

THE WEIGHT OF THE GST COUNCIL RULING

Relevant for: Indian Economy | Topic: Issues relating to Growth & Development - Public Finance, Taxation & Black Money incl. Government Budgeting

No space for one-upmanship | Photo Credit: Getty Images/iStockphoto

In *Union of India Anr. vs Mohit Minerals Pvt. Ltd.*, the Supreme Court of India on May 19, 2022 while deciding on a petition relating to the levy of Integrated Goods and Services Tax (IGST) on ocean freight paid by the foreign seller to a foreign shipping company, ruled, “The recommendations of the GST Council are not binding on either the Union or the States...”. While the issue before the Court was with reference to the levy of IGST on a particular transaction, the question is why should the Supreme Court of India have to deliberate at length on the nature of recommendations of the GST Council?

Some States have rejoiced over the ruling and said that this has restored the autonomy of States to legislate on GST.

Immediately after the pronouncement of the judgment, the Revenue Secretary of the Government of India said: “... (this) reiterates the scheme of things in the constitution and the GST laws... the council will continue to work in future the way it has worked in the last 5 years.” This creates the notion that the Union government is in agreement with this ruling and there is no question of law in this regard.

On the contrary, the Union government (represented by the Additional Solicitor General) submitted to the Supreme Court in this case that the recommendations of the GST Council are binding on the executive and the legislature while they frame laws relating to the GST by the power under Article 246A. Thus, the Government of India was of the opinion that the GST Council could function as a super Parliament/Assembly by sending binding recommendations on laws, rules and regulations with reference to the GST to the Union and State governments.

Article 246A gives powers to the Union and State governments simultaneously to legislate on the GST. In other words, the two tiers of the Indian Union can simultaneously legislate on matters of the GST (except the IGST, which is in the legislative domain of the Union government); obviously it can be inferred that neither of the legislations can supersede each other.

Article 279A stipulates the creation of the GST Council and its functions. The Council has to function as a platform to bring the Union and State governments together, and as a mark of cooperative federalism, the Council shall, unanimously or through a majority of 75% of weighted votes, decide on all matters pertaining to GST and recommend such decisions to the Union and State governments. The purpose of GST, as a harmonised commodity tax, is to make India a single market. The Government of India further argues, “Neither can Article 279A override Article 246A nor can Article 246A be made subject to Article 279A.” However, cooperative federalism is to operate through the GST Council to bring in harmony and alignment in matters pertaining to the GST from both governments. Given this background, the Union government had almost delegated the powers to create laws under the GST Act Section 5(1) to the GST Council through repeated use of the phrase “notification on the recommendation of the (GST) council”. Hence, the constitutional validity of the Council’s recommendation should be upheld; generally, the recommendations of the GST Council could be overridden only in exceptional cases, as argued by the Additional Solicitor General.

While the respondents in this case were represented by several senior lawyers, hardly anyone made a substantive response to the issue of the supremacy of the GST Council in this matter. However, the judges of the Supreme Court have spent nearly a third of the 152-page order to deliberate and resolve this issue. Section C of this order gives an elaborate history of the constitutional amendment to bring GST as a tax that could be simultaneously legislated by the Union and State governments. It is a treatise on the democratic and federal imports of the GST legislations.

In 2013, while replying to a query from the Standing Committee on Finance that was debating the 2011 Constitutional Amendment Bill, the Attorney General emphatically said, “The powers of the legislature over the Finance are sacrosanct and are not affected by the setting up of the GST Council.” Thus, in the beginning of the debate on Constitutional Amendment to bring in GST, the clear line of demarcation of powers between the legislature and the GST Council was drawn. However, the issue of conflict between the Union and State governments has to be resolved on a platform such as the GST Council.

The judges of the Supreme Court have recorded, “Since the Constitution does not envisage a repugnance provision to resolve inconsistencies between the Central and State laws on GST, the GST Council must ideally function, as provided by Article 279A(6) in a harmonised manner to reach a workable fiscal model through cooperation and collaboration.”

The fact that the Union government holds one-third weight for its votes and all States have two-thirds of the weight for their votes, gives automatic veto power to the Union government because a resolution can be passed with at least three-fourths of the weighted votes. This imbalance in the voting rights between the Union and State governments, makes democratic decision-making difficult. Further, though all the States are not equal in terms of tax capacity, everyone has equal weight for their votes. This creates another political problem as the smaller States with lesser economic stakes can be easily influenced by interest groups.

Of course in this context, the debates in the GST Council will be on political lines rather than on the economics of taxation; the GST Council has borne witness to several such instances. When the States governed by Opposition parties are vocal on counter-points, the States governed by the same party at the Union government are mute spectators. It is a fact that States have not got full compensation for the shortfall in GST revenue collection during the COVID-19 pandemic period and that States wanted to extend GST compensation beyond June 2022 given the current recession and widely expected slow growth in effective revenue under the GST. The Union government and States ruled by the Bharatiya Janata Party and its alliance partners were not cooperating with States ruled by Opposition parties in reaching an amicable resolution on the issues of compensation during the pandemic period or even for debating the extension of compensation cess after June 2022.

If the contestations are healthy in a federation (and even in such circumstances), it requires extraordinary political acumen and statesmanship from all leaders to strike a balance between the autonomy of legislatures and compromise for obtaining a harmonised commodity tax system. The nuanced understanding of cooperative federalism shows that there is no space for one-upmanship in either of the two tiers of the Indian federal government and particularly for the Union government under a quasi-federal Constitution. Clause 6 of Article 279A reflects this spirit: “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 GST and for the development of a harmonised national market for goods and services”. In an atmosphere of a non-cooperative Union and State governments, the fear that the GST Council would break down is not unfounded; the responsibility lies on all governments equally, contrary to what the weighted votes reflect.

Given these arguments, the Supreme Court of India adjudicated that the GST Council's recommendations are non-qualified and the simultaneous legislating powers of the Union and State governments give only persuasive value to the Council's recommendations. The power of the recommendations rests on the practice of cooperative federalism and collaborative decision-making in the Council.

Therefore, the submission of the Union government to the Supreme Court of India that the GST Council's recommendations are binding on Parliament/Assembly can be construed as a precursor for a wilful giveaway of the legislative power on commodity taxation to the GST Council which is not the forum for the direct representatives of the people to legislate on any matter. Given the lopsided power structure favouring the Union government in the GST Council, it is against the spirit of democracy and federalism that the finances of governments can be left to such bodies. Finally, it is pertinent to understand that in a democracy, the power to legislate is given to Parliament/Assembly by its people who have curtailed their private autonomy to accept collective decisions. John Locke, the 17th century English philosopher and liberal thinker persuasively said, "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others...."

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