



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 04<sup>TH</sup> DAY OF JANUARY 2022**

**BEFORE**

**THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV**

**WRIT PETITION No.52371/2019 (T-RES)**

**C/W**

**WRIT PETITION No.51473/2019 (T-TAR)**

**WRIT PETITION No.52323/2019 (T-RES)**

**WRIT PETITION No.52374/2019 (T-RES)**

**WRIT PETITION No.651/2020 (T-RES)**

**WRIT PETITION No.713/2020 (T-RES)**

**WRIT PETITION No.2318/2020 (T-RES)**

**WRIT PETITION No.6114/2020 (T-RES)**

**WRIT PETITION No.6122/2020 (T-RES)**

**WRIT PETITION No.3810/2021 (T-TAR)**

**IN W.P. No.52371/2019**

**BETWEEN:**

M/s.V.S.Products  
A Proprietary Firm  
Represented by its Proprietor  
Mr. Manoj Kumar Srivastava  
S/o Sitaram Srivastava,  
Aged about 50 years,  
R/o Plot No.21-P, 2<sup>nd</sup> Phase,  
Antharasanahalli Industrial Area,  
Tumkur- 572 106  
(Karnataka).

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
Sri. K.G.Raghavan, Senior Advocate,  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. Vinay Kuttappa K.S., Advocates)

**AND:**

1. Union of India  
Represented by Joint Secretary  
Ministry of Finance, Department of Revenue  
Room No.46, North Block,  
New Delhi - 110 001.
2. The Commissioner of Central Tax  
(Earlier known as the  
Commissioner of Central Excise)  
Bangalore I Commissionerate  
P.B.No.5400, Queens Road,  
Bangalore- 560 001. ... Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w  
Sri. Jeevan J. Neeraigi, Advocate)

This Writ Petition is filed under Articles 226 & 227 of Constitution of India, praying to quash the Notification No.3 of 2019 dated 06.07.2019 issued by the first respondent, purporting to exercise power under Section 5 (A) of the Central Excise Act, 1944, levying Central Excise on tobacco and tobacco products vide Annexure-'A' and etc.

**IN W.P. No.51473/2019**

**BETWEEN:**

R.M.DHARIWAL (HUF)  
# 13, Near to TCI-XPS Courier Depot,  
Near Singasandra Bus Stop,  
Bengaluru- 560 068.  
Rep. by Shri. Jevan B. Sancheti  
Authorised Representative ... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
Sri. K.G.Raghavan, Senior Advocate,  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. Vinay Kuttappa K.S., Advocates)

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**IN W.P. No.52323/2019**

**BETWEEN:**

Everest Industries, LLP  
A Limited Liability Partnership  
Registered under the provisions of  
Limited Liability Partnership Act, 2008  
Having its registered office at:  
Manikchand House, Plot No.100-101,  
D Kennedy Road, Pune- 411 001.  
and Having its Principal place of Business at:

# 13, Near to TCI-XPS Courier Depot,  
Hosur Main Road, Singasandra,  
Bengaluru- 560 068.  
Represented by Shri. Jevan B. Sancheti  
Authorised Representative

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
Sri. K.G.Raghavan, Senior Advocate,  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. Vinay Kuttappa K.S., Advocates)

**AND:**

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... Respondents

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**IN W.P. No.52374/2019**

**BETWEEN:**

Fast Track Packers Private Limited

A Private Limited Company  
 Registered under Companies Act, 1956,  
 Having its registered office at  
 Plot No.94C, Situated in Survey No.23,  
 Part of Nagenahalli village,  
 Vasanthanagara Industrial Area,  
 Kora Hobli, Tumkur, Karnataka- 572 138.  
 Rep. by its Manager  
 Authorised Representative

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
 Sri. K.G.Raghavan, Senior Advocate,  
 Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
 Sri. Goutham S. Bharadwaj and  
 Sri. Vinay Kuttappa K.S., Advocates)

**AND:**

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 Represented by Joint Secretary  
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 (Earlier known as the  
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 2019 dated 06.07.2019 issued by the first respondent, purporting  
 to exercise power under Section 5 (A) of the Central Excise Act,  
 1944, levying Central Excise on tobacco and tobacco products vide  
 Annexure-'A' and etc.

**IN W.P.No.651/2020****BETWEEN:**

Maa Sharda Tobacco Private Limited  
 A Private Limited Company registered  
 Under the Companies Act, 1956  
 Having its Factory Premises at:  
 51/1A4, Hdpura village,  
 Dasanapura Hobli, Bengaluru- 562 123.  
 Rep. by its Director Mr.Hari Bushan Bajpai ... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate  
 Sri. K.G.Raghavan, Senior Advocate  
 Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
 Sri. Goutham S. Bharadwaj and  
 Sri. Sumanth M.S., Advocates)

**AND:**

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 Represented by Joint Secretary  
 Ministry of Finance,  
 Department of Revenue  
 Room No.46, North Block,  
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**IN W.P.No.713/2020****BETWEEN:**

Thrishul Zarda Pouches,  
Having its factory premises at  
Sy.No.2, Katha No.54, Megalahalli Road,  
Bommenahalli – 577 520,  
Chitradurga (T) & (D),  
Rep. by its Authorised Signatory  
Mr.Rajashekhar Narajji ... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate  
Sri. K.G.Raghavan, Senior Advocate  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. M.S. Manvi Bhandari, Advocates)

**AND:**

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Ministry of Finance  
Department of Revenue  
Room No.46, North Block,  
New Delhi - 110 001.  
Represented by its Joint Secretary
2. The Commissioner of Central Tax  
(Earlier known as the  
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P.B.No.5400, Queens Road,  
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**IN W.P.No.2318/2020****BETWEEN:**

Habson Food and Products  
Having its registered office at  
No.83, Near Prestige School,  
Virgo Nagar PO, Rampura,  
Bengaluru- 560 049.

Rep. by its Proprietor  
Mr. Mohamed Inayathulla

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate  
Sri. K.G.Raghavan, Senior Advocate  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. Vinay Kuttappa K.S., Advocates)

**AND:**

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2. The Commissioner of Central Tax  
(Earlier known as the  
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Bangalore I Commissionerate  
P.B.No.5400, Queens Road,  
Bangalore- 560 001.

... Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w  
Sri. Jeevan J. Neeralgi, Sri K.V. Aravind and  
Ms. Vanita K.R., Advocates for R1 & R2)

This Writ Petition is filed under Articles 226 & 227 of Constitution of India, praying to quash the Notification No.3 of 2019 dated 06.07.2019 issued by the first respondent, purporting to exercise power under Section 5 (A) of the Central Excise Act, 1944, levying Central Excise on tobacco and tobacco products vide Annexure-'A' and etc.



**IN W.P.No.6114/2020****BETWEEN:**

Jalaram Industries,  
Having its registered office at  
120/4, Alur Road, Bangalore- 562 162.  
Represented by its Partner

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
Sri. K.G.Raghavan, Senior Advocate,  
Sri. Prashanth F. Goudar, Sri. Goutham S. Bharadwaj  
and Ms. Ananyaa Jagirdhar, Advocates)

**AND:**

1. Union of India  
Represented by Joint Secretary  
Ministry of Finance, Department of Revenue  
Room No.46, North Block,  
New Delhi - 110 001.

2. The Commissioner of Central Tax  
(Earlier known as the  
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Bangalore I Commissionerate  
P.B.No.5400, Queens Road,  
Bangalore- 560 001.

... Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w  
Sri. Jeevan J. Neeralgi, Advocate)

This Writ Petition is filed under Articles 226 & 227 of Constitution of India, praying to quash the Notification No.3 of 2019 dated 06.07.2019 issued by the first respondent, purporting to exercise power under Section 5 (A) of the Central Excise Act, 1944, levying Central Excise on tobacco and tobacco products vide Annexure-'A' and etc.

**IN W.P. No.6122/2020****BETWEEN:**

Harsh International Flavour

Tobacco Private Limited  
 Having its registered office at  
 20/9, Alur Road, Bangalore- 562 162.  
 Represented by its Authorised Signatory ... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate,  
 Sri. K.G.Raghavan, Senior Advocate,  
 Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
 Sri. Goutham S. Bharadwaj and  
 Sri. M.S. Nalin Talwar, Advocates)

**AND:**

1. Union of India  
 Represented by Joint Secretary  
 Ministry of Finance  
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 Room No.46, North Block,  
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2. The Commissioner of Central Tax  
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 Sri. Jeevan J. Neeralgi, Advocate)

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**IN W.P.No.3810/2021**

**BETWEEN:**

M/s. Dinesh Fragrance

Having its registered office at  
No.17/5, Behind Bharath Benz Showroom,  
Budihal, Bengaluru- 562 123.

Rep. by its Aurtherised Signatory

... Petitioner

(By Sri C.S.Vaidyanathan, Senior Advocate  
Sri. K.G.Raghavan, Senior Advocate  
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,  
Sri. Goutham S. Bharadwaj and  
Sri. Shamanth M.S., Advocates)

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1. Union of India  
Represented by Joint Secretary  
Ministry of Finance, Department of Revenue  
Room No.46, North Block,  
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2. The Commissioner of Central Tax  
(Earlier known as the  
Commissioner of Central Excise)  
Bangalore I Commissionerate  
P.B.No.5400, Queens Road,  
Bangalore- 560 001.
3. Assistant Commissioner of Central Tax  
North West Division-3,  
Bengaluru North-West Commissionerate,  
2<sup>nd</sup> Floor, South Wing,  
BMTc Bus Stand Complex,  
Shivajinagar, Bengaluru- 560 051. ... Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w  
Sri Madanan Pillai, CGC for R1;  
Sri. Jeevan J. Neeralgi, Advocate for R2 & R3)

This Writ Petition is filed under Articles 226 & 227 of  
Constitution of India, praying to quash the Notification No.3 of  
2019 dated 06.07.2019 issued by the first respondent, purporting  
to exercise power under Section 5 (A) of the Central Excise Act,  
1944, levying Central Excise on tobacco and tobacco products vide  
Annexure-'A' and etc.

These Writ Petitions having been heard and reserved on 05.10.2021 and coming on for pronouncement of orders, this day, the Court made the following:

### **ORDER**

#### **S. SUNIL DUTT YADAV. J**

**This Order has been divided into the following Sections to facilitate analysis:**

<b>I</b>	<b>Preamble</b>	<b>13</b>
<b>II</b>	<b>Contentions of Petitioners</b>	<b>15</b>
<b>III</b>	<b>Contentions of Respondents</b>	<b>24</b>
<b>IV</b>	<b><u>Consideration :</u></b>  <b>A. Power under Article 246 r/w Entry 84 list I post, the GST Regime and Introduction of Article 246A of the Constitution of India</b>  <b>B. Taxing of taxable event, Aspect Theory and Subsumation of manufacture in Supply</b>  <b>i) Subsumation of manufacture in the Concept of Supply</b>  <b>ii) Taxing of Taxable event</b>  <b>iii) Aspect Theory</b>  <b>C. Legality of levy of NCCD as per Section 136 of the Finance Act, 2001</b>  <b>D. NCCD as a surcharge and Article 271</b>  <b>E. Levy of NCCD during the period of Exemption of Excise Duty</b>  <b>F. Levy of basic excise duty and NCCD is violative of Article 14 of the Constitution of India</b>	<b>30</b>

**I PREAMBLE**

1. The petitioners are stated to be manufacturers of Tobacco and Tobacco products and are registered in terms of Rule 9 of the Central Excise Registration Rules, 2002 ("the Rules, 2002" for short). Subsequent to coming into force of the Goods and Services Tax ("GST" for short) regime, the petitioners have registered themselves under Rule 10 (1) of the Central Goods and Services Tax Rules, 2017 ("CGST Rules" for short).

2. The petitioners in W.P.No.52374/2019, 52323/2019, 51473/2019, 6114/2020, 6122/2020, 2318/2020, 651/2020 and 713/2020 have sought for the following reliefs:

a) Setting aside of the Notification No.3/2019 dated 06.07.2019 issued by the first respondent-Union of India whereby Central Excise Duty has been levied on tobacco and tobacco products.

b) Declaration that the Repeal and Saving provision as contained in Section 174 of the Central Goods and Services Act, 2017 ("CGST Act" for short) insofar as it seeks to save the operation of the Central Excise Act, 1994 *qua* tobacco and tobacco products as unconstitutional and bad in law.

c) Declaration that Section 136 of the Finance Act, 2001 under which there is levy and collection of National Calamity Contingent Duty (hereinafter referred to as "NCCD") as unconstitutional.

d) In the alternative and without prejudice to the relief at prayer (c), have sought for declaration that Section 136 of the Finance Act, 2001 under which there has been a levy and collection of NCCD has been impliedly repealed with effect from 01.07.2017 i.e., the date on which CGST Act, 2017 has come into effect.

e) Consequential to the prayers above, have sought for refund of the NCCD collected by the respondents with effect from 01.07.2017 till date.

3. In W.P.No.3810/2021, apart from the above prayers, petitioner has sought for quashing of show-cause notice dated 29.09.2020.

## **II. CONTENTIONS OF PETITIONERS:**

### **Issue for Consideration:**

4. The petitioners have put forth the following issues for consideration (as per submissions of petitioner filed on 05.10.2021) :

1) Whether after coming into force of the Constitution (101<sup>st</sup> Amendment) Act, with effect from 01.07.2017 the levy of basic excise duty and NCCD is constitutionally valid?

2) Whether simultaneous levy of GST under Article 246A of the Constitution of India and levy of basic Excise duty and NCCD under Article 246 *qua* tobacco and tobacco products is legally permissible?

3) Whether such simultaneous levies would be consistent with purposive and harmonious construction of the Constitution?

**Propositions relied on by the Petitioners:**

5. In support of the aforesaid issues raised, petitioners have relied on the following propositions:

i) The introduction of the Constitution (101<sup>st</sup> Amendment) Act, 2016 and consequent enactment of the four GST Acts with effect from 01.07.2017 was to avoid cascading effect of taxes and providing for a Common National Market for Goods and Services.

ii) The Goods and Services Tax is a single tax which subsumes various existing taxes levied at each stage of the supply chain starting from manufacture or import till the last retail level. Reliance is placed on the Statement of Objects of various Acts.

iii) Upon coming into force of the GST regime, all goods and services were subjected to the Goods and Service Act except (a) supply of alcoholic liquor for human consumption in respect of which the legislative power continues in Article 246 read with Entry 51 of List II of the Seventh Schedule; (b) goods with respect to which levy of GST has been



deferred viz., petroleum crude, high speed diesel, motor spirit (commonly known as petrol, natural gas and aviation turbine fuel). In the interregnum, old regime of indirect taxes *qua* such products continues.

iv) Article 246A contains a *non-obstante* clause while conferring power on the Parliament and legislature of the State to make laws with respect to goods and services. As Article 246A is carved out of Article 246, there is a denudation of power under Article 246.

Article 246A being a *sui generis* power exhaustive of taxes on all aspect and facets of supply of goods including tobacco and tobacco products, overrides the taxing power of legislature referable to Article 246 in light of the *non-obstante* clause in Article 246.

v) Article 248 which provided for residuary power of legislation including the power to impose a tax not mentioned in the concurrent or State List stands curtailed, as the same has been amended by 101<sup>st</sup> Constitutional

Amendment whereby Article 248 has been amended and begins with the phrase "subject to Article 246-A, ....."

vi) The levy of basic excise duty by virtue of amended Section 3 of the Central Excise Act at the rates set forth in the Fourth Schedule to the Central Excise Act, 1944 despite being subjected to various indirect taxes under the GST regime is unconstitutional. Once the Central Excise Tariff Act, 1985 stood repealed by Section 174 of the CGST Act, the reference to the Central Tariff Act, 1985 in the Seventh Schedule of the Finance Act, 2001 is otiose.

vii) The levy of surcharge under Article 271 is to be restricted to goods and services which are excluded under Article 246A and as tobacco products fall within the ambit of Article 246A recourse to Article 271 to justify surcharge and sustain NCCD is impermissible.

viii) The Union cannot levy any tax, cess or surcharge in the form of basic excise duty or NCCD on a facet of supply (that is manufacture) on tobacco products beyond the GST

framework and scheme envisaged under Article 246A, 269A, 270 and 279A.

ix) The scheme envisaged by the Constitution provides for levy of surcharge/tax only pursuant to the recommendation by the GST Council which consequentially would determine apportionment between the Union and the States. The effect of levy of basic excise duty and NCCD which is exclusively retained by the Union and not subjected to apportionment between the States and the Union is violative of the Constitutional Scheme.

x) The levy of excise duty and consequential NCCD despite the same being taxed under the GST regime is a colourable exercise of power and falls foul of the constitutional mandate.

xi) The mere mention of tobacco and tobacco products in Entry 84 of List I of the Seventh Schedule to levy excise duty and NCCD is based on a false premise as entries in the

Seventh Schedule are not powers of legislation but only fields of legislation.

xii) The continuation of tobacco and tobacco products in Entry 84 post the 101<sup>st</sup> Constitutional Amendment is violative of the Constitutional Scheme as set out in Article 246, 246A, 265, 269A, 270, 271 and 279A.

xiii) The levy of basic excise duty and NCCD which is a duty of excise on tobacco and tobacco products is violative of Article 14 on the following grounds:

**a) Unreasonable Classification:**

Twin tests are required to be satisfied viz.,

(i) Classification must be made on the basis of an "intelligible differentia";

(ii) The intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

All goods were subject to excise duty in the erstwhile indirect tax regime (i.e., pre-GST regime) and were subjected to tax on two taxable events i.e., manufacture and sale and after coming into force of the GST regime, tobacco products are subjected to indirect taxes under the pre-GST regime (i.e., under the Excise Act) and GST regime as well. The singling out of tobacco products for such taxation vis-à-vis other goods which are subjected to tax only under GST regime does not have any legal justification for such hostile and discriminatory treatment.

**b) Manifest Arbitrariness:**

The levy of excise duty and levy of NCCD has elements of caprice, irrationality and lacks adequately determining principles rendering the levy bad as being manifestly arbitrary.

xiv) The phrase "adequately determining principle" has been held to be "principle which is in consonance with the constitutional values". In the present case, the levy of excise

duty by recourse Notification No.3/2019 dated 06.07.2019 to sustain excise duty is violative of the constitutional scheme and consequently illegal and ought to be set aside as being manifestly arbitrary.

xv) Once it is prima-facie shown that the classification is arbitrary and violative of Article 14 there is a duty on the revenue to justify reasonableness of the said classification and there has been no attempt by the respondent to justify classification either by way of an affidavit or pleadings.

xvi) There has been a subsumation of the two taxable events of "manufacture and sale" as was recognized in the pre-GST regime into one taxable event of supply in the GST regime.

(xvii) The contention of the Revenue that the two taxable events of "manufacture and supply" continue to co-exist in the GST regime *qua* tobacco products is liable to be rejected and accordingly the levy and collection of basic

excise duty or NCCD after 1<sup>st</sup> July, 2017 simultaneous with the levy of GST on tobacco products is unconstitutional!.

(xviii) The construction of a taxing entry must be made in a manner so as to avoid overlapping and if GST is leviable by virtue of Article 246A exclusivity of such legislative power must be maintained and permitting levy of excise duty and NCCD on tobacco products must be avoided.

(xix) In light of Article 279A (4) (f) which provides for the Goods and Services Tax Council to make recommendation to the Union and the States regarding special rate or rates to raise additional resources during natural calamity or disaster would indicate a scheme and recourse to raising of resources by way of NCCD which is in the nature of a duty of excise is violative of the constitutional framework.

(xx) The Aspects Theory cannot be made applicable in relation to the interpretation of the powers of legislation under Article 246, 246A as the same pertains to fields of

distribution of legislative powers between Federal and Provincial Governments.

(xxi) The issue of simultaneous levy under Article 246 and 246A of the Constitution was not dealt with in the judgment of ***Unicorn Industries v. Union of India*** reported in **(2020) 3 SCC 492** and no reliance can be placed in the said judgment by the Revenue.

(xxii) For the period of 2017 to 2019 when excise duty was not levied on tobacco products, there cannot be any levy of NCCD and the same is unconstitutional.

### **III CONTENTIONS OF RESPONDENTS:**

6. The contention of the respondents are as follows:

i) Except for alcoholic liquor for human consumption, petroleum and petroleum products, stamp duty, tobacco and tobacco products and opium, all other goods are liable only to Goods and Services Tax under Article 246A of the Constitution.



ii) Tobacco and tobacco products are subject to the following taxes/levies:

- a) GST under Article 246A
- b) Compensation Cess under Article 270
- c) Surcharge in the nature of NCCD under Article 271
- d) Excise duty under Entry 84 List I r/w Article 246

Reliance is placed on the observations of the Apex Court in ***Union of India and Others v. VKC Footsteps (decision dated 13.09.2021 in Civil Appeal No.4810/2021)*** wherein it is observed that with the enactment of the 101<sup>st</sup> Constitutional Amendment, Entry 84 of the Union List has been restructured to incorporate duties of excise on Tobacco and tobacco products.

iii) The Courts while interpreting the GST regime has to keep in mind that the Parliament had to make balances to accommodate the interest of the States and that the area of GST Law is such that judicial interpretation cannot be ahead of policy making.

iv) Though GST has subsumed majority of goods and services into its ambit, a complete subsumation of goods into GST remains a constitutional goal for the GST Council to achieve under Article 279A.

v) Considering the nature of both the Federal partners and the complexity involved certain goods are kept outside the ambit of GST and certain goods such as tobacco, tobacco products and opium are subject to both GST and other taxes. The constitutional competence cannot be questioned as to whether goods are liable to GST and other taxes/levies and such question cannot be raised when there is no express bar.

vi) The source of power and field of legislation is available for imposition of excise duty under Article 246 r/w Entry 84 of List I while GST can also be imposed under Article 246A.

vii) The exercise of power and its availability under Article 246A does not denude or restrict exercise of power under Article 246.

viii) The points of distinction between excise duty and GST that ought to be kept in mind are:

a) Source of Power – Article 246 vis-à-vis Article 246A.

b) Field of Legislation – Entry 84 List I vis-à-vis Article 246A.

c) Taxable Event in case of Excise duty is on manufacture. In the case of GST, it is supply of goods or services or both.

ix) The Parliament has retained power under Article 246 to levy excise duty on tobacco products notwithstanding that tobacco products suffer the levy of GST as the levy of GST is on the taxable event of supply of goods or services, whereas levy of excise duty is on taxable event of manufacture.

x) The use of the word “notwithstanding” in Article 246A only enables the Union and the States to impose GST on the notified goods irrespective of any other provision in the Constitution and does not destroy or denude powers

otherwise available elsewhere in the Constitution providing for valid imposition of taxes.

The words "subject to" employed in Article 246A is to be read as conveying a limitation and restriction in the exercise of power and does not in any way take away the power available elsewhere.

xi) The two provisions can operate exclusive of each other and remain independent without influencing the other and the existence of one provision need not restrict or prevent the operation of the other. Accordingly, the levy of excise duty under Entry 84 of List I read with Article 246 is independent and can co-exist without influencing or being impacted by the levy of GST on the very same goods namely tobacco products under Article 246A.

xii) Article 246A contains source of power and field of legislation and provides for simultaneous power of taxation insofar as GST is concerned, but Article 246 read with Entry 84 of List I confers sole power on the Union.

xiii) As per the Aspect Doctrine, the same transaction may involve two or more taxable events in different aspects and accordingly, there is no illegality in the levy of GST as well as excise duty on the same product.

xiv) Selecting Objects to the Tax, determining the quantum of tax, legislating the conditions for the levy and the socio-economic goals which a tax must achieve are the matters of legislative policy.

xv) The statement of objects and reasons cannot be read in isolation.

xvi) The taxable event for levy of GST under Article 246A is supply while the taxable event for levy of excise duty under Article 246 r/w Entry 84 List I is manufacture.

xvii) The exemption of excise duty as per the Notification does not have the effect of granting exemption of NCCD unless the same is made clear by way of a notification.

**IV. CONSIDERATION:****A. POWER UNDER ARTICLE 246 R/W ENTRY 84 LIST I post the GST REGIME AND INTRODUCTION OF ARTICLE 246A OF THE CONSTITUTION OF INDIA :**

The introduction of levy of Central Excise on tobacco and tobacco products by virtue of Notification of 2019 has resulted in levy of a nominal duty of Central Excise. Such imposition is eventually traceable to the power under Article 246 with the field of legislation specified in Entry 84 of List I.

By virtue of the Constitution (101<sup>st</sup> Amendment) Act, 2016 there has been amendment to the Seventh Schedule insofar as Entry 84 has been substituted and the relevant extract is reproduced as below:

“84. Duties of Excise on the following goods manufactured or produced in India, namely .....  
f) tobacco and tobacco products”.

Article 246A has been inserted by way of an amendment which reads as follows:

"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."

The effect of introduction of Article 246A is conferment of the power of simultaneous levy on goods and services in the nature of Goods and Services Tax and the use of the word "notwithstanding" which is a *non-obstante* clause does not have the effect of abrogation of power available under Article 246. The words "notwithstanding anything contained in Article 246" ought to be construed as having the effect of merely clarifying that inspite of the power under Article 246, power under Article 246A could be exercised and that Article 246 would not be an impediment to the operation of 246A. The observations of the Apex Court in ***South India Corporation Pvt. Ltd. v. Secretary, Board of Revenue, Trivandrum and Another reported in (1964) 4 SCR 280***

draws a distinction between the expression "subject to" and "notwithstanding" and the relevant extract reads as follows:

*"19. That apart, even if Article 372 continues the pre-Constitution laws of taxation, that provision is expressly made subject to the other provisions of the Constitution. The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Further Article 278 opens out with a non obstante clause. The phrase "notwithstanding anything in the Constitution" is equivalent to saying that spite of the other articles of the Constitution, or that the other articles shall not be an impediment to the operation of Article 278....."*

On the same lines is the decision of the Apex Court in **Chandravarkar Seetharathna Rao v. Ashalatha S. Guram** reported in **(1986) 4 SCC 447** which reiterates the above position while explaining that the effect of "notwithstanding" clause would merely amount to declaring that inspite of the provision mentioned in the *non-obstante* clause the provision would have its full operation.



**Para 67 of the judgment reads as follows:**

*67. A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum [AIR 1964 SC 207, 215 : (1964) 4 SCR 280] .*

As rightly pointed out by the respondents, the words "subject to" if used would have had a contrary connotation and would have the limited power of the provision.

Accordingly, use of the words "notwithstanding anything contained in Article 246" in the present scheme would not have the effect of extinguishing the exercise of power under Article 246. Taking note of the intention as reflected in the conscious amendment to Entry 84 of List I, it could be construed that even post introduction of Article 246A, there would be protection and continuance of exercise of power under Article 246. The observation of the Apex Court in ***Union of India and Others v. VKC Footsteps (decision dated 13.09.2021 in Civil Appeal No.4810/2021) at Para 29*** is apt in the present context and is as follows:

"..... with the enactment of 101<sup>st</sup> Constitutional Amendment, Entry 84 of the Union List has been restructured to incorporate duties of excise on the following goods manufactured or produced in India namely:

- a) Petroleum Crude;
- b) High Speed Diesel;
- c) Motor Spirit (commonly know as petrol);
- d) Natural Gas;
- e) Aviation Turbine Fuel;

**f) Tobacco and tobacco products. "**

**(emphasis supplied)**

The contention of the petitioner that Article 246 and 246A are not mutually exclusive and to the extent that special power under Article 246A is exercised there is denudation of power under Article 246 is liable to be rejected.

The sources of power under Article 246A and 246 are in fact mutually exclusive and could be simultaneously exercised.

If that were to be so, the court ought not to forbid the Union from exercising power under Article 246 which is not otherwise prohibited.

It is to be noted that the Constitution (One Hundred and First Amendment) Act, 2016 introduced Article 246A which identifies the field of taxation as well as source of power. No doubt, GST is levied on products by virtue of the introduction of the Central Goods and Services Tax Act, 2017 pursuant to the amendment made to Article 246A of the Constitution. But as discussed, despite Article 246A

containing a *non-obstante* clause, the power under Article 246 stands protected.

No doubt, it has been contended that there is a clear distinction between source of power and field of legislation and the entries in the lists being fields of legislation cannot be construed as a source of power. It must be noted that Article 246 continues to be the source of power even post-introduction of Article 246A. The amendment to Entry 84 List I whereby field of legislation indicating levy of duty of excise on goods manufactured or produced relating to tobacco and tobacco products does indicate the conscious intention to preserve the exercise of power under Article 246 even after introduction of Article 246A.

If the argument of the petitioners that post-introduction of Article 246A and if on the product by virtue of Goods and Services Tax Act under Article 246A GST has been introduced, there would be no power to take recourse to Article 246 r/w Entry 84 of List I to levy a duty of excise, it would in effect render the restructuring of Entry 84 of List I

redundant. Such an interpretation is to be avoided. Further, irrespective of the restructuring of Entry 84 of List I the power under Article 246 remains unaltered. The intention of preserving such power under Article 246 is further reflected in the repealing and saving provision of Section 174 of the Central Goods and Services Tax Act, 2017 which saves provisions of the Central Excise Act, 1974 in respect of goods included in Entry 84 of the Union List of the Seventh Schedule to the Constitution.

**Section 174 (1) reads as follows:**

*(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Tariff Act, 1985 (hereafter referred to as the repealed Acts) are hereby repealed.*

The High Court of Allahabad in the case of ***Indian Oil Corporation Ltd. v. Union of India*** reported in **(2020) SCC Online All. 1538** had an occasion to consider the following relief:

"3..... This writ petition has been filed for the following reliefs:-

.....d) Declaring continued existence/non-deletion of SKO from the Fourth Scheduled of Central Excise Tariff Act, 1944, after 1.7.17, to be violative of Section 174 of Central Goods and Service Tax Act 2017 and also violative of Entry No.84 of List I (Union List) of the Seventh Schedule to Constitution of India, which has been amended by the Constitution (One Hundred and First) Amendment Act, 2016.

The Court concludes at Para 18 and Para 22 as follows:

*"18. "Manufacture" is the taxable event under the Central Excise Act, 1944 while under Section 9 of the CGST Act/UPGST Act, the event of taxation is the supply of goods or services except the supply of alcoholic liquor for human consumption. Sub-Section 2 of Section 9 of the CGST Act/UPGST Act empowers to levy tax on*

*supply of petroleum crude, high speed diesel oil, motor spirit, natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council. Thus, GST may be levied even on such goods which are excisable goods under the Central Excise Act, 1944. Therefore, Superior Kerosene Oil (SKO) shall continue to be an excisable goods under the Central Excise Act, 1944 even if GST on supply of Kerosene Oil (PDS) is levied under the GST laws.*

*22. Undisputedly, Superior Kerosene Oil is mentioned in the Fourth Schedule although no rate of duty has been provided. If rate of duty has not been provided it shall merely mean that no duty is leviable in the absence of rate of duty. It does not mean that such goods are not excisable. All the goods mentioned in Fourth Schedule to the Act, 1944 shall continue to be excisable goods unless the goods is removed from the schedule by an amendment. Section 174 of the CGST Act has not repealed the Central Excise Act, 1944 as respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution. The Central Excise Act, 1944 as amended by Act 18 of 2017 has been enacted*

*with respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution which includes S.K.O."*

The stand taken by the High Court of Allahabad would support the interpretation placed above regarding availability of power under Article 246 post-GST.

**B. Taxing on taxable event, Aspect Theory and Subsumation of manufacture in Supply :**

Apart from challenging the validity of levy of NCCD the petitioners in all of the petitions have also challenged the levy of Central Excise on tobacco and tobacco products at rate as specified in column 4 of the Notification.

The legal attack raised by the petitioners is analysed as regards the following aspects:

**(i) Subsumation of manufacture in the Concept of Supply:**

Though it is contended that the constitutional scheme as envisaged by the 101<sup>st</sup> Constitutional Amendment provides for a system whereby upon recommendation of the



GST Council, tax is levied under Article 246A on goods and services and ignoring such structured methodology and reverting back to exercise of power under Article 246 would be a colourable exercise of power such a ground of challenge will not stand legal scrutiny and deserves to be rejected. The subsumation of manufacture in the concept of supply even if accepted would not make a difference as it would at the most amount to double taxation i.e., taxing a taxable event on two occasions which *per se* is not impermissible, as per the discussion *infra*.

In fact, the Apex Court in ***Union of India v. Mohit Mineral (P) Ltd.*** reported in **(2019) 2 SCC 599** has observed that even post Constitution 101<sup>st</sup> Amendment Act, 2016 there would be no bar for levy of surcharge even if there was a subsumation of various taxes. The relevant observation is as follows:

*"56. The expression used in Article 246-A is "power to make laws with respect to goods and services tax". The power to make law, thus, is not general power related to a general entry rather it*

*specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that the Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied."*

Accordingly, the legal argument based on intendment of avoiding of cascading taxes will not have the effect of prohibiting levy of tax which otherwise is permissible as the power under Article 246 remains protected and preserved.

It must also be noted that the Legislature enjoys a wide latitude to decide on the methodology of revenue generation and the courts should not rush and must tread carefully while dealing with legislation based on Fiscal Policy. In the process of achieving ultimate goal as envisaged while introducing the GST the continuance of levies under the previous legislations unless barred ought to be permitted as being competent vis-

à-vis available source of power which cannot be defeated by resort to argument based on objects of GST as contained in the Objects Clause.

**(ii) Taxing of Taxable event:**

Even though the petitioner would contend that what is being taxed is the aspect of manufacture under the Central Excise Act and the same taxable event of manufacture as subsumed in GST, even if such contention were to be accepted it would amount to taxing of the taxable event of manufacture on two occasions and unless there is any prohibition in law such a levy would still be permissible.

It must be noted that taxing statutes are revenue generation statutes and in that context, levy even if on the same taxable event which may also amount to double taxation is *per se* not prohibited unless prohibition can be read into on the basis of any other constitutionally available principle. The aspect as to whether the levy of excise duty when considered along with other existing duties including

NCCD has the effect of falling foul of constitutional guarantee may be a different ground of attack.

The observation of the Apex Court in ***Avinder Singh v. State of Punjab*** reported in **(1979) 1 SCC 137** to the effect that if on the same subject matter the legislature chooses to levy tax twice over, there is no inherent invalidity in the fiscal adventure unless there are some other prohibitions, is to be noted as laying down the correct position of law. The relevant extract is as follows:

*"The principal invalidatory charge, based on the Act, is that Section 90 (4) interdicts any tax "already imposed". The present tax is on sales and there is, under the general sales tax law, already a like levy on sales of foreign liquor in the State, and so the second fiscal venture is beyond Government's power.*

*..... A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have*

*been mentioned out of courtesy to counsel. The last one, for instance, deserves the least attention. There is nothing in Article 265 of the Constitution from which one can spin out the constitutional vice called double taxation. (Bad economics may be goods law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Western India Theatres (Cantonment Board Poona v. Western India Theaters Ltd., AIR 1954 Bom 261].*

*.... If on the same subject matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist.*

**(iii) Aspect Theory:**

Another aspect that would require consideration is the "Aspect Theory" as referred to by both the petitioner and the respondent.

The respondent relying on the Aspect Theory has contended that the aspect of supply as defined in the GST Act (Article 246A and the GST Act) would be distinct from the

aspect of manufacture which is sought to be taxed by virtue of levy of excise (Article 246 Entry 84 List I) and accordingly, looked at from the subjective point of view of the legislature a single subject from different aspects could be a subject matter of different taxes.

The petitioners have specifically contended that the Aspect Theory would not be applicable as it would be applicable only where there is a dispute relating to field of distribution of legislative powers between Federal and Provincial Governments.

In fact, in the case of ***Federation of Hotel and Restaurant v. Union of India*** reported in **(1988) 3 SCC 634** the question that was considered was whether expenditure tax was in "pith and substance" actually a tax on luxuries which was squarely covered by Entry 62 List II or it could be construed as a tax on consideration paid on purchase of goods which would fall under Entry 54 of List II and accordingly, the question of legislative competence of the Parliament was in question. The then Attorney General

Parasaran had invoked the Aspect Theory by contending that there could be different aspects of the same matter constituting distinct fields of legislation. In effect it was submitted that Hotels may be taxed in their "expenditure aspect" by the Union and in their "luxury aspect" by the States. The Apex Court was essentially considering legislative competence of the Union Parliament and it is in that context that the principle of the Aspect Doctrine appears to have been considered and eventually held as follows:

*88. In the light of the above entries and decisions, I think that the learned Attorney General is right in urging that, merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. For instance, a luxury tax may, to cite a catchy example, encourage construction of*

*"janata" hotels rather than five star hotels. Such a tax may be on the person offering the luxury or the person enjoying it. It may be levied on the basis of the amount received for providing, or the amount paid for or expended for enjoying, the luxury. Conceivably, it could be on different bases altogether. The object of an expenditure tax — and, that, conceptually, there can be an expenditure tax is borne out by Azam Jha case [(1971) 3 SCC 621 : (1972) 1 SCR 470] — is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure in unproductive or undesirable channels. If a general Expenditure Tax Act, like that of 1957, had been enacted, no challenge to its validity could have been raised because it incidentally levied the tax on expenditure incurred on luxuries. The fact that there will be some overlapping then or that here there is a good deal of such overlapping, because the States have chosen to tax only some types of luxuries and the Centre to tax, at least for the time being, only expenditure which results in such luxuries, should not be allowed to draw a curtain*



*over the basic difference between the two categories of imposts. For instance, if the conflict alleged had been between the present State Acts and an Act of Parliament taxing expenditure incurred in the construction of theatres or the maintenance of race horse establishments or the like, there would have been no overlapping at all and the pith and substance of the central tax could well be described as "expenditure" and not "luxuries". This distinction is not obliterated merely because of the circumstance that both legislatures have chosen to attack the same area of vulnerability, one with a view to keep a check on "luxuries" and the other with a view to curb undesirable "expenditure".*

Clearly, in the present case the question as to legislative competence of the Union vis-à-vis the State is not in question. The question as to whether power under Article 246A which is tax on goods and services if levied on a product could also be a subject of levy of an indirect tax on the same product in exercise of power under Article 246. While the power under Article 246A provides for a simultaneous levy by the Parliament and subject to 246A (2)

the legislature of every State; on the other hand, power under Article 246 is with the Union. The question of legislative competence under 246A vis-à-vis Article 246 would not strictly fall within the ambit of applicability of the Aspects Theory.

Even otherwise, while it is the aspect of supply which is the consideration while levying tax under GST, it is the aspect of manufacture that is of consideration while levying excise duty. Though it is contended by the petitioners that the aspect of supply has subsumed manufacture and accordingly, the levy of tax would in effect be on the same taxable event of manufacture in the present case, however, a closer scrutiny would reveal that the legal taxable event under GST would be on supply while on excise would be on manufacture which are two different legally recognized aspects and even if the incidence is on a single subject, the different legal aspect would not lead to an overlapping and would result in treating the levy of tax as on different aspects.

Even otherwise, even if it is construed to be a tax on the same aspect unless such levy of tax falls foul of other constitutional safeguards, it would *per se* not vitiate levy of tax. **(see Avinder Singh v. State of Punjab - AIR 1979 SC 321).**

**C. Legality of levy of NCCD as per Section 136 of the Finance Act, 2001**

Section 136 of the Finance Act, 2001 provides for levy of NCCD and Section 136 (1) and (2) are extracted herein below for reference:

*1) In the case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collected for the purposes of the Union, by surcharge, a duty of excise, to be called the National Calamity Contingent duty (hereinafter referred to as the National Calamity duty), at the rates specified in the said Schedule.*

*2) The National Calamity duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central*

*Excise Act 1944 (1 of 1944) of any other law for the time being in force.*

As per Section 136 of the Finance Act, a surcharge by way of duty of excise at the rates specified in the schedule is levied.

By virtue of the amendment of the Twelfth Schedule of the Finance Act, 2005 the rates stand amended.

The surcharge would merely refer to an increase of the duty which in the present case is by way of a duty of excise. The nature of alteration of duty by way of the Finance Act has been considered in the case of ***The Madurai District Central Co-operative Bank Ltd. v. The Third Income Tax Officer, Madurai*** reported in ***(1975) 2 SCC 454 (Bench of Three Judges)***. The Apex Court has clearly opined that the surcharge leviable under Section 2 (1) of the Finance Act, 1963 are relatable to Article 271 of the Constitution of India. In a detailed discussion, the Apex Court has also clarified that the purpose and concept of the

additional surcharge is different from the Income Tax and that "26.... *Thus, additional surcharge is a distinct charge not dependent for its leviability on the assessee's liability to pay income tax or super tax.*"

The Apex Court has also observed that the Income Tax Act and Annual Finance Acts are enacted by the Parliament in exercise of the power conferred by Article 246 (1).

As to the nature of power exercised under the Finance Act, it is observed as follows:

*"12..... Once the Parliament has the legislative competence to enact a law with respect to a certain subject matter, the limits of competence cannot be judged further by the form or manner in which that power is exercised. Accordingly, though it would be unconventional for the Parliament to amend a taxing statute by incorporating the amending provision in an act of a different pith and substance, such a course would not be unconstitutional."*

*"13.....Much more so can the Parliament introduce a charging provision in a Finance Act."*

*True, as said in Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax, (Central) Calcutta [AIR 1966 SC 1370 : (1966) 2 SCR 688, 704 : (1966) 59 ITR 767] that the Income Tax Act is a permanent Act while the Finance Acts are passed every year and their primary purpose is to prescribe the rates at which the income tax will be charged under the Income Tax Act. But that does not mean that a new and distinct charge cannot be introduced under the Finance Act. Exigencies of the financial year determine the scope and nature of its provisions. If the Parliament has the legislative competence to introduce a new charge of tax, it may exercise that power either by incorporating that charge in the Income Tax Act or by introducing it in the Finance Act or for the matter of that in any other statute.....”*

Accordingly, it becomes clear that surcharge is a methodology for raising additional revenue and has nothing to do with the leviability of the tax or the assesses liability to pay the tax.

**D. NCCD as a surcharge and Article 271 :**

The legality of such surcharge is to be tested independent of the tax and must be traced to Article 271 eventually.

The levy of the surcharge i.e., NCCD by way of provision of the Finance Act, though is described as a duty of excise, is legally speaking a self-contained levy which stands independent of the duty.

Article 271 provides for levy of surcharge, which reads as follows:

*"271. Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred in those articles except for the goods and services tax under Article 246-A by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part the Consolidated Fund of India."*

Though the NCCD is a surcharge by way of duty of excise, its validity rests on the validity of the provision of the

Finance Act of 2001 and has nothing to do with the validity of leviability of the duty of excise. As noted supra, in the case of ***The Madurai District Central Co-operative Bank Ltd. v. The Third Income Tax Officer, Madurai*** reported in ***(1975) 2 SCC 454*** the Apex Court has clarified the legal position and upheld the validity of imposition of surcharge by way of provision in the Finance Act and accordingly, levy of surcharge by way of provision under the Finance Act of 2001 is not open to be questioned.

Article 271 is also clear and provides for increase in duty or taxes by a surcharge.

The only bar under Article 271 is that the surcharge contemplated excludes the surcharge as regards the Goods and Services Tax under Article 246A. In the present case, the surcharge is by way of duty of excise and accordingly, cannot be construed to be a surcharge as regards Goods and Services Tax as contemplated under Article 246A.



The interpretation of the petitioners that surcharge cannot be levied under Article 271 as regards those goods and services which are included under Article 246A is liable to be rejected as no such restriction could be placed on a plain reading of Article 271 which provides that surcharge could be levied at any time to increase duties or taxes. In fact, surcharge being imposed by way of the Finance Act has nothing to do with surcharge on GST that may still be levied. As levy under Article 246 is permissible even after introduction of Article 246A, the levy of surcharge tracing power under Article 271 would still subsist even if the goods are subjected to levy of goods and services tax under Article 246A.

**E. Levy of NCCD during the period of Exemption of Excise Duty :**

Insofar as petitioner's contention that the exemption of Excise Duty by virtue of Notification No.11/2017 would result in NCCD being inapplicable at least till 06.07.2019 whereby

Notification 2/2019 introduced nominal Excise Duty also requires to be rejected.

The levy of NCCD is to be construed to be independent of the levy of basic Excise Duty in light of the discussion supra.

It must be noted that the argument of the petitioner while relying on the judgment in **Bajaj Auto Ltd.** case has been clarified by the judgment of the Apex Court in **Unicorn Industries Vs. Union of India (2020) 3 SCC 492** where Apex Court has declared the judgment in **Bajaj Auto** to be *per incuriam*. It was also held by the Apex Court that the judgment in **Union of India Vs. Modi Rubber Ltd., (1986) 4 SCC 66** was not considered earlier in **Bajaj Auto** and in **S.R.D. Nutrients v. CCE (2018) 1 SCC 105**. In the case of **Modi Rubber** it was clearly held that the exemption of Excise Duty under the Act of 1944 could not be extended to exempt the levy introduced by the Finance Act.

The Exemption notification No.11/2017 dated 30.06.2017 exempts the excisable goods from so much of the duty of excise specified there on under the said Schedule to the Excise Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in Column (4) of the said Table. Accordingly, as Notification No. 11/2017 does not refer to the exemption of NCCD, the exemption of Excise Duty cannot be extended to NCCD as well which interpretation would flow from the law laid down in the case of "Modi Rubber" as well as the detailed discussion in the Unicorn Industries case. Accordingly, though the Notification No.2/2019 dated 06.07.2019 reintroduced a nominal basic Excise Duty, the levy during the period of 30.06.2017 and 06.07.2019, is not disturbed and accordingly the relief sought for in by the petitioners for refund of NCCD during such period is liable to be rejected. It must further be noted that even though NCCD is in the nature of duty of Excise and may be construed to be an additional duty, yet it is an independent levy and exemption granted on Excise Duty

cannot prohibit imposition of other additional duties or levy and accordingly there is no bar for operation of NCCD.

**F. Levy of basic excise duty and NCCD is violative of Article 14 of the Constitution of India :**

At the outset, it needs to be noted that the petitioner has not raised any contentions in the pleading regarding the attack of the levy of basic duty and NCCD on the ground of it being violative of Article 14 of the Constitution of India. It is only in the written submission that such contention has been raised.

The case that is made out is that tobacco and tobacco products are the only category of goods which are subject to indirect taxes under two regimes viz., GST Regime and Excise Regime.

**Grounds of challenge are:**

- a) Unreasonable Classification
- b) Manifest arbitrariness

It must be noted that the respondent has countered such contention on the ground that twin test of reasonableness and rational nexus is achieved if taxation on tobacco is viewed as sin tax with the other underlying object being of revenue generation.

The Apex Court in the case of ***Commissioner of Urban Tax v. Buckingham & Carnatic Company Ltd.*** Reported in **(1959) 2 SCC 65** has reiterated the settled principle that selecting objects to the tax, determining the quantum of tax, legislating conditions for the levy and the socio-economic goals which a tax must achieve are matters of legislative policy and these matters have been entrusted to the Legislature and not to the Court.

It is a settled principle that the Legislature has a larger discretion in the matter of classification for the purpose of tax. The requirement however is that there is a classification and a rational nexus between such classification and the object sought to be achieved.

7. As regards such aspect at the time of oral submission, it was pointed out that the levy of NCCD was also to discourage consumption. If that were to be taken note of, the classification of tobacco and tobacco products as a separate class, keeping in mind objective of discouraging its consumption, and such classification could be stated to be based on a intelligible differentia. After having so classified the levy of NCCD which is for the purpose of discouraging consumption and relates to object associated with the levy cannot be described to be a classification without any basis.

8. It needs to be kept in mind that taxation is not merely a source of raising revenue but is also recognised by the fiscal tool to achieve fiscal and social objective. The observation in the judgment of ***ELEL Hotels & Investments Ltd. V. Union of India*** reported in ***(1989) 3 SCC 698 at Para 20*** would be relevant which is as follows:

*"20. Similar contentions as to the unreasonableness of the restrictions which the imposition of the impugned tax was said to bring about on the petitioners' freedom of trade and*

*business and the adverse effect of this tax on a significant area of national economy generally and the Tourism Industry in particular have been considered in the petitions assailing the vires of the Expenditure Tax Act, 1987. It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority. The presumption of constitutionality has not been dislodged by the petitioners by demonstrating how even hotels, not brought into the class, have also equal or higher chargeable receipts and how the assumption of economic superiority of hotels to which the Act is applied is erroneous or irrelevant."*

9. The reliance of the petitioner on the authorities mentioned in Para 59 of the written submissions does not in any way help the petitioner insofar as the judgments lay down broad principles relating to classification. In fact, the same authorities are also often cited to contend that legislature has wide discretion in classifying items for tax purposes and that the differentia has some reasonable relation to the object of the legislation.

10. It must also be noted that the levy is also for the purpose of revenue generation and the choice of the category of goods for the purpose of revenue generation cannot *ipso-facto* be a ground of judicial review and something more is required such as hostile discrimination and singling out a particular category of goods.

11. In fact, the choice of the category of goods as in the present case may also be influenced by the objective of discouraging consumption and accordingly the choice of the category of goods for the purpose of revenue generation cannot be held to be arbitrary.



12. As regards the aspect of Manifest Arbitrariness, finding its basis in Article 14, it is accepted that this principle could be pressed into service where the arbitrary actions have "elements of caprice, irrationality, disproportionality or excessiveness and be characterised by the lack of determining principle". There are no grounds made out in the pleadings, calling for application of the said principle.

13. Further, the levy of tax is a product of legislative choice and on policy decisions which are the prerogative of the Executive and as laid down by the Apex Court in the case of **VKC Footsteps (supra)** the Courts are not to readily enter into adjudication on such issues.

14. In the present case, while entering upon adjudication on the basis of contentions relating to constitutional validity the observation at Para 81 of "VKC Footsteps" needs to be kept in mind, which are as follows:

*"81..... Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax,*

*concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive. Many of the considerations which underlie these choices are based on complex balances drawn between political, economic and social needs and aspirations and are a result of careful analysis of the data and information regarding the levy of taxes and their collection. That is precisely the reason why courts are averse to entering the area of policy matters on fiscal issues. We are therefore unable to accept the challenge to the constitutional validity of Section 54 (3)"*

15. In the above factual matrix, keeping in mind the guideline laid down by the Supreme Court, no case is made out for interference on the ground of the levy being hit by the law contained in Article 14.

16. In light of the above discussion, the petitions are dismissed.

**Sd/-  
JUDGE**

Np/-