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# Why the Recommendations of the GST Council are not binding on the Union and States?

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*The Parliament enacted the 101st Constitutional Amendment Act, of 2016 which brought out an entirely new constitutional scheme for indirect taxes. The Amendment brought out several changes paving the way for Goods and Services Tax (GST). The newly inserted Article 246A allowed for simultaneous legislation on Goods and Services Tax by the Union and States and the inclusion of Article 279A allowed for the creation of the Goods and Services Tax Council (GST Council) wherein its functions are to make "recommendations" to the Union and States. Furthermore, Article 279A(11) states that GST Council shall establish a mechanism to adjudicate any dispute. The Constitution Amendment Act was examined by Supreme Court wherein the court clarified that the recommendations of the GST Council are non-binding on the Union and States. This Article sheds some light on the rationale for such a conclusion by discussing different aspects of the GST Council including its legislative history and interpretation.*

**Keywords:** *gst council, recommendations, article 279a, taxation, constitution, union, state.*

## INTRODUCTION

To improve production efficiency and boost the export competitiveness of Indian goods and services, a switch to consumption taxes was first suggested in 2004 by the Task Force on

Implementation of the Fiscal Responsibility and Budget Management Act 2003. The anomalies inside the then-current oblique tax regime, which suffered from the disadvantage of the multiplicity of taxes, taxable events, compliances, and authorities, brought about the want for this sort of vast adjustment inside the tax system. For instance, different regions of India would have different rates for the sales tax and value-added tax (VAT) on the same commodities. In some cases, before the commodities entered the borders of a state, they would even apply entry taxes on them. On September 8, 2016, the Constitution (One Hundred and First Amendment Act) 2016, which added Articles 246A and 279A, was put into effect. According to Article 246A, the State legislatures and the Parliament are both authorized to enact laws governing the GST. The Goods and Service Council (hereinafter, GST Council) is established by the enactment of Article 279A, and it advises the Union and the States on a variety of GST-related issues.

The question that whether the recommendations made by the GST Council to the Union and States are binding or not arose because of the case *of Mohit Minerals v Union of India*[1]. The petitioner is an importer of coal from Indonesia, South Africa, and India, preferred a writ petition under Article 226 before the Gujarat High Court wherein the main question was, whether or not the importer is prone to pay tax on ocean freight services supplied via way of means of overseas shipping line qua the overseas provider under the reverse charge mechanism for CIF Contracts. The divisional bench of the High Court declared that the IGST levy on ocean freight is ultra-vires with the levy provisions of the IGST Act.

The Supreme Court in *Union of India v Mohit Minerals*[2]examined the impugned notifications, wherein the Union of India contended that under the first Notification, on the providing of certain services, including the transportation of goods in a vessel from a location outside of India to the customs station of clearance within India, the notification imposed an integrated tax at a rate of five percent and on the recommendation of the GST Council, furthermore, the Union Government issued a second notification that expanded the definition of an importer under

[1] *Mohit Minerals v Union of India* [2020] SCC OnLine 49 (Guj)
[2] *Union of India v Mohit Minerals* [2017] SCC OnLine 1733 (SC)

Section 2(26) of the Customs Act, 1962 to include recipients of services or supplies of products made by a person or vessel in non-taxable territory. One of the major questions posed before the Supreme Court was whether the word "recommendation" given under Article 279A creates a binding effect or does it only mean a suggestion where the Union and States have the option to follow or reject such recommendations. The Supreme Court upheld the High Court's Judgement and also examined various aspects of the GST Council and held that recommendations made by the GST Council are non-binding.

## SUPREMACY OF THE PARLIAMENT AND THE STATE LEGISLATURES TO LEGISLATE ON GST

Given the diversity of a state's welfare operations, it is improbable that it can choose all the specifics to fit the many facets of a complicated scenario, hence it must inevitably delegate the determination of specifics to the executive or any other agency.[3] Delegation of powers by the legislature is a fundamental constitutional principle where the legislature may assign any subsidiary or supplementary powers to a delegate but the legislative policy and principles must be established to provide the delegate with enough direction in carrying out the power of delegation.[4] Most importantly, it is impermissible for the legislature to abdicate its essential legislative functions.[5]

The court in *A.B. Abdul Kadir v State of Kerala*[6] held that *"Where the encroachment is ostensibly ancillary but in truth beyond the competence of the enacting authority, the statute will be a colorable piece of legislation and constitutionally invalid."* The issue of motive is entirely irrelevant if the legislature is incompetent to address a particular matter.[7] The Act must pass the test of legislative competence as well as it should be legally valid, and it must also be congruent with the principles of the Constitution, i.e., they cannot violate the Constitution.[8] If recommendations of the GST Council are made binding on the Union and States then, firstly, it

[3] *Devi Das Gopal Krishnan v State of Punjab* [1967] AIR 1895
[4] *Vasantlal Maganbhai Sanianwal v State of Bombay* [1961] 1 SCR 341
[5] *Vasu Dev Singh and others v Union of India and Ors* [2006] 12 SCC 753 [18]
[6] *A B Abdul Kadir v State of Kerala* [1976] 3 SCC 219
[7] *K C Gajapati Narayan Deo v State of Orissa* [1953] AIR 375
[8] *Poppat Lal Shah v State of Madras* [1953] SCR 677

would amount to excessive delegation of legislative functions and secondly, it would curtail the power of Legislature to enact laws on GST because both Parliament and State Legislature have power to legislate on GST under Article 246A and the legislative power under Article 279A are not "subject to" Article 279A.

The ability to enact legislation on the topics specified in the Constitution's Seventh Schedule is granted to Parliament and the State Legislatures by Article 246 when read alongside the Seventh Schedule. Before the Constitution Amendment Act of 2016 introduced Articles 246A and 279A, the Union and the States had sole legislative authority over taxes. The tax-related subjects of the Union are compiled under entries 82 to 92B in the Union list and the subject head related to taxation for the States are given under entries 45 to 63 in the State list. The Concurrent list on the hand contains subject heads where both, the Union and the States enjoy their legislative power concurrently but the concurrent list does not include any entry related to taxation. The constitutional principle of a simultaneous levy, as opposed to the idea of concurrence, is embodied in Article 246-A; Article 254 governed concurrence, which took place inside the Concurrent List.[9]

Furthermore, a non-obstante clause is a well-known legislative tool that is often used to give specific provisions precedence over any contrary provisions that may be included in the same or another law, i.e., to prevent the operation and effect of all contrary provisions.[10] Neither does Article 279A begin with a non-obstante clause nor does Article 246A provide that the legislative power is subject to Article 279A, therefore, it can be established that the legislative authority of the Union and the States under Article 246A is not subject to Article 279A, since there would have been a clear provision in Article 246A if the GST Council were meant to be a constitutional body whose recommendations necessarily became legislation.

The essential legislative function cannot be delegated by the legislature; in other words, even a partial abdication of the legislative function or power about a particular issue or subject that

[9] *Union of India v VKC Footsteps* [2022] 2 SCC 603
[10] *Union Of India & Anr v G.M. Kokil & Ors* [1984] AIR 1022

the Constitution has given the legislature responsibility over is not at all permissible.[11] The rule must comply with the law and fall inside the purview of the rulemaking power of the authority; if any of these two requirements is not met, the rule as formulated would be invalid.[12] Article 246A gives simultaneous powers to Union and States to legislate on GST and if they are not free to legislate then it would amount to a violation of Article 246A and will also amount to delegation of essential legislative functions. Therefore, it can be concluded that the Union and States have the power to legislate on GST and if recommendations by GST Council have a binding effect, then it would take away the power of the Union and State legislature to legislate on GST.

**THE DELETION OF ARTICLE 279B**

The Task Force on GST was established by the Thirteenth Finance Commission. The Task Force suggested that the Empowered Committee of State Finance Ministers become a permanent constitutional body called the "Council of Finance Ministers" with the implementation of the GST. The Task Force recommended the following features:

- The Council would be in charge of changing the dual GST and overseeing the country's indirect taxation system;
- The Council would decide using the majority rule rather than unanimity. The Union and three-fourths of the States would both approve of the initial decision. The decision may be changed later with the support of two-thirds of the States and the Union;
- Since both the Union and the States would forfeit their financial independence to implement the GST system, the body would maintain the "existing balance of federal fiscal authorities;
- Upon agreement, the basis for levy should be the same for the Union and the States. The Australian GST legislation, requires the Union and the States' permission before any change in the rate or base of GST can be followed in this case; and

[11] *Municipal Corporation v Birla Cotton, Spinning and Weaving Mills* [1968] 1232 (SC) [189]
[12] *General Officer Commanding-in-Chief v Subhash Chandra Yadav* [1988] 2 SCC 351 [14]

- A mechanism that requires the defaulting State to pay a fine should be implemented if the States vary from their mutually agreed-upon position on GST rates.

The Constitution (One Hundred and Fifteenth Amendment) Bill 2011 was tabled by Parliament to amend the Constitution's provisions to implement the GST regime. Some changes were suggested by the Standing Committee of Finance The 2011 Amendment Bill's draft of Article 279A stated that every decision taken by the GST Council required the approval of all members in attendance. The Bill also called for the establishment of a GST Dispute Settlement Authority, which would be responsible for hearing any complaints from the States or the Union government about Council recommendations that were disregarded and resulted in lost revenue or had an effect on the GST's unified structure.

The Standing Committee of Finance in its 73rd report on the 2011 Amendment Bill explained that the GST Council only plays an enabling and constructive role[13] and The Parliament and State Legislatures will be able to exercise their authority over all matters on which the Council has made recommendations; these legislative bodies may deviate from the Council's suggestions.[14] The Attorney General also asserted that the establishment of the GST Council has no bearing on the authority of Finance, which is an essential legislative function.[15] Article 279B was suggested to be omitted.[16] Additionally, it was advised that a clause be added to Article 279A itself giving the GST Council the authority to settle disputes resulting from its recommendations. The Constitution (One Hundred and Twenty-Second Amendment) Bill 2014 was introduced after incorporating the recommendations of the Standing Committee and Article 279(11) was inserted wherein GST Council has the power to devise a mechanism of dispute resolution.

Some of the States opposed the idea of the GST Council as a constitutional body and were concerned that it will override the legislative supremacy and it would also destroy the fiscal autonomy of States as it appeared that the Union Government have more weightage in the

[13] *Ibid*
[14] *Ibid*
[15] *Ibid*
[16] *Ibid*

voting structure of the GST Council which would imply that a consensus achieved by all the States can be stopped by the Union if it wishes to do so. The Finance Minister clarified that none of the States will be losing their authority instead the Union and States will be pooling their sovereignty together.

Furthermore, a Select Committee of Rajya Sabha suggested a dispute settlement authority, in other words, a reintroduction of the Article 279B[17] but the government in their reply stated that *"2.71 It may further be mentioned that Article 279A (11) only provides that GST Council may decide the 'modalities' to resolve disputes arising out of its recommendations. The 'modalities' could include any dispute resolution mechanism which could be inter-alia negotiation, mediation, arbitration, or even a judicial authority as deemed appropriate by the GST Council depending on the nature of the dispute before it. Thus, as per the proposed Bill, the GST Council shall, by itself, not be resolving the disputes but decide on the modalities for resolving the disputes."*

To determine the conditions that led to the creation of certain legislation and the aim of the legislature, one can examine the reports of the Parliamentary Committees and the speeches made in the Parliament,[18] hence, the statements by the mover of the Bill outlining the rationale for its introduction can undoubtedly be resorted to determine the wrong that the legislation is intended to correct and the intent and purpose for which the legislation is passed.[19] Therefore, the Legislature keeping in mind the fiscal autonomy of the States and the sovereignty of Parliament and State legislatures to legislate on GST, intended to make recommendations of GST Council non-binding on the Union and States.

## THE WORD "RECOMMENDATION" IN THE PRESENT CONTEXT IS OF A NON-QUALIFIED CHARACTER

The word "recommendation" in a literal sense means a suggestion that something is good or suitable for a particular purpose but at the same time, the phrase, 'recommendation' is used in numerous provisions in the Constitution, however, the meaning of the word varies depending

[17] Constitution of India 1950, art. 279B
[18] *Kalpana Mehta v Union of India* [2017] 7 SCC 295
[19] *K.P Varghese v ITO* [1981] 4 SCC 173

on the context.[20] The court in the case of *Reserve Bank v Peerless General Finance*[21] held, *"…Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."* Construction will be adopted by the policy and object of the statute.[22] The Union of India contended that, in the present context, the word "recommendation" should be interpreted in a sense to further the purpose of the enactment which would make the recommendation binding on the Union and States. They argued that the intended purpose of the enactment would be defeated since the Union and States would be free to reject the recommendations, and there would be no dispute to be resolved under Article 279(11), therefore, Parliament had intended to give the recommendations a binding effect.

A construction that modifies the meaning of the words and even the sentence structure may be applied to a statute when its ordinary meaning and grammatical construction results in a clear contradiction of the apparent purpose of the enactment or lead to some inconvenience or absurdity that was presumably not intended.[23] but at the same time, it is an accepted principle of interpretation of provisions there should not be any deviation from the language of the law when interpreting the law and if unambiguous words are used in a rule, then they must be understood and expound limited to their natural and ordinary sense.[24]

In the present context, the phrase 'recommendation' must be interpreted in contrast to 'direction' or 'mandate'.[25] The word 'recommendation' has persuasive value[26] because, unlike a "direction" or "mandate," recommendations cannot establish legally binding rights.[27] The binding character of "recommendation" arises when there is an explanation of the value of such

[20] *Union of India v Mohit Minerals Pvt. Ltd.* [2017] SCC OnLine 1733 (SC) [52]
[21] *Reserve Bank v Peerless General Finance* [1987] AIR 1023
[22] *Kanwar Singh v Delhi Administration* [1965] AIR 871
[23] *Tirath Singh v Bachittar Singh* [1955] AIR 830
[24] *Dr. Sudha Suri, Professor v Union of India and Ors* [2003] 1 SLR 679 (DB)
[25] *Manohar v State of Maharashtra*[2012] 13 SCC 14
[26] *Naraindas Indurkhya v State of Madhya Pradesh* [1974] 4 SCC 788
[27] *Union of India v Pradip Kumar Dey* [2000] 8 SCC 580

a recommendation.[28] As observed in Mohit Minerals[29] (supra), there are five categories into which the phrase 'recommendation' has been deployed in the Constitution:

- Recommendation by the President before laying before the Parliament for voting as given under Articles 3, 109, 111, 113, 117, 203, 207, 255, and 274.
- The recommendation is followed by consultation given under Article 233, wherein it is a two-step process, firstly, recommended by the High Court and secondly, appointment by the Governor in 'consultation' with the High Court.
- Recommendation with accountability as given under Articles 243I, 243Y, 280, 281, 338, 338B, and 340 wherein recommendation is followed by accountability such as an explanatory memorandum on the action taken on such recommendations.
- Non-qualifying recommendations as given under Article 263 wherein recommendations are made in the public interest for better coordination of policy and action.
- Recommendations that are obligatory in nature as given under Articles 270, 275, 344, 349, and 371A wherein certain committees or commissions must make recommendations that make them binding.

In the fourth category, Article 263 only states that the Inter-State Council must recommend and there is no further explanation on whether the recommendation ought to be mandatorily accepted or just be carefully considered. The Supreme Court concluded that the recommendation in the present context falls within the fourth category which is one of a non-qualified character because it neither has an explanation on the value of such a recommendation nor recommendations are made to the President or the Governor like the other categories.

The Supreme Court held, "*Yet the notion that the recommendations of the GST Council transform into legislation in and of themselves under Article 246A would be farfetched. If the GST Council was intended to be a decision-making authority whose recommendations transform into legislation, such a qualification*

[28] *Union of India v Mohit Minerals Pvt. Ltd.* [2017] SCC OnLine 1733 (SC) [52]
[29] *Ibid*

*would have been included in Articles 246A or 279A. Neither does Article 279A begin with a non-obstante clause nor does Article 246A provide that the legislative power is 'subject to' Article 279A."*

**CONCLUSION**

Before the GST regime, the Parliament and State Legislatures were exclusive power on taxation and there are no entries related to the same in the concurrent list. The Union of India has a quasi-federal structure and this separation of powers about taxation was done to provide financial autonomy to the States, i.e., States are not entirely dependent on the Union for funds. After GST was implemented simultaneous powers to legislate on GST were given to the Union and States, therefore, the States still retained their authority to legislate but at the same time if recommendations of the GST Council were made binding on the Union and the States, then it would imply that the legislature has lost its authority to legislate on GST which is given under Article 246A. Therefore, the Parliament in their wisdom deleted Article 279B and two significant changes were made as a result of the 2014 Amendment Bill's deletion of Article 279B and the addition of Article 279(11) to the Constitution. Firstly, the Council now has the authority to determine the "modalities" of dispute resolution rather than having to establish a separate dispute resolution authority. Secondly, Article 279B previously stated that the authority would decide on disputes "arising out of the deviation from the recommendations." The phrase 'deviation' has been omitted. The Government had stated before the Select Committee of Rajya Sabha that 'the disputes shall be resolved by modalities including mediation and arbitration.

Due to the concerns expressed by the States, the Standing Committee on Finance specifically recommended the deletion of Article 279B in its report. An equivalent qualification would have been included in Articles 246A or 279A if the GST Council was intended to be a decision-making body whose recommendations become legislation but there is no non-obstante clause nor any repugnancy provision or any other phrase stating that the legislative authority is subject to Article 279A. Therefore, the Supreme Court interpreted the phrase "recommendation" and found that the recommendations are non-binding on the States and the Union while also taking into account the legislative history of the enactment and the sovereignty of the legislature to legislate on GST.