ɔe here]

R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THI5 THE 04°^ DAY OF 3ANUARY 2O22

BEFORE

THE HON’BLE MR.JUSTICE S. 1UNIL DUTT YADAV

WRIT PETITION No.52311.’2019 (4-RES)

WRIT PETITION No.51473/2019 (T-TAR)
WRIT PETITION N<.5219?/?O19 (T-RE5)
WRIT PETITION NO.5??74/2O1?2 (T-RE5)
WRIT PETITION No.ss1/zezo (T-RES)
WR.11- PETITIO¥¥ No:713/2020 (T-RES)
WRIT PETITION t1o.23&8/2020 (T-RES)
WRIT ‘*ETITION No.6114/2020 (T-RES)
WRIT PETITION No.0122/2020 (T-RES)
WRIT PETITION No.3810/2021 (T-TAR)

GN W.P. No.52371/2u19

BETWEEN :

N/s.‘7.S. Products
A Proprietary Firm
P,epresented by itsProprietor
M r. tlanoj Kumar Srivastava
•/ • Sitaram Srivastava,
Ag=.d about 50 years,
R/D Plot No.21-P, 2nd Phase,
Antharasanahalli Industrial Area,
Tumkur- 572 1D6
(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. UniDn of India
Represented by Joint Secretary
Ministry of Finance, Depailment of Reven Ie
Room No.46, North Block,
New Delhi - 11D D01.

2. The Commissioner of then!:ra ! Tax
(Earlier known as the
Commissioner of Cent•ai Exr:ise)
Bangalore I ommissionerate
P.B.No.5400,. gue=r s Poad,.
Bangalore .°i6u 101. Respondents

(By Sri M. Vcnkatara an, Addition a! Solicitor General a/w
Sri. Jeevan 1. Neer•›si, AdIocate)

This Writ Petition. fiied under Articles 226 & z27 of Constitution of India, p rayIng to quash the Notification No.3 of 2019 dated 06.OF.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

BE]]fVEEN:

R.Pi.DHARIWAL (HUF)
‹3, Near to TCI-XPS Courier Depot,
Near Singasandra Bus Stop,
Bengaluru- 560 068.
Rep. by Shri. 3evan B. Sancheti
Authorised Representative Petitioner

ɔe here]

(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 Reven'ue
Room No.46, North Block,
New Delhi - 110 001.

2. The Commissioner f Central Tax
(Earlier known as the
Commissioner of Central Excise)
Bangalore I Commissions rate
P.B.No. 5400, ueer:s Road,
Bangalore - 56" CO1. Respondents

(By Sri M. VenKataromar. ñ.dditional Solicitor General a/w
Sri. Jeevan i. Neera!gi, Advocate)

This Writ Petition ‹s fied under Articles 226 & 227 of Constitution of India, pr nying to quash the Notification No.3 Df 2019 dated 06.07.2019 issued by the first respondent, purporting to exe.°cise power under Section 5 (A) of the Central Excise Act, 1944, levy.ng Central excise on tobacco and tobacco products vide Annexure-'A' an'1 etc.

INV[.P.No.5]323/2O*9

BETV¥ EEN:

Evcrest Industries, LLP
é u:mited 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:

ɔe here]

13, Near to TCI-XPS Courier Depot,
Hasur Main Road, Singasandra,
Bengaluru- 560 O6g.
Represented by Shri. Bevan B. Sancheti
Authorised RepresentatiVe PQtit'Dner

(By Sri C.S.Vaidyanathan, Senior Advocate,
Sri. K.G.Rag havan, Senior Advocate,
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Gcudar,
Sri. Goutham S. Bharadwaj and
Sri. Vinay Kuttappa K.S., #.uvocates)

AND:

1. Union of India
Represented by Joint Secretary
Ministry of Finance, Deoartment of Re nue
Room No.45, Korth Block,
New Delhi - CIO 001.

2. The Cont.misr›:Dner of Central Tax
(Ea i iier known ed the
Commissions.r of Central Ex-ise)
Bangaiore I Camm Issicnerate
P.B.No.5400, Queens Road,
Bangalore- 560 0v*1. Respondents

(By Sri M. ¥'.=nkataramar„ Additional Solicitor General a/w
Si i. Jeevan. 1. Neeralgi, Advocate)

This Writ Petition is filed under Articles 226 & 227 of Constitution uf India, praying to quash the Notification No.3 of 2019 dateci 06.07.20 19 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 Annex!‹re-'A' and etc.

IN W.P. No.52374/2019

:TWEEN:

Fast Track Packers Private Limited

ɔe here]

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 13g.
Rep. by its Manager
Authorised Representative Pet:Sorer

(By Sri C.S.Vaidyanathan, Seni'or Advocate,
Sri. K.G.Rag havan, Senior Advccate,
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,
Sri. Goutham S. Bharadwaj and
Sri. Vinay Kuttappa K.S., A1vc ates,

AND:

1. Union of India
Represented b'/ Joirit .6ecre ar'/
Ministry of Finance, Department of Revenue
RDGm *!o.*6, North Biock,
New Delhi - 11ñ OF1.

2. The Commissio ei of Central Tax
(Earlier known as the
ñummissiuner of Central Excise)
"uangalore I Comm issionerate
P.B. Nn.5400, Queens Road,
Danga lore- 560 OO 1. Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w
Sri. Jee 'an 1. Neeralgi, Advocate)

Thfs Writ Petition Is filed under Articles 226 & 227 of Csnstitution of India, praying to quash the Notification No.3 of 201d dated 06. 07.2019 issued by the first respondent, purporting to exercise power under Section 5 (A) Df the Central Excise Act, t914, levying Central Excise on tobacco and tobacco products vide Annexure-'A' and etc.

<u>IN W.P.No.651/2020</u>

<u>BETWEEN:</u>

Maa Shard a Tobacco PriVate Limited
A Private LimitBd Company registered
Under the Companies Act, 1956
Having its FactoryPremises at:
51/1A4, Hd pura village,
Dasanapura Hobli, Bengaluru- 562 12?.
Rep. by its Director Mr.Hari Bush an Bajpai **Petitioner**

(By Sri C.S.Vaidyanathan, Senfor é.dv.ocate
Sri. K.G.Raghavan, Senior Advscnte
Ms. Ananyaa Jagirdar. Sri. Prashanth F. Goudar,
Sri. Goutham S. Bharauwaj »nd
Sri. Sumanth M.S., Advocates)

<u>AND</u>:

1. **Union ofIndia**
Represent.=.a by Joint Secretay'
Ministry of Finance,
Department of Re'•er›ue
Room No.46, N rth Bloc! ,
New Delhi - 110 001.

2. 7"he Commissioner of Central Tax
Earli•r i‹nown asthe
Cumm issicner of Central Excise)
Banga lo•e I ?ommissionerate
^.B.hio. 5400, Queens Road,
Bangalore- 560 001. **Respondents**

(By Sri 11. Venkataraman, Additional Solicitor General a/w
Sri. Jeevan 1. Neeralgi, Advocate)

This Writ Petition is filed under Articles 226 & z27 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.713/2O2D

BETWEEN :

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

(By Sri C. S.Vaidyanathan, Senior .0o'vocate
Sri. K.G.Rag havan, Senior Advocate
Ms. Ananyaa Jagirdar, Sri. Prasl i.an.th F. Goudar,
Sri. Goutham S. Bhararl aj ano
Sri. M.S. Manvi Bhandari, Arlvor:atr‹s)

AND:

1. UniDn cf Inw<ia
Ministry of FI' ancr.
De r•^mert of P.•v<°nue
Roam No.46. North Bisck,
New D=.lhi - 110 OO 1.
Reprc°sented by its Jcint Secretary

z. +i- e Comm.issicner of Central Tax
{ Earlier know n as tne
Commissioner of Central Excise)
Bangs lore T Commissionerate
.B,hio. 400, Queens Road,
Bangs!ore- 560 001. Respondents

(By Sri N. Venkataraman, Additional Solicitor General a/w
Sri. Jeevan 1. Neeralgi, Advocate)

- Tnis Writ Petition is filed under Articles 226 & 227 of :onstitution of India, praying to quash the Notification No.3 of 20*.9 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 tobaccD and tobacco products vide Annexure-'A' and etc.

ɔe here]

IN W.P.No.231B/2D20

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
Plr. Mohamed Inayathulla Petitionei

(By Sri C. S.Vafdyanathan, Senior Ad ’ocate
Sri. K.G.Rag havan, Senior Ad locate
Ms. Ananyaa Jagirdar, Sri. Prashanth F. Goudar,
Sri. Goutham S. Bharadwaj and
Sri. Vinay Kuttappa K.S.,- Aci ocates)

AND:

1. Union cf India
Ministry of Firance’, Department of Revenue
Represented by joint S=.ci etary
Rocm No.4G. North Rlcck,
New Delhi - 110 OG1.

2. The Commiasionei of central Tax
{Ea lier kncwn as the
GemmIssioner cf C:entral Excise)
Bangalore I Commissianerate
P.B.No.5*00. Queens Road,
Bangalore- 560 001. Respondents

(By Sri M. Venkataraman, Additional Solicitor General a/w
Sri. Jeevan 1. Neeralgi, Sri K.V. Aravind and
Ms. V-anita K.R., Advocates for R1 & R2)

This Writ Petition Is filed under Articles 226 & 227 of Cop.stitution 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, SRnior Ad 'acate,
Sri. K.G.Rag havan, Senior Advocate,
Sri. Prashanth F. Goudar, E ri. Goutham '. »haradwaj
and Ns. Ananyaa Jagirdhar, Add ocates,

AND:

1. Union of India
Represented by Joint Secretary
Ministry of Finance, Department of R=• enue
RDOITi No.46, ^!orth BIc*CK,
New Deihl 119 ñ01.

2. The C:ommissioner of Central Tax
(Ez‹rlier krcwn .1s the
CDmm issione r ,q{ wertra! Excise)
BangalGre I Commission.erate
P.B.No.5400, Queens P.oad,
Bangalore- 560 001. Respondents

(9y Sri M. Venkataran-an, Additional SDlicitDr General a/w
Sri. Jeevan 1. Neeralgi, Advocate)

7his \‘?rit Petition is filed under Articles 226 & 227 of Constitution ct India, praying to quash the Notification No.3 of 2019 *.ated C6.07.2019 issued by the first respondent, purporting ”to exerc'se power under Section 5 (A) Df the Central Excise Act, t9+1, levying Central Excise on tobacco and tobacco products vide ’\r nexure-’A’ and etc.

IN W.P. No.6122/ 2020

:TWEEN:

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.Rag havan, Senior Advocate,
Ms. Ananyaa Jagirdar, Sri. Prashdntn F. Coudar,
Sri. Goutham S. Bharadwaj and
Sri. M.S. Nalin Talwar, Advocates

AND:

1. Union of India
Represented by Joint Sec: etary
Ministry of Finance
Department of Revenué
Room No.4G, hlorth Blocl:,
New Delhi - 110 001.

2. The Commissioner of T.ontrz l Tax
(Earlier knowi as the
Commissioner cf Central Excise)
Banga.ore I omrnissionerate
P.B.No. 5400, Queens koud,
Bangalore- 560 U0 . Respondents

(By Sri M. *enkatoraman, Additional Solicitor General a/w
Sri. Ie.evan 1. Neeralgi, Advocate)

7h‹s H'rit 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, purportins to exercise power under Section 5 (A) of the Central Excise Art 1944, levying Central Excise on tobacco and tobacco prDJ»cts vide Annexure-'A' and etc.

IN W.P.No.3B1O/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 Aurthorised Signatory Petitioner

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

AND:

1. Union of India
Represented by 3oint Sec'etary
Ministry of Finance, Department of Rev=.nue
Room No.46, North Block,
New Delhi - 110 001.

z. The Come›ss.on•.r-of Central 1ax
(Earlier known as the
Commissioner cf ñ.•.ntrai Excise)
Bangalore I Co•nn•. issioilerate
P.b.Nc.51O6, /ue•n Road,
Bansalcre- 56C u"O1.

3. Assistant Commissioner of Central Tax
florth West >ivisiori-3,
Beris• |uru North-test Commissionerate,
2 d Fioor, South Wing,
bñT 6us Stand Complex,
Shivajinagar, Bengaluru- 560 051. .. Respondents

(By Sri M. Veilkataraman, Additional Solicitor General a/w
Sri h1acianan Pillai, CGC for R1;
3ri. Jeevan 1. Neeralgi, Advocate for R2 & R3)

This Writ Petition is filed under Articles 226 & z27 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 :

<u>O R D E R</u>

<u>s. sunzL DUTT YADAV. 3</u>

This Order has been divided into the following See:tions to facilitate analysis:

I PREAMBLE

1. The petitioners are stated to be manLifis?E urers of Tobacco and Tobacco products and are regist:•.reJ in terms of **Rule 9 of the Central Excise Reciistration Rules, *.002 (“tie** Rules, 2002” for short). Subseque .t to coming into furc• of the Goods and Services Tax (“GST“ for short) regime, the petitioners have registered tnems°I ’es under Rule 10 (1) of **the Central Goods and Services £Lnx R les, 2017 (“CGST RuJes” for short).**

2. I”he petitioners in W.P.No.52374/2019, 5Z323/2G19, 514T?,‘2L"1fJ, 6114/2020, 6122/2020, 2318/2520, 6!?1/?02G and 713/2020 have sought for the following i”=.licfs:

a) Setrlng aside of the Notification No.3/2019 dated i36.07.2019 issued by the first respondent-Union of India hereL/y 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 z.nd Services** Act, 2017 ("CGST Act" for short) insofar as it seei‹s to seve the operation of the Central Excise Act, 195t qoa tobacco and tobacco products as unconstitutional and bao in law.

c) Declaration that Sectiu•n 136 cf the Finance Act, 2001 Under which there is ie •y a nd collection of National Calamity Contingent Duty (herein afte7 referred to as "NCCD") as inconstit.uticnal.

d) In the alternati'/e ar.d without prejudice to the relief at prayer (c), have sounh* for declaration that Section 136 of **the F'! anc•. Act, 2001 under which there has been a levy and** collection of N?!CD has been implied ly repealed with effect from 01.07. 20 7 i.e., the date on which CGST Act, 2017 has come into effect.

" ñ) Consequential to the prayers above, have sought for rerund 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 she a-cause notice dated 29.09.2020.

<u>CONTENTIONS OF PETITIONERS:</u>

<u>Issue for Consideration:</u>

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

1) Whether after c•ming into force of the Constitution (101*[t] Amendment) Act, with effect from 01.07.2017 the levy of basic excise duty a nd i\ICCD is constitutionally valid?

a") V?hether simultaneous levy of GST under Article *.46A sf the ño.nstitution of India and levy of basic Excise duty and NOTD under Article 246 *qua* tobaccD 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 issu=s raised, petitioners have relied on the following propositions:

i) The introduction of the Ccnstituti•r t 101" Amendment) Act, 2016 anc1 consequent enactment of the four GST Acts with effect frorr 01.07.2*17 v.'as to avoid cascading effect of taxes an1 prox'iding for a Common National Market for GorJds and Services.

ii) The Goods and *er •iaes Tax is a single tax which subsumes va7icus existing taxes levied at each stage of the supply chain starting trem manufacture or import till the last retail !e'zel. Re!:ance is placed on the Statement of Objects of various Acts.

iii) UpGn .oming into force of the GST regime, all goods and servir.es were subjected to the Goods and Service Act =xcept (a) supply of alcoholic liquor for human consumption in i-espect 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 interregn um, old regime cf indirect taxes *qua* such products continues.

iv) Article 246A contains a *non-obst.ante.* clause wr:°II2 conferring power on the Parliament and legislature of the State to make laws with respe .I tc socds and services. As Article 246A is carved nut of Aiticie 246, there is a denudation of power under- Article- 246.

A1Icle 246A heing a sa/ *generis* power exhaustive of taxes on ail aspect and fac=ts of supply of goods including tobacco and tobacco rDducts, ovl2rrides the taxing power of l=gis!ature. referab!e to Article 246 in light of the. *nor-ohstant=.* -lause in Article 246.

v) Article 248 which provided for residuary power of !eglr.lation including the power to impose a tax not m+ntioned in the concurrent or State List stands curtailed, as · the same has been amended by 101st Constitutional

Amendment whereby Article 248 has been amended and begins with the phrase “subject to A1icle 246-A, ”

vi) The levy of basic excise duty by virl‹ie of ar«erde‹d Section 3 of the Central Excise Act at the rates set forth in the Foulh Schedule to the Central fixcise ’«?, 194« despite being subjected to various indire•ct ta›:=s under the GST regime is unconstitutionr.I. O we the Central Excise Tariff Act, 1985 stood repealed by Section 171 of the CGST Act, the reference zc tne 1".=.ntraI Ta iT Act, 1985 in the Seventh Schedule of the Fii .ance Act, 2001 is otiose.

vii) Thne levy of surcharge under Article 271 is to be restricted to goods and services which are excluded under Article 2ñ 6A and as tobacco products fall within the ambit of Artic!e 2J6A 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 orc›viJes for levy of surcharge/tax only pursuant to the **recommendation by the GST Ciouncil which corser,uentially** would determine apportionment between the Union and the **States. The effect of I»v'j cf !si‹sic exc"se duty and NCCD** which is exclusively retained by the Unlon and not subjected to apportionment betwe=n the States and the Union is violative of Lhe Cons'Lftutional S -*deme.

x) 1”he lev’/ 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 **cc»s1 itutio rial mandate.**

xi} The mere mention of tobacco and tobacco products in ?ntry 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 DI legislation but only fields of legislation.

xii) The continuation of tobacco and tobacco products its **Entry 84 post the 101st Constitutional Amendment is violative** of the Constitutional Scheme as set out in * rt›cle 24a, 245A, **265, 269A, 270, 271 and 279A.**

xiii) The levy of basic excise duñ/ ancl NCCD which is a duty of excise on tobacco an.d tobacco products is violative of **Article 14 on the folio"iny• gFGUFIds:**

a) <u>Unreasonable Classification:</u>

Twin tests are reduired to be satisfied viz.,

(i) Classification must be made on the basis of an "intelligible Jiff.=.rentia";

(ii) -the intelligible differentia must have a rational nexus with the object sDught to be achieved by the I£?gal /"MOV ISIOf\.

All goods were subject to excise duty in the erstwhile indirect tax regime (i.e., pre-GST regime) anci 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) ancl GST regime as well. The singling out of t.nbaccc products fo such taxation vis-a-vis other goods which ai-e subjected to tax only under GST regime does not have= any Deşai justification for such hostile and ciiscriminatory treatment.

b) <u>Manifest Arbitrarine.ss:</u>

”ice levy of excise duty and levy of NCCD has elements of caprice, ii rationality and lacks adequately determining pr 'nclples retd.dering the levy bad as being manifestly arbitrary.

x:v) 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 constitutiona! scheme and consequl2ntly illegal and ought to be set aside as heing manifestly arbitrary.

xv) Once it is prima-facie shown that tile clas!sification is arbitrary and violative of Article t4 there is a duty on th£? revenue to justify reasonableness of the said classification and there has been no att.=.rnpt by the r=spondent to justify classification either by • ay-of on affidavit or pleadings.

xvi} There= has been a sLibsumation 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) T e contention of the Revenue that the two "taxable" e»ents of "manufacture and supply" continue to co-. exist i i the GST regime *qua* tobacco products is liable to be rejected and accordingly the levy and collection of basic excise duty or NCCD after 1st July, 2017 simultaneous with the levy of GST on tobacco products is unconstitutio a'.

{xviii) The construction of a taxing entry must be made in a manner so as to avoid overlapping and if G6T !S Inviabie by virtue of Article 246A exc!»sivity of such ie•g slati ‘e power must be maintained and permitting levy of excise duty and NCCD on tobacco produr.ts mus*. be a•oiJed.

(xix) In I'g*t of A1icI.° 279A {4) (f) which provides for the Goods and Services Tax Council to make recomrr endation to che Union and the States regarding special rate or rates to raise additional resources during nature.i calamity or disaster would indicate a scheme and recourse tc raising of resources by way of NCCD which is in the natut e of a duty of excise is violative of the constitutional frame'.work.

(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 24/ **and 246A of the Constitution \vas nut d»alt ?vith in the** judgment of *Unicorn Industries v. 7?»inn o:? Zndia reported in (20¥O)* **Z** *SCC* **492 and «o reliance can be** placid in the said judgr e! I by '.ice P.evenue.

(xxii) For tlie geriod cf 2017 ?c 2019 when excise duty was not leviu•d *rχ r* **toba«cc° prcd'ucts, there cannot be any levy** of NCCL' and tl?c saixe is unconstitutional.

III <u>CONTEN'7IONS OF RESPONDENTS:</u>

5. Thc• contention of the respondents are as follows:

i) E«ept for alcoholic liquor for human consume tiun, petrolRum and petroleum products, stamp **d Qty tobacco and tobacco products and opium, all other** gocds are liable only to Goods and Services Tax under A1icle **246A of the Constitution.**

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

a) GST under A1icle 246A

b) Compensation Cess under Ar?icle 27O

c) Surcharge in the nature of Nt?CD undel A1irle 171

d) Excise duty under Entry '34 List I Article 246

Reliance is placed on the ohseP•ations of the Apex Cout in *Union of Zndlia and Others v. VfTC Footsteps (decision âated 15.-09.âOx*.I - in Civil Appeal No.4810f20ñ1)* wherein it is observed that with the **enactment of the 01st Co‹•.st:itutional Amendment, Entry 84** of the Union Li»t has !ae»ri restructured to incorporate duties **of e»:cise o« Tobacco «nd tobacco products.**

iii) The Couls while interpreting the GST regime has to keep in niind that the Parliament had to make balances tD **accummodate the interest of the States and that the area of** u6T Law is such that judicial interpretation cannot be ahead - of policy making.

iv) Thoug h GST has subsumed majority of goods and Sl2rvices into its ambit, a complete subsumation ct goods into GST remains a constitutional goal for the AST ñ:u!‹r»il to achieve under Article 279A.

v) Considering the nature of both. the Federal partners and the complexity invoi «ed certain gocds are kept outside the ambit of GST an‹1 c. rtzia goods such as tobacco, tobacco products and opium are subject to both GST and other taxes. TW col st.tutionaJ competence cannot be questioned as t• vhe:h •r goods ore liable to GST and other taxes/levies anci scici•. question cannot be raised when there is no express bar.

vi) I"/e source of power and field of legislation is ava!Inbie fsr imposition of excise duty under Article 246 r/w Ents' 84 of List I while GST can also be imposed under Article 2^.6A.

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-â-via Article 245A.

b) Field of Legislation - Entry 8 List I vis-â-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 cornices sr both.

ix) time Parliament has stained power under Article Z46 to Ie.'y »xci»e éat'j oi•. t'3bacco 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 nf excise duty is on taxable event of manufactur.=..

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 Allele 24ñA :'s t.c be read as conveying a limitation arnd res?ricti.on in the exercise. of power and does not in an y wa y take awa'y the power availabJe elsewhere.

xi) The two provisions ca.n og°.rat» exclusive of each other and remaln independent v?it:inout influencing the other and the exist»ri«e of otte |nrav!siun need not restrict or prevent the e¿»ratian of tine other. Accordingly, the levy of **excise duiy ander Enf.ry 8fi of List I read with A1icle 246 is** indepenclent and c¿In co-exist withOut influ£?ncing or being impacted L•y ihe levy of GST on the very same goods namely **tubuc«o greducts under A1icle 246A.**

xii) '.rticle 246A contains source of power and filgld of i°gislatian and provides for simultaneous power of taxation ins'Jfar as GST is concerned, but Article 246 read with Entry 84 of List I confers sold power on the Union.

xiii) As per the Aspect DDctrine, the same transaction may involve two or more taxable events in diPeren!: aspects and accordingly, there is no illegality in the i°vy oi GST as well as excise duty on the same prsd:‹ct.

xiv) Selecting Objects to th» Tax, ci».termiriin¿ i:!ñe quantum of tax, legislating the cc•nditio«s tor the levy and the socio-economic go»Is wt‘.icti a tax iññust achieve are the matters of IRgislative peiicy

xv) The stat£?ment of s/aje-ts and reasons cannot be read in 'solatic».

xvi) I”he taxabi°. event for levy of GST under A1icle 246A is supply while the taxable event for levy of excise duty under .Article 24é r/w Entry 84 List I is manufacture.

xviij The exemption of excise duty as per the i^lotifl«ation does nat have the ePect of granting exemption of NCCD unless the same is mad£? clear by way of a notification.

IV. CONSIDERATION:

A POWER UNDER ARTICLE 246 R/W ENTRY 84 LIST I post the GST REGI IE AND INTRCDUCTIOñI OF ARTICLE 246A OF THE CONSTITUTION OP INDIA :

The introduction of levy of Central Exci»e oa to.hacco and tobacco products by Vilue Df Notificai:ion uf 2019 !nas resulted in levy of a nomina! «iut'/ of Central Excise. Such imposition is eventually traceable to tLi°. power under A1icle 246 with the fie!J of letyislatiun sg»«if1eñ in Entry 84 of List I.

By virtue ef th» Ccnst:tution (101st Amendment) Act, 2016 th»re has !ieer. am»nciment to the Seventh Schedule insofar as Entr\' S4 ha.c been substituted and the relevant extract is reprodu<»d as below:

> "8°.. Duties of Excise on the following goods manufactured or produced in India, namely f)"toaacco and tobacco products".

-.4rticle 246A has been inseled by way of an arriendment which reads as follows:

"246A (1) Notwithstanding anything contained in articles 246 and 254, Parlianfieat, and, subject to clause (2) the Legislature of «-ery State, have power to make laws with re.«»eci ñ« goods and services tax imposed by the Uni«» »r by such State.

(2) Parliament has exclusive ,ccwer to i»ake. laws with respect to goods an.d c.ervice» tax wi:ere the supply of goods, or cf services, o• hof.h tal.es place in the course «I" inter- Stete traâe or commerce. "

The effect of introJl:cticn ui" Ai1::'cle 246A is conferment of the power of s"mult»i›ecu« levy on gouds and services in the nature nf Cucrsd» a«d Services Tax and the use of the word "noSiñ/ithc-taming" ›'/hici1 is a *non-obstante* clause does not have the eficct cf »bfegation of power available under A1icle 246. The wnrds "notwithstanding anything contained in Article 2t6" oug!z? to be construed as having the ePect of irac'rei\' clari?yins that inspite of the power under A1icle 246, pow»r unJer Alicle 246A could be exercised and that A1icle ?46 worilr not be an impediment to the operation of 246A. The - observations of the Apex Court in *South Zndia Corporation Pvt. Ltd. v. Secretary, Board oF Revenue, Trivandrum and Another reported in* f /+ 64/ *4 SCR 380* draws a distinction between the expression “subject to” and “not withstanding” and the relevant extract reads as fullows:

> *"19. That apart, even if Article 372’. continues the pre-Constitution laws oT taxation, that provision is expressly made subject to the other provisions of the Constitution . T’ne expression "subject to conveys time. idea or a proVision yielding place to another provis on or other provisions to wlsic'i ie is made subject. rurther Article* 278- *opei-›s ou-t with a non obstante clause. The phrase "notwithstanding anything* in *the ConstJtu tioi ”* is *equivalent* Lo SZt f/ L*at So/re *cf time ci:her articles of the Co.astitution, or ti:at t’r.e other articles shall not be an impediment* to *the operation of Article 278. "*

u*n !t›e. same lines is the decision of the Apex Cout in *Chandravarknr Seetharathna* Rao v. *Ashalatha S. Guram i eported in* f +•^•$ *4 SCC 442'* which reiterates the abov.°. position while explaining that the ePect of “nc›twithstanding” 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 expr»s»i«n "notwithstanding anything contained in t'nis **4 I o-** *in some particular provision in the Act cr ii1 som.e* **part/cu/ar** *Act or in any law for the* **fume** *being in Torce, or in any contract" is mc•re* **oRcn** *thnn it»t appended to a* **section i"n** *the beo/nn/ng* **lull*› a** *view to give the enacting part ot the se‹:tion in case of conflict ai« overridi«;i eHect over the provision oF the Act nr the- ccnc. a«t mentioned in the non ob»ta.nte clau»e.. il is eg»-'"•› alent to saying that in sy»ite cf Th•. -protisinn- of the Act or any other Act me.nticned iii tne non obstante clause or any co».!ract nr doc!Jment mentioned the enactment f»!lowi»g it will have its full operation or that the pm-ovIsions embraced in the non i.'bstante clause \'YouId not be an impediment for a.n ope ation of the enactment. See in this cc.«.ne.ctia.« ñhe observations of this Court in South /ndin orpn. (P) Ltd. v. Secretary, Board of Fa-venue, Trivandrum (AiR J 964 SC 207, 215 : (1964) 4 SCR 280j .*

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 A1icle 246” in the present ucheme would not have the ePect of extinguishing the exercise of power under Article 246. Takin¿ note of tile intenticn »s reflected in the conscious amendment tu Entry 8°, e* list I, it could be construed that even ¿lost icti-sdLiCtion of A1icle 246A, there would be jsrotectior i and «ontinuance of exercise of power under A1icle 2é6. i I«e obsem.1tion of the Apex Cout in *Union af* 7n4ia *and Others v. VKC Footsteps* f<ecision *dat<d 1“H.Oñ.itO24 in* Ciri/ *Appeal Mo.4810f¥0¥1)* **aP** *nai-a ¥9* **is apt in the present context** and is as follows:

> "..... with the enactment of 101st C?onstitutional .^.mendment, Entry 84 of the iinion List has been restructured to incorporate ñu‹ies sf excise on the following goods r«ai»iufac1ured 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 ex?ent that special power under Article 246A is exei°ciseci ii3»re is denudation of power under Articl.° 246 is i!aiile ta i?e rejected.

The sources of power under A1icle 246A and 246 are in fact mutually exclusiv» and could be simultaneously exercised.

If that wei e to be sc, ti?e cuurt ought not to forbid the Union fi'om ex°rcising puwer «nder A1icle 246 which is not otherwise ¿rohibi?eJ.

It is to be noted that the Constitution (One Hundred and First: Am.°.ndment) Act, 2016 introduced A1icle 246A wi›.ic.h identifies the field of taxation as well as source of powei. ?Jo doubt, GST is levied on products by vilue of the int›-u^uction of the Central Goods and Services Tax Act, 2017 pursuant to the amendment made to AXicle 246A of the Constitution. But as discussed, despite Article 246A containing a *non-obstante* clause, the power under A1icle 246 stands protected.

No doubt, it has been contended that tiñere is a clear distinction between source of power aNd field ofi !egisIa.tion and the entries in the lists h>eing fields of !e¿i»Iatioi1 cannot be construed as a source of It must be noted that Alicle 246 continues te Ue th» .cource of power even post-introduction of A1icle ?ñ5.4. Tne a.•\1endment to Entry 84 List I whereh.y field of legislatier. indicating levy of duty of excise oc g«cés manufactured or produced relating to tobacco anJ tcbacco Dr.cducts does indicate the conscious intention to gr»erve ?he exercise of power under A1icle 246 °.ve« ate.r intraduC!!?n Of Article 246A.

If the arg•ument of the petitioners that post-introduction of Article 246A and if on the product by virtue of Goods and ueivt«es Tax Act under A1icle 246A GST has been :'ntroduced, 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 ePect 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 Cout of Allahabad in the case of *Zndian Oil Corporation Ltd. v. Union of 7ndia reported i» (2020) SCC Online All. 153B* had an occasion tc corsiJ»r !he following relief:

"3....... This writ petition has been fileé for the ic°Ilcwing reliefs:-

.......d) Declaring -.ontir.u»d existence/'non-deletion of SKO from the Foulh Schedulu•d -of Central Excise Tariff Act, 1944, aher 1.7.17, to be v!aIative nf Section 174 of Central Goods and Sem ice Tax 4.c? ?017 and also violative of Entry No.84 ‹of List T (lunien Listj of the Seventh Schedule to Constituticn of ?n«iia, 'which has been amended by the Constita!ion (G.ce hiundred and First) Amendment Act, 2016.

The Cru1concludes at Para 18 and Para 22 as follows:

> *"1P.. "Nanufacture" is the taxable event uinder the Central Excise Act, 1944 while under Section 9 of the CGST Act/UPGST Act, the event " cf 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 l*ue*l shall be levied with effect from such date. as i».ay be notified by the Government o•n* Ffte *recommendations of the Co l:nci(.* T:1us, <•*:?:•T .may be* levied even *on such goods v›ñ.'"ch are ez.cisahIo goods under the Cent.ral ?xcise Ari:, 1914. Therefore, Superior Kerosene i+"ll (fiiKC)* sha*ll continue to be a« e»cisahI° yoods «nder the Central Excise Act, 1?44 ev'«n if G::fiiT on supply of Kerosene 0Il (PDS* f *I«vieâ un.der i.^"ie GST laws.*

21. 'v!ni:iisnuie‹1ly, fi•uyeri-cr Kerosene Oil is mertJon»d *l›-.- tk›e fiouiTh Schedule although no* Fare *oT d«:;‹' has .ñe«n pi-ovided. if rate of duty has ›«ot been pr»'vid«u* JI *shall merely mean that no duty Is le.v.'"ab›'e i"n the absence of rate of duty. iñ dces noi i?•.ean that such goods are not exe.isa'«le. All the goods mentioned in Fourth ificheci'xle ño the Act, 1944 shall continue to be excisab!e goods unless the goods is removed from the .schedule by an amendment. Section 174 of* L.he *CGST Act has not repealed the Central E»cise Act, 1944 as respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the* ConstJtution. *The Central* ExcJse *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 tu I.he Constitution which includes S.K.O. "*

The stand taken by the High Cout Ali.ahabad wotilé suppol the interpretation placed above re¿ardir.g avaiiaisility of power under Article 246 p<os?-GST.

B. <u>Taxing on texable event, Aspect Theory and Subsumation of manufacture in âuyply :</u>

Apa1 B•urn t!nalléngin-g t!n-e validity of levy of NCCD the petitioners !n all of th.°. petiticns have also challenged the levy of Ceñtra! Ercise o.= tcbacco and tobacco products at rate as specii"ied in coi•‹n•..n 4 of the Notification.

I-he !e¿al attack raised by the petitioners is analysed as regai-d» th.° following aspects:

(i) <u>Subsumstion of manufacture in the Concept of</u>

Though it is contended that the constitutional scheme as envisaged by the 101st Constitutional Amendment provides for a system whereby upon recommendation of the ɔe nere]

GST Council, tax is levied under A1icle 246A on goods and services and ignoring such structured methcdo!c¿y and reveling back to exercise of power under Article 246 7'o\‹ld be a colourable exercise of power su«h a groui-‹'i of ci«ai!en¿je will not stand legal scrutiny and deserves to be rejeiited. The subsumation of manufacture ii3 ti3e concept cf »uppiy even if accepted would not mai‹e a differe.rc» as it would at the most amount to double taxation -i.e., taxing a taxable event on two occasions whi«h *p«r ae* not irTipermissible, as per the discussion ir.fra.

In fact, the ?‘-.pex <o«rt in *Union oF 7néia* v. *Mohit Mineral (P) Ltd. r«pcrred i•* f^^+•J ¥ *GCC* S99 has obser¥°t1 tl•.at eve« ;?ost Constitution 101” Amendment Act, 7.016 there v›ould be no bar for levy of surcharge even if ther». wa» a subsumation of various taxes. The relevant ubservatinil is as follows:

> *”E6. 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*

ɔe nereȷ

specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we. ñaii to comprehend that how such power sh,zII nuñ include power to levy cess o» good.i and services tax. True, that the Constitution *(One .Yund»ed end First Amendment) ACi 201st* It/as *yassed to subsume various* taxes, *surcharges and* cesses *into one tax but the co»stiñ«ñio.nal provision does not indicate that h«•n«ef»rñh. no surcharge or cess shall be levi»d."*

Accordingly, tl›r. Iea_‹l »rg:‹men! based on intendment of avoidIU¿I Df cascac.in.g taxes v»ilI not have the effect of prohibiting ievy of tax wh:'ch otherwise is permissible as the power under /'.1icle 2w6 remains protected and preserved.

It must at.ro be noted that the Legislature enjoys a wide IatiSude to dr cide on the methodology of revenue generation and the courts should not rush and must tread carefully while :1ealinc 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-â-vis available source of power which cannot be defeated by resol to argument based on objects of GST as «critained in the Objects Clause.

(ii)

Even though the petitiai•.er would ccnt»nd tnat what is being taxed is the aspect of ma»fa«ture under the Central Excise Act and the same - taxaD!e eveilt <cf manufacture as subsumed in ?>ST, ever if su«h contention were to be accepted it ’xoi1Id antounf to taxing of the taxable event of manufai:ture en t\vo occasions and unless there is any prohibitior. in law sur.I. a lev'y would still be permissible.

It !r1«st be on.'ed that taxing statutes are revenue se.1er«tion statuY.es and in that context, levy even if on the sam.°. taxable. event which may also amount to double taxatior› is *per* se not prohibited unless prohibition can be . reo6 into on the basis of any other constitutionally available j3rinciple. 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 diPerent ground of attack.

The observation of the Apex Court in *dvln4er* **Sfngh** *». State oF Punja6 reported in l***2979***l 1 SCC 1G7 to* **the ePect that if on the same »ubjec? rTiatt«r i!1e legisi.ature chooses to levy tax twice over, there is no inherent invalidity in the fiscal adventure. unle»s thei ° are some other** prohibitions, is tc be fioteJ as la'/ing down the correct **position of la'//. T4e relevant »xiracf is as follows:**

> *"Tñ<° princiya/ invalidatory charge, based* **on** *The Act, is ñhaT Section 90 (4) interdiCts any tax "ai.•eaJy im,oosr.d". The present tax is on »'ales and i.ñere is, under the general* **sa/es** *tax lew, already a like levy on* **sa/es** *of foreign liquor in the. ctate., and so the second fiscal venture* **Js** *beyond uoVernment'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* **a/so** *voiced. Some of these contentions hardly merit consideration, but have*

been mentioned out of courtesy to counsel. The last one, *for instance, deserves the leaaf. attention. There is nothing in Article 26T:i af the Constitution from which one can* sp//. OFF tfie *constitutional* vJce *called doi:bI.• ta›.-atio«. (Rad economics may be goods law a»d ‹'ice v•r»a). Dealing with a somewhat similar argun1e«t, tf›e Bombay High CouW gave short »hii?. ta it in Western india T.ñeatres fi?antonmerit Board Poona v. Western ind‹'"a Tl•.eaters Li:J., AiR 1954 Born 261).*

. .!L «it tile s«m.e »hject matter the legislature c!iooses to ie!zv tax twice over there is no i.«her«»t in»'alidit¿ in the fiscal adventure save w'nere otih.er prohibitions exist.

(iii) ¿tspect Theory:

An.ether a.cpect that would require consideration is the "Asgect The•ur\'" as referred to by both the petitioner and the respondenf..

- The respondent relying on the Aspect Theory has **.ontended 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 soug ht to be taxed by vilue **of levy of excise (Article 246 Entry 84 List I) and accordingly, looked at from the subjective point of view ef the !egisiat‹ire** a single subject from different asg»cts could i:e a subject **matter of diPerent taxes.**

The petitioners have speci!irally cnntended that the Aspect Theory would nut be np¿il«able as it would be applicable only vvilere ti i«re is a dlspute relating to field of **distribution oi" I«oisletive- po»ers between F-ederal and** Provincia! £?overnn.enl>.

In fact, in tl:e cas» of *Federation of Hotel and Restnorxnt v. union o7 India repoRed in (1988J 3 DCC 634* !h« question that was considered was whether exjaenditure tax was in "pith and substance" actually a tax on **luxuries 'whi«h was squarely covered by Entry 62 List II or it** «oul«i 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 szin3e !Ytatter constituting distinct fields of legislation. li» ePeci it v‹'as submitted that Hotels may be tex=cI in their “expenditure aspect” by the Union and in their “luxury aspec?’ by the States. The Apex Cout was ess»ti‹alIy considering legislativ£? Competence of thEl Union arliament and it is in that context that the principie of-the Aspect Doctrine appears

to have been cc»«idereñ an:J eventually held as follows:

> *88. In the* **/ig'hr** *af th.e above entries and decisic.«g* **F** *,#| tli.«I the learned Attorney General is light in urging that, merely because the 1987 Act as well* **as** *the State Acts levy* **taxes** *›’hich have ulLim.ate impact on persons who enjoy ceWain luxuries, the pith and substance oF both cannot ”b.. considered to be the same. The obJect of a tax on luxury is to impose a tax on the enjoyment oT 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 aHord 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 diHerence between the two categories of imposts. For instance, if the cc.«fl!ct alleged had been between the present Si:HTC° TH*S and an ACI Of Parliament taxing e‘zpe»flii»re incurred in the construction. cf theatre» of' ‹,he maintenance of race home* **e.st‹1k!i>h/»ents** *or *.he like, there would have ’ae.en n<« overlappi.«g at ali and the pith and subs7an« of the •.eniral tax could weil be de».«•ibed a» "exp•.nditure" and not "luxuries". This ‹:iistin»-ticii is not obliterated merely because cf ttie. «irc«r»starice that both legislatures* **‹hive.** *«hcsen to a?ta«k the same ared Of VUlr›'ershility, one !vit.h a View to keep a check on "iu«iir¦es" and the ‹otii«r with a view to curb vndesirahle ""expe,nditL•re".*

Clearly, in the present case the question as to legisiative cGmpetence of the Union vis-â-vis the State is not ii1 qu°.stion. 1”he question as to whether power under A1icle 246A wliicia is tax an goods and services if levied on a Di sduct could also be a subject of levy of an indirect tax on th°. uame product in exercise of power under A1icle 246. Wi«ile the power under A1icle 246A provides for a simultaneous levy by the Parliament and subject to 246A (2) the Jegislature of every State; on the Dther hand, power under Alicle 246 is with the Union. The question of legislative competence under 246A vis-â-v.s A1icle ?46 would not strictly fall within the ai3nbit of appii«ability uf tiie Aspects Theory.

Even otherwise, while it is tite aspect c! supply which is the consideration whiie levying tax iJnder GST, it is the aspect of manufacture that is of conSidGFdtion while levying excise duty. I-hoJugh :it is con?»ndré by the petitioners that the aspect of !iupyiy iia» subsumed manufacture and accordingly, the !»v\ of tax wauld in effect be on the same taxable event nf r«ar›ufac‹i‹re in the present case, however, a closer scrutiny r/ould reveal that the legal taxable event uader GST ›'.'ould be on supply while on excise wDuld be on ma» ufactui e *'vhich are two diPerent legally recognized aspects aad even if the incidence is on a single subject, the Ji!?erent legal aspect would not lead to an overlapping and would result in treating the levy of tax as on diPerent aspects.

Even otherwise, even if it is construed to be a tax on the same aspect unless such levy of tax falls fcui o_c other constitutional safeguards, it would *per* se nei vitiufe ie'/y of tax. (see Avinder Singh v. Sta?e of Punjab - AIR 19“79 SC 321).

C. <u>Legality of levy of NCCiD as per Se«t:ioi1 136 of the</u> Finance Act 2001

Section 136 of the Finance- Ant, ?001 provides for levy of NCCD and :ñec*..or. 136 (1) and (>j are extracted herein below for re!er»n«e:

> 1) *1”r. the case «f goods specified in the Seve.«t’n. S«hefli«!e, being goods manufactured or produced, ñhere shall be levied and collected for* **rhe** *pAirposeu »f the Union, by surcharge, a duty of e.•cise, to be called the National Calamity Co»tiiige.«I duty (hereinafter referred to as the Nat‹'onal Calamity duty), at the rates speCified in th<. »aid 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 siur«ha‹s° b'/ way of duty of excise at the rates specified ii1 the «hedule i» **levied.**

By virtue of the aiiñendnieizf. cf the Twelhll Schedule of the Finance Act, 2005 the rat»s séand a›i?e›nded.

The surct:arge wcu!d merel\ refer to an increase of the **duty whi«h in the present ca»e is my way of a duty of excise. The nature of alt.°.i aticn oi duty by way of the Finance Act has been ccnsiJered in !iñe case of** *The ñfa4nrai Oistrict Cen.f*ral Ce-operañi'»e Bank Ltd. v. The Third Encome Tax ONicer, é0adurai reported in (1975) ¥ GCC 454* **f^e.vch** *of Tñree 3udges).* **The Apex Court has clearly** opined "that the surcharge leViable under Section 2 (1) of the **F!FIB0Ci3 Act, 1963 are relatable to Article 271 of the Constitution of India. In a detailed discussion, the Apex** Cout has also clarified that the purpose and concept of the additiDnal surcharge is different frDm the Income Tax and **that** *"26.... Thus, additional surcharge is a distinct charge not dependent for its leviability on the assessees liabt!i‹¿* **ro** *y•ay income tax or super tax."*

The Apex CDurt has alsu obser ed thct the Income "tax Act and Annual Finance Acts are enacted by the Parliament in ex£?rcise of the. power conferred by Aiticl= 246 (1).

AS tD the r›atr‹re of sDwer ex cised under the Finance Act, it is obs°.rved as fcllc¥7s:

> *"12....... Cnce The Parliament has the legislative. cnm.oete»ce to enact a law with respect l» a certain subJect matter, the limits of competence cannot be judged further by the Tnrm ur manner in which that power is exercised. Accoid›"ngly, though it would be unconventional Tnr the Parliament to amend a taxing statute by inc rporating the amending provision in an act of - a diHerent 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.*

ɔe nere]

True, as *said in Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax, (Central) Calcutta {AiR 1g6a sc i ”»o : (1966) 2 SCR 688, 704 : (1966)* 79 *.!TR 7Y?7j that the Income Tax Act a permanei:I Act while the Finance Acts are pñ»ed e.ver yr year and their primary purynse is tc pre.a«ribe tf'e rates at which the incoi›«e tax* wJl/ *k• ci›arged under the fncom-e Tax vfi«ñ. B«t that does* not *mean that a new and disi.irict charge cannot be introduced »'nder* t/Ie *Finance Act. Exigencies of the financia'' ;.qar determj»« the* scope *and nature of its pravisio»s. !t" th• Farliament has the* /e¿zisiaiiJv’e *c«,'i?p«ñence i» introduce a new charge «T ta.«,* ir *may e.»ercise that power either by in«orporañin¿ thañ charge in the income Tax* /‹LL *or by !ntrodu«ing it in the Finance Act or for the maKer of tint* in *anz other statute. ”*

Accordi • sly, it becomes clear that surcharge is a methodology’ for raising additional revenue and has nothing to du with the leviability of the tax or the assesses liability to pa,/ the tax.

D. NCCD as a surcharge and Article 271 :

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

The levy of the surcl•.ar.ge i.e., NCCU by way of provision of the Finance Act, thuLI !n is described as a duty of excise, is legally speaking a s«li--co.ctaii.ed levy which stands independent of th» duty.

Article. 271 groviJe» for levy of surcharge, which reads as follows:

> *":ii71. Li»tt.'ithacanding anything in Articles* i'69 *and ?70, 1'arliament may at any time i».cr«.ase any of the duties or taxes referred in these aAicles except for the goods and services tax url:l»r Article* 2#6-A *by a surcharge for p-crycses of the Union and the whole proceeds of any such surcharge shall form part the* "uonso/idaFed *rund 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 tl•.e case of *The Madurai District Central Co-operative Ranñ Ltd. v. The Third Zncome Tax OHi«e». Madurai rc•pon‹°.d .'n (1975)* S *SCC* 4S4 the Apex Ccurl has clai ified tile legal position and upheld the validii:v ef imposition of surcharge by way of provision in th» Finance .4«t and accordingly, levy of surcharge by way of provision under the- F.nance Act of 2001 is nDt open tD be cc est on=d.

A1i«le. ?71 iE aiso clear a»d provides for increase in dUty or taxis by a surcharge.

Tii» only bar unJer A1icle 271 is that the surcharge cofiteraplar»é excludes the surcharge as regards the Goads and Services Ta‘x under A1icle 246A. In the present case, the surcharge is by way Df duty of excise and accordingly, cannot i?e «nnstrued to be a surcharge as regards Goads and Seiwices Tax as contemplated under A1icle 246A.

The interpretation of the petitioners that surcharge cannot be levied under Alicle 271 as regards ?ho.ce goods and services which are included under A1icl» 24éA :'s !ia hle to be rejected as no such restrir?ion coald br ol«c»d on a plain reading of A1icle 271 whic»h |:rovides that »urciñarge could be levied at any time te incl ea».°, Jut'•es or taxes. In fact, surcharge being• imposed by way of the Finance Act has nothing to do with surchurse en GST that may still be levied. As levy c•nder Alicie ?45 :•s permissible even after introduction of /+'licie 24C•A, l.he levy of surcharge tracing power r nder A:?icle 2?1 would still subsist even if the goods are subject.ed to !ev j nf goods and services tax under A1icle 246A.

E Levy of NSCD **during the period of Exemption of** Exci»• Duty :

Insofar as petitioner's contention that the exemption of . fi«ise Duty by virtue of Notification No.11/2017 would result in i\ICCD 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 .he indepeñerif. of the levy of basic Excise Dut\' in lig!ñt of ih» discussion **supra.**

It must be noteñ that tiñ» argument uf the petitioner while relying on the judgiJñent ia *Bajaj- fiixTo* 1t4. case has been clarified by !he judgrri°.nt of the Apex Cout in *Unicorn Industries Vs. LInion o? En«tia (2020) 3 SCC 492* **where** Apex C‹›u1 has declared tiñe judgment in *Bajaj Auto* to be *per incuriem.* **It was ai.ro held by the Apex Court that the judgrrefi? in** *Union oF.Tndia Vs. Modi Rubber Ltd., (1986) & SCC 06* **wa.s nDt considered earlier in** *Ba ay Auf:o* **and in** *E.R.D.* £ftrie.oés Y. *CCL (ZO18) 1 DCC 1 OF.* In the case of *Modi* **Ru/s6er it was clearly held that the exemption of Excise Duty under the Act of 1944 could nDt be extended tD »xempt the levy introduced by the Finance Act.**

The Exemption notification No.11/2017 dated 30.06.2017 exempts the excisable goods from »o n.uch of the duty of excise specified there on under the said S«fi»éi‹le to the Excise Act, as is in excess r.f ?he amoun? «alculat°.d at the rate splgCified in the corresponding entry in Column (4) of the said Table. Accordingly, as Notification No. 11/2G17 does not refer to the »emp1:ioi1 uf f'iCCD, tile exemption of Excise Duty cannot be extei•.ded tc NCI?.D as well which interpretation ›.'vocilJ flew frr>m ?he law laid down in the case of "Modi Ruisber" as \ve!l as the detailed discussion in the Unicorn Indusi!l»s cas». Accordingly, though the Notification No.2/2015 d.Ited fñ6..'1?.âG19 reintroduced a nominal basic Excise C»ty, ti•.°. levy Juring the period of 30.06.2017 and 0é.07.?O19, :'s not disturbed and accordingly the relief SG!JSht fur !n b'y the petitioners for refund of NCCD during such per:od is liable to be rRjected. It must further be noted ihat »ven though NCCD is in the nature of duty of Excise and m»y 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 N'?CC.

F. <u>Levy of basic excise duty and NCCD is •xioIstive of Article 14 of the Constitut.ion of Indis :</u>

At the outset, it needs to be .noted t!nat. the petit:'o«er has not raised any contentions in the pleading regarding the attack of the levy of ba»i« duty ané N*?CC on the ground of it being violative of .41icle 1-1 of the t?onstitution of India. It is only in the written siJ !51*oFI tia.et SUCh contention has been raised.

The «as» tI?at is ni.ad«- out is that tobacco and tobacco produr.is are tf›°. only category of goods which are subject to inJ"rec? t»xes under two regimes viz., GST Regime and Excise Regime.

Grounds uf challenge are:

- a) Unreasonable Classification

b) Manifest arbitrariness

It must be noted that the respondent has countered such contention on the ground that tw!D test of reasonableness and rational nexus is achiev»ci if texaticn on tobacco is viewed as sin tax with I.he othe.r underlyintj cbje«t being of revenue generation.

The Apex Cout in the «ase of **Commiss7oner o7** *Urban Tax v. Buckingi1ain h Ca»natic Company Ltd.* Repoled in *(1959) 2 fiñ?.C* 6S ha» rciierated the settled principle that selecting cbjecFs tc the tax, determining the quantum of tex, legislating «ond.'€ions for the levy and the socio-economic gnels wi1icl: -a tax must achieve are matters of legislative polic\' a»d f.i1ese matters have been entrusted to the Legislature a!:d aot to the Cout.

It i6 a se7.‹led principle that the Legislature has a larger discretion iri the matter of classification for the purpose of iax. The requirement however is that there is a classification 5nt1 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 N/?.t?D was also to discourage consumption. If that wei e tu ia°. !aiien note of, the classification of tobacco and f.obac« products »s a separate class, keeping in mind oiñjective af dis«uur»ging its consumption, and such cla»sif!catioi•, cc•iJId be° stated to be based an a intelligible «iiPerei1iie. A.0.er hav ing so classified the levy of NCCD which is for the pLM-po»e of discouraging consumption ané relates to object associated with the levy cannot be dt*scrib•.d ts be ‹a classification without any basis.

8. It neeñs to be i‹ept in mind that taxation is not merely a source of ra!siag revenuR but is also recognised by the fis«al tsol to »«!ñieve fiscal and social objective. The nb»r‹'atisn in tIl•. judgment of *ELEL Hotels O Investments Ltd. V. Union oF Endia reported* in *(1989) G SCC 698 at Hara* 20 v›ouId be relRvant which is as follows:

> *"ZO. Similar* contenFJons *as to the unreasonableness oT the restriCtions which the imposition oT 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 ice» not in any way help the petitioner insofar as the judgment.c lay down broad principles relating to «lacsifir.ation. Ir. f.Act. tne same authorities are also often «ited to ccntei'.d that legislature has wide discreticn 'n classifying items for iax purposes and that th» different:'a has o reasonable relation to the object of th» ieglsbticn.

10. It *lust alsu iae -not°d ?hat the levy is also for the purpose cf i-°vei.•ue generation and the choice of the category o." ¿oa«is fcr the purpose of revenue generation cannot ipso-7arto be a ground of judicial review and something iTiore is required such as hostile discrimination am^ si.cgi:'ng put a palicular category of goods.

11. lit fact, the choice of the category of goods as in ?he present case may also be influenced by the objective of discouraging consumption and accordingly the choice of the - category of goads 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 »riaitrañy a«tir•ns have "elements of caprice, irrational!t , rlisprcpollcnailty or excessivlgness and be characterised by the iack of determining principle". There are no gr<ounds made out in the pleadings, calling fcr appIlcai:'on cf the said principle.

13. Fulher, the I»vy of tax is a product of legislative choice and on péic\' decidon» r7hi«h are the prerogative of the Executive anc as Iain^ deV/n by the Apex Cout in the case of ***VXC Fo»Tste¿.«*** {supra§ the Couls are not to readily enter into aJjuJication en such issues.

14. In the present case, while entering upon adjciJication an the basis Df Contentions relating to cons?itutiunal 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 legis/ative 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 up.on /egis/aFire choices, and On poliCy decisio».s wñich are the prerogative of the executive. h1any' »f ?I«° considerations which underlie these cncioes are based on complex balances dra‹•/n ñe7\w»ei-i political, economic xnd s‹ccJ"«a/ »«».ds i!no' aspirations and are a re»iilc of car•.f"u.' analysis of the data and inf»rmaticn regarding cl1e leVy of taxes and their co!le«ñicn. Thai: i» precisely the reason why «ourt« ar.° aVer»e ñc erltering the area OF |0OlIC'y' fTtai?er» en 7/Sca/ iss«•». We are therefore unable acceyc ?h.e «hallenge to the coriS7IL"»'ti‹›nal validity oT 5c«tion 54 (3)"

15. In the ahcve factual matrix, keeping in mind the guidelic.°. laid down by the Supreme Cout, no case is made **out tur int.=.rT°rence on the ground of the levy being hit by II:e law csittai»ed in Article 14.**

1ñ. In light of the above discussion, the petitions are u^i»!T\is»ed.

Sd/-
3UDGE

Np/-