemplated under the Fabric of the freedom of trade commerce and intercourse is ultra- vires of the Constitution. Whether the tax is prohibitory or compensatory has been left to facts and circumstances of each and every case. With so many judicial decisions regarding freedom of trade commerce and intercourse still there has been no evolution of any straightjacket formulae to decide the nature of tax and judicial decision because of lack of set criteria has varied in this respect. Thus we can conclude that the freedom under the fabric of Art. 301 is for interstate as well. Trade commerce and intercourse have the widest connotation and cover almost all the commercial activities. The freedom guaranteed is not only from the laws enacted in the exercise of the powers conferred by the related legislative entries but also the tax laws. Further it has to be concluded that only those taxes that directly hampers the trade or business will be void otherwise not. Laws, which are purely regulatory and compensatory in nature, are not violative of the Freedom so guaranteed.

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