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**UNDERSTANDING THE RELATIONSHIP BETWEEN ENTRY TAX AND FREEDOM OF TRADE AND
COMMERCE UNDER THE CONSTITUTION**

Edited By:

1) Saumya Tripathi

(Editor)

Saumya.judicateme@gmail.com

+91 9044382618

Publisher Details:

1) Saumya Tripathi

+91 9044382618

Address: Vikas Nagar, Lucknow

Email Address: Saumya.judicateme@gmail.com

Student Editor Name

Judicat

**UNDERSTANDING THE
RELATIONSHIP BETWEEN ENTRY
TAX AND FREEDOM OF TRADE
AND COMMERCE UNDER THE
CONSTITUTION**

By Samarth Khanna

From, Amity Law School, Noida

ABSTRACT-

the concept of interstate trade , commerce and intercourse has occupied an important position for the free movement of trade between two states and within the states . under part XIII articles 301 to 307 of the constitution deals with interstate trade , commerce and intercourse . the seventh schedule which consists of three lists deal with the tax provisions under central list entries 89 and 92A in list 1 , entries 52, 54, 56to 60 in list II of state entry 35 in concurrent list confers power to levy tax on centre and state. To reconcile the freedom of trade and commerce and the power of taxation, the supreme court has revolved the concept of regulatory and compensatory tax which is not hit by article 301. Further, the concept of compensatory and regulatory tax imposed in not a barrier to the free movement of goods .Imposition of tax on goods from other states is also said to be a regulatory and compensatory measure which is upheld by the supreme court,

thereby clearing the constitutional deadlock on entry tax . in Jindal stainless steel Pvt. Ltd. Vs. state of Haryana (AIR 2016 SC, HARAYANA) upheld the validity of entry tax legislation.

It laid down test of ‘working proportionality’ in determining ‘compensatory’ nature of it in Atiabari tea vs. state of Assam (AIR 1951 UNDER entry 56,list II was challenged on the ground that it violated article 301 of the constitution and was not saved by article 304 (b). the court held that the impugned law undoubtedly levied a tax directly and immediately on the movements of goods and therefore , came within the preview of article 301. In this case , the validity of he Assam taxation (on goods carried by the roads or in land waterways)act of 1954 , under entry 56. List II was challenged on the grounds that it had violated article 301 of the constitution and was not saved by on the movements of goods and therefore came with in the preview of article 301.

In order to overcome the hurdle presented by part XIII , THE SUPREME court in automobile (Rajasthan)ltd. Vs. state of Rajasthan propounded a judicial doctrine of ‘compensatory taxes ‘ . the court held this imposition is no hit by article 301 as it is not in the nature of the tax , but a regulatory measure for the use of trading facilities which does not violate article 301 of the

constitution of India, and is also saved by article 304. In this paper, it is proposed to discuss imposition of tax with regard to inter state and intra state in the form of compensatory and regulatory measure with decided case laws which does not hit article 301.

KEY WORDS-interstate trade, compensatory tax, commerce and intercourse and regulatory measures.

ABSTRACT-(continued) PART XIII OF THE TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA.

ARTICLE 301- FREEDOM OF TRADE, COMMERCE AND INTERCOURSE - SUBJECT to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free.

ARTICLE 302- power of parliament to impose such restrictions on the trade, commerce and intercourse – Parliament may by law impose such restrictions on the freedom of trade, commerce and intercourse between one state and another or within any part of the territory of India as may be required in the public interest.

ARTICLE 303- restrictions on the legislative powers of the union and of the state with regard to trade and commerce –

(1) Notwithstanding anything in article 302, neither parliament nor the legislative of a state shall have power to make any law giving, or, authorising the giving of any preference to one state over another, or making or authorising the giving of any preference to one state over another, or making or authorising the making of, any discrimination between one state and another, by virtue of any entry relating to trade and commerce in any of the lists in the seventh schedule.

(2) Nothing in clause (1) shall have prevent parliament from making any of law giving, or authorising the giving of, any preference or making any of law giving, or authorising the making of, any preference or making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

ARTICLE 304- Restrictions on trade, commerce and intercourse among states; – now notwithstanding anything in article 301 or article 303, the legislative of a state may by law

(a) Imposes on goods imported from other states (or the union territories) any tax to which similar goods manufactured or produced in that state are subject, so, however, as not to discriminate between goods so imported and imported and goods so manufactured or produced and,

(b) Impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within the state as may be required in the public interest.

Provided that no bill or amendment for the purposes of clause (b) shall be introduced or moved in the legislative of a state without

the previous sanction of the president .

ARTICLE -305- saving of existing laws and laws providing for the state monopolies – no thing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the president may by order otherwise direct , and nothing in of the constitution (fourth amendment) act , 1955, in so far as it relates to , any such matter as is referred to in sub clause (ii) of clause (6) of article 19)

ARTICLE 306- power of certain states in part B of the first schedule to impose restrictions on trade and commerce –[rep. by the constitution (seventh amendment) act , 1956, section 29 and schedule (wef)I-II-1956]

Article -307- Appointment of authority for carrying out for the purposes of article 301 to 304- appointment of authority for carrying out for the purposes of article 301 to 304-

Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

[I]

INTRODUCTION-

In all freedoms an attempt is made through constitutional provisions to create and preserve a national economic fabric to remove and prevent local barriers to economic activity , to remove the impediments in the way of interstate trade and

commerce and thus to make the country as one single economic unit so that economic resources of all the various units may be utilised to the common advantage of all.[bowie studies in federalism, pg. 296-257(1954)]

[II]

The object of such provision in a federal constitution-

the framers of the constitution were fully conscious of the importance of maintaining the economic unity of the importance of maintaining the economic unity of the union of the country which alone could sustain the progress of the country . prior of the integration of India and the new constitution , there were in existence a large number of Indian states which in exercise of their sovereign powers, had created custom barriers .between themselves and the rest of the India, thus hindering at several points which constituted the boundaries of those Indian states , the free flow of commerce . thus, the main object of article 301 was obviously to breakdown the border barriers between the states and to create one unit with a view to encouraging the free flow of stream of trade and commerce throughout the territory of India(Atiabari tea co. ltd. VS state of Assam [AIR 1961 SC 252], INDIAN CEMENT VS. STATE OF ANDHRA PRADESH[(1988) I SCC 744].

Article 301 of the constitution of India declares that trade , commerce and intercourse throughout the territory of India shall be free .

Article 301 of the Indian constitution is modelled on section on section 92 of the Indian constitution is modelled on section 92 of the Australian constitution which says

that ,”trade and commerce and intercourse among the states whether by means of internal carriage or ocean navigation, shall be absolutely free. “

In his historical context , this section was intended to abolish state custom barriers .but as a result of judicial decisions , it applies to both the commonwealth as well the states. This was recognised in the decision of James vs commonwealth of Australia , in which a commonwealth statute requiring a license for interstate shipments of dried fruits was declared unconstitutional by the privy council. But , the freedom in India is wider than that in Australia under section 92. While section 92 refers to inter state trade only . Article 301 includes both the freedom in Inter state and inter state , i.e., within the territory of Indian state trade and commerce . that, it imposes are striction on the legislative power of both parliament and the state legislature. The presence of words “absolutely free” in Australian constitution presented many difficulties in that country . trade and commerce could not be regulated by the centre . the restriction was to be spelled out by the court .

In India , the constitution itself lays down the restrictions on article 301 . the restriction are contained in articles 302 to 305. This is necessary because no freedom is ‘absolute’ and even in Australia , the freedom is not absolute and even in Australia , the freedom is not absolute , but ‘regulated’ and ‘relative’ .

Article 301 applies not only to interstate trade but also intra-state trade , commerce and intercourse . thus , article 301 will be violated where restrictions are imposed at the frontier of a state on any stage prior or

subsequent . The freedom guaranteed by article 301 will be violated where restrictions are imposed at the frontier of a state on any stage prior or subsequent . the freedom guaranteed by article 301 is freedom from all the restrictions , except those which are provided for in the other provisions of part XII, I.E., articles 302 to 305. These provisions clearly show that the guarantee under article 301 is freedom from all the restrictions , except those which are provided for in the other provisions clearly show that the guarantee under article 301 cannot be taken away by an executive action (district collector , Hyderabad vs. Ibrahim and co.)[AIR 1970 SC 1255]. RESTRICTIONS FROM WHICH THE freedomis guaranteed should be such restrictions as directly and immediately restrict the free flow of movement of trade and not incidental or indirect restrictions. (automobile transport vs. state of Rajasthan) (AIR 1962 SC 1406).

THE word ‘trade’ means ‘buying and selling of goods , while the term , ‘commerce’ includes all form of transportation such as by land , air or water . The word/term ‘intercourse’ means movement of goods from one place to another place ,thus ,the words ‘trade’, ‘commerce’ and ‘intercourse’ covers all kinds of activities which are likely to come under the nature of commerce .

It is noted that article19(1)(g) also guarantees to citizens the right to practice any profession or carry on trade , business , etc. articles 301 confers only a statutory right . the right under article 19(1)(g) can only be claimed by citizens , but the right under article 301 can be claimed by anyone.

The word 'free' in article 301 does not mean freedom from laws or regulations . there is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and law imposing rules of proper conduct or other restraints for the due and orderly manner of carrying over the activities . The distinction is known as regulations. The word 'regulation' has no fixed commutation . its meaning differs according to the nature of the thing which it is applied .

[III]

COMPARISON WITH THE CONSTITUTION OF SOME OTHER FEDERAL CONSTITUTIONS---

[KC WHEARE ,FEDERAL GOVERNMENT 126(1968)]

IF ONE CONSIDERS economic life within the boundaries of the federation a complicated situation is found .generally , in a federal government a complicated situation is found . generally , in a federal government , powers of exclusive control, actual or potential , over certain aspects of economic life vests. These include currency , coinage and legal tender, weights and measures , copy rights and patents , bankruptcy, and insolvency , immigration and emigration from and to countries outside the federation, and the using bound on the credit of general government .

It is difficult beyond his first list , to find any important topic in economic affairs which is granted without some qualifications to the general government in all federations .

(A)POSITION IN AUSTRALIA – IN AUSTRALIA , the crucial provision to secure the freedoms of trade ,

commerce and intercourse in section 92 of the constitution. It contains similar language as is used in article 301 of the Indian constitution.

Section 92 of the commonwealth of Australia act, 1901 lays down: on the imposition of uniform duties of customs , trade and commerce and intercourse among the states , whether by means of internal carriage or ocean navigation shall be means of internal carriage or ocean navigation shall be absolutely free. But not withstanding anything in their constitution , goods and imported before the imposition of uniform duties, be reliable to any duty chargeable on the importation of such goods into a commonwealth , less any duty paid in respect of the goods on their importation.

Section 92 applies to both states as commonwealth with the result , that it is has very much circumscribed government interference with business. It guarantees legislature as well as executive freedom . it prohibits fiscal burden as well as discrimination. But this clause applies to interstate commerce and not to intra state commerce.

As a matter of fact , there is no provision in the Australian constitution which guarantees rights to carry on trade or business such as guaranteed in article 19(1)(g) of the Indian constitution . lord wright held that only section 92 declares right of trade or business .

Lord porter is of the view that it does not create a new right and therefore , he added , "it does give the citizen of state or commonwealth the right to ignore and if necessary to call on the judicial power to

held him to restrict legislature or executive action which offends against the section.” The effect of both the views declare any attempt to interfere with the freedom of an individual engaged in interstate trade and commerce as violative of section 92. In *James vs. Commonwealth* [(1936) AC 631], the Privy Council said, “the Commonwealth should be held to have failed in its attempt by the method adopted under the act in question to control prices and establish a marketing system even though the Commonwealth should be held to have failed in its attempt by the method adopted under the act in question to control prices and establish a marketing system even though the Commonwealth government is satisfied such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But there are inconveniences liable to flow from a written constitution...”

Professor Nicholas is of the view that this section requires attention in view of the persistent difference of judicial opinion (Nicholas – *The Australian Constitution* 250 (3rd ed.)) while criticising section 92 he said that it is totally inapplicable to an age of planning of the Commonwealth of Australia.

As a result of so wide language, the freedom guaranteed under section 92 of the Australian Constitution is unlimited and unqualified. But there can be no absolute freedom and it was necessary for the courts to evolve certain restrictions and limitations on the freedom. The Privy Council in *Commonwealth of Australia vs. Bank of New South Wales* [(1950) AC 235] has laid down two propositions

(a) that regulation of trade, commerce and intercourse among the states is compatible with its absolute freedom, and,

(b) that section 92 is violated only when a legislature or executive act operates to restrict such trade, commerce and intercourse among the states directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

Accordingly, legislation of prohibitory nature has been held to be bad. (*Hydnes and Value Proprietary Ltd. vs. State of New South Wales* [(1955) AC 241] AND *Australian National Highways vs. Commonwealth* [71 C.L.R.29])

The scheme developed in bank nationalisation case [*Commonwealth vs. Bank of New South Wales*] (1950 AC 235) had a striking similarity to the scheme of section 297 of Government of India Act, 1935. Section 92 operated in its terms as a prohibition on trade, commerce and intercourse among the states, that is, interstate and interstate trade, commerce and intercourse among the states, that is, interstate and interstate trade, commerce and intercourse, and its construction, and its construction in 1935 was taken as settled in two matters.

(1) It was binding on the states only [W AND A. MC. ARTHUR LTD. VS QUEENSLAND [(1920) 28 C.L.R.530] AND

(2) IT PROHIBITED ANY DISCRIMINATION AGAINST INTERSTATE AS OPPOSED TO INTERSTATE TRANSACTIONS [FOX VS. ROBBINS (1909) 8 C.L.R. 115]

It is likely that the draftsman of the Government of India Act, 1935 were inspired by the Australian experience and incorporated in section 297, the above propositions as applicable in the section 297, the above propositions as applicable in the section 92 context. [D.

K SINGH OP. IT f n 1 at 44] . a significant develop prevent as already stated took place later in the construction of section 92 , and it was held to be applicable to commonwealth as well . [James vs. commonwealth(1936) 55 C.L .R. 631]. This shift in the Australian scene may have some bearing as forming the conceptual background for the enactment of part XIII OF PRESENT constitution [D.K.Singh op. cit. f. n 1 at 45]

Constituent assembly tried to incorporate in Article 301 , the emotional appeal of section 92 of the Australian constitution whilst altering its provisions . at the same time , section 297 of the government of India act , 1935 was before the assembly as a guide line . servvai have termed it as unfortunate [servvai op. cit. f. n. 1 at 45]

The most important provision in the USA is article 1 section 8 clause 3 , known as the commerce clause , which provides , interalia that congress shall have the power to regulate commerce among the several states.

This power of congress is described as a regulation and it is limited to interstate commerce ,and it has been construed so far as interstate and foreign, commerce are concerned , as a matter of national concern and requiring national treatment (D.K. SINGH OP. CIT, f .n.1 at45). This construction has given the congress an exclusive jurisdiction in the matter[corwin . the construction and what it means today ,(1954)(1961)] . the result is that though clause does not in terms restrict state protection , yet by a process of judicial interpretation , it has come to have restrictive effect on the states In those

matters where the supreme court considers that uniformity is necessary to national economic well being .[Cooley vs. port wardens 12 how 299]. Even the silence on the part of congress in any particular aspect of the matter would be taken as an indication of being . [COOLEY vs. port wardens 12 how 299]. Even the silence on the matter would be taken as an indication of being free from restraint by an indication of being free from restraint by any state action[D.K. SINGH OP.CIT. f. n. 1 at 45].

However , a state legislation which discrimates against interstate commerce and is to be condemned as invasive of the federal jurisdiction in the absence of congressional legislation may be validated by congress [prudential insurance co. vs. Benjamin(1946) 328 USA 428]

Congress can regulate even those activities which affect interstate commerce as to make their regulation appropriate . [USA vs. Darley (1941) 312 USA 100]. THE EMPHASIS IS ONE REGULATION WHICH MAKES THE FEDERAL CONTROL ALMOST unlimited . the influence of commerce power the states in a negative one and by implication , it acts as a restraint on the state legislative activity in this area.[Wickard vs. Filburn(1942) 317 USA 111]

However, the object of part XIII of the present Indian constitution is not the same . Instead, it aims at guarantying the freedom of trade , commerce and intercourse throughout the territory of India, and parliament and state legislatures are expressly prohibited from making a law which inhabits that freedom[d.k. singh , op.cit.f.n.at 45-46]

While reading the provisions of part XIII , prof. rice found in article 301 , an echo of

the federal commerce power as construed in the united states constitution and read it in an affirmative grant of power for parliament in addition to subject matters enumerated in the union list schedule VII “with public interest “as equivalent of due process of law” in its procedural sense . article 301 according to him was a statement of part of the constitutional rule ‘ which invalidated ‘state action’ depriving persons of liberty or property , that is , action by government and not be persons .[RICE DIVISION OF POWER , IJILI 159(1958-59)]

(B) POSITION IN CANADA- IN CANADA , THE PROVINCES HAVE BEEN DEPRIVED OF THE POWER TO LEVY INDIRECT TAXES so that they may not be able to create inter-provincial trade barriers . this has been further strengthened by making “regulation of trade and commerce” a central matter , but this central power has not played were meaningful role so far. Then, section 121 of the BNA ACT , which provides that “articles of growth , produce or manufacture of any province”, also curtails the provincial power to put restrictions on entry of goods from other provinces.

(IV) AMERICAN AND AUSTRALIAN DECISIONS COMPARED :---the constitution of the united states of America provides only one clause ,viz, the congress shall have the power to regulate commerce among several states , etc. and this phrase ,”to regulate commerce” has received different judges of the USA supreme court. Indeed ,the us supreme court has used the commerce power to meet the exigencies of different situations but the common thread was that transportation across the borders , either physically or conceptually was uniformly held to be a necessity ingredient

of the expression ‘commerce’. The following cases illustrate more than anything else that ‘commerce’ in America has been to mean traffic in its operation across the state borders-:

- (a) R.c. tway coal co. vs. c.h. clark[(1936) 80 law ed. 1160]
- (b) Public utilities commission vs. c.h. clark[(1919)249 US 236]
- (c) Kidd vs. pearson[(1888) 32 law ed. 346] and
- (d) Welton vs. Missouri[(1875) 91 us 275]

The constitution of the Australian commonwealth came to be passed in 1900. The constitution makers of the Australian commonwealth made elaborate provisions on trade and commerce presumably to avoid confusion on the working of the constitutional provisions . while in the USA constitution of the expression used in commerce in section 92 of the Australian constitution , the expression ,’trade, commerce and intercourse has been used . the Australian constitution act not only does not provide for any restriction on the freedom of trade , commerce and intercourse but has also used an expression of the widest amplitude , viz, “absolutely free”. This expression also came to be interpreted in a different manner . the privy council evolved , the power to restrict the said freedom by the states from the concept of absolute freedom itself . this was necessitated because there was no statutory provisions limiting the absolute freedom . in this respect , the privy council decision in rex vs. swither [(1912) 16 CLR 99, w&a mc Arthur ltd. Vs. state of queensland[(1920) 28 CLR 530] are instructive . these decisions have taken the expression,”trade , commerce and intercourse” in its widest amplitude.

In *James vs. Cowan* [(1932) AC 542, *Hughes v. State of New South Wales* (1955) 93 CLR 160], the Australian decisions broadly laid down that no law whether fiscal or other can be challenged unless it directly and immediately restricts the traffic across the borders, and secondly, the law which is regulatory in character cannot be called restrictive or violative of the freedom of trade, commerce, etc as guaranteed by section 92.

The composite expression, "trade, commerce and intercourse" was borrowed from an American decision into the constitution act of the Commonwealth of Australia. This expression has acquired a definite signification in both the countries, namely, free flow of movement of trade across the state borders, and the said freedom should not be distributed or infringed by state action, whether by taxation or otherwise. However, this freedom may be subject to such laws as may be beneficial to the general public, that is to say, in the public interest.

Our constitution makers in enacting in article 301 with succeeding articles in part XII has tried to avoid both the extreme of the American as well as Australian constitutions.

Though the honourable judges of our supreme courts have warned against the relevance of foreign decisions, there are certain fields where foreign decisions on the same words, or phrases may be of the relevant provisions of those (American and Australian) constitutions which form the background of article 301 of our constitution. Gajendra Gadkar, J. in *Atiabari Tea Co. v. State of Assam*, took a balanced view that is, the court would enquire how far other judicial minds have responded to the challenge presented by similar provisions in other states

constitution. In *Fateh Chand Himmathal v. State of Maharashtra* Krishna Iyer, J. WHILE interpreting 'trade' said that when Indian courts are called upon to interpreting 'trade' said that when Indian courts are called upon to interpret words borrowed from foreign constitutions, they must aculimize the expressions to the particular conditions prevailing in the country. However, lexicographic vide and understandings in alien jurisdictions may be booked into, but not beyond that.

There is no gain saying that the fact that our judges of supreme court got enough light from the American and Australian decision to avoid pitfalls and to proceed on the right track.

The Indian constitution has borrowed from the constitution act of Australia, the expression shall be free although the word absolutely was deliberately dropped. Another fact to be mentioned is that the control over inter state, subject to certain qualifications vested in the state under entry 26 of list II in schedule VII resembles the control exercised by the constituent states of the Australian and American constitutions, there is only one entry respect of trade and commerce which comes under the competence of the centre, the residue of the authority is left to constituent units.

In India, our parliament and states have, within their respective jurisdictions, full plenary powers of legislation also including, what is called incidental and ancillary to the subject matter. Entry 42 of list I of schedule VII confers full powers on parliament to the subject matter including one which imposes restrictions on the freedom of inter-state trade and commerce in public interest.

While by provision in article 301, our constitution makers wanted to energise

trade and commerce by giving a free flow without any state barrier being imposed in it, at the same time by article 02, they have conferred full powers on parliament to enact laws whereby to impose restrictions on the freedom of trade and commerce between one state and another in public interest. This provision compares well with section 99 of the Australian constitution. But article 303(1) carries out an exception from the relocation given by article 302. In other words, it limits the power of the state legislatures to enact discriminatory law giving preference to one state over another. Article 304 has been inserted as a proviso to articles 301 and 302. The first clause of article 304 authorises the states to impose taxes on goods imported from other states subject to the condition that there is no discrimination between two classes of goods, local or imported. The second clause authorises the states to impose such reasonable restrictions on the freedom of trade, commerce or intercourse as may be required in the public interest. Thus, by removal of prohibition contained in clause (1) of article 303 on the exercise of state power, it is possible theoretically for a state to practice by its legislation, discriminations or preferences as between one state and another. But in practice, this danger may not materialise because of the conditions imposed on the state legislation as well as 'reasonableness' of the measure. But, it is to be noted in this connection that 'no reasonableness' is attached to parliamentary law being enacted under article 302.

It seems clear from the decided cases particularly in Australia on the freedom of trade, where the provisions under section 92 is more empathetic than in article 301 of the Indian constitution – that the concept of freedom of trade, commerce and

intercourse must be delimited by consideration of social orderliness. The word 'free' does not mean extra legem, any more than freedom means that we are not subject to law. [Duncan vs. state of Queensland (1916) 22 CLR 556].

SIMILARLY, freedom of trade and commerce as enshrined in article 301 of the constitution cannot be extra legem. If the word 'free' in article 301 means freedom to do whatever one wants to do then chaos may be the result.

[V]

Relation of part XIII with other provisions of the Indian constitution:

In *Atiabari* case, majority of the court held that, "the doctrine of freedom of trade, commerce and intercourse enunciated by article 301 is not subject to the other provisions of part XIII, THAT means that once the width and amplitude of the freedom enshrined in article 301 are determined, they cannot be controlled by any provision outside part XIII [AIR 1961 SC 232].

Seervai while disagreeing with the above has said that this view is incorrect. The only word has been used after word does not appear in the text [Seervai op. cit. f. n. 2 at 985]. He held it contrary to the settled principles of construction, because provisions to article 304(b) requires previous consent of president to a bill for the purpose of clause (b). It relates part XIII TO PART XI, because article 255 of part XI provides that if previous consent is not obtained, it can be satisfied subsequently. Therefore, the established freedom guaranteed under article 301 is subject to article 304 (b) and 255.

Further, article 19(1)(g) of the present Indian constitution deals with the trade and as a rule of interpretation relating to article 301 with article 19(1)(g) is also is

also necessary for proper construction [ARTICLE 19(1)(G) guarantees to every citizen the right to acquire hold and dispose of property .Again discrimination is not barred only by article 303. Article 14 and 15 also guarantees equality and as stated above relation of articles 303, 14 and 15 is necessary for the best interpretation of the constitution .

In its earlier decisions , the supreme court failed to develop any clearline of the relationship between article 301 and 19(1)(g). in *chambargangawalla case* (state of Bombay vs. RMD CHAMBARBAUGWALLA CASE(1951 SCR 374) DASS J. HELD THAT article 301 deals with trade in movements and therefore , gambling is not protected under article 301.

Rights guaranteed under article 19(1) are only to citizen and not to any person and are subject to reasonable restrictions provided in article 19(2) to article 19(6). Article 19(5) provides that right of trade and commerce can be restricted in the public interest as well as in the interest of the protection of scheduled times (seervai, op. cit. f. m. 2 at 987).

Seervai is of the opinion that article 301 cannot be used to extend right of citizens which has expressly been limited by article 19. At the same time , restrictions imposed on article 19(1)(g) cannot be abrogated by article 301 .

It is , therefore, submitted that power of legislature to legislate on the freedom of trade , commerce and intercourse are subject to provisions of article 302 and 305 as well as article 19(6).

Article 14 prohibits discrimination as a general rule .but , it does not mean that reasonable classification cannot be made . article 15 prohibits discrimination on the ground of religion , race, caste sex or place

of birth. Article 16 forbids discrimination on these grounds in public employment . discrimination is economic field in favour of domestic trade is permissible under article 14 as distinction between “domestic trade” and “outside trade” is based upon a rational differentia reasonably related to the object i.e. to promote domestic trade . article 303(1)prohibits discrimination by article 303(2) and 304(b) are exception to general rule . it is further submitted that such discrimination must stand the test of article 14 since all laws are subject to the provision of part III (ARTICLE 13 of the Indian constitution)

The object of part XIII of the constitution , therefore, is to guarantee the freedom of trade , commerce and intercourse throughout the territory of India. Its provision operates a limitation on the power of parliament and state legislatures which may in the absence of part XIII, pars laws interfering with this freedom . the freedom is protected from legislature interference in the manner prescribed in the provision of part XIII. Part XIII should not be read as providing for a source of legislative power, which is in chapter 1 to part XI , as the opening words of article 245 “subject to the provisions of this constitution” suggests [D.K. Singh op. cit. f. n. 1 at 47]. According to Shiva Rao constituent assembly debates support the above view[Shiva Rao, the framing of India’s constitution a study 699,701-3(1968)].

Within their respective jurisdiction , parliament and state legislatures have full and plenary power of legislation and extent to prescribing a course of conduct which promotes or prohibits something which is related to or prohibits something which is related to or course of conduct which promotes or prohibits something which is related to or connected with the subject

matter of legislation , a legislature having power to make a law with respect to something which is 'incidental 'or 'ancillary' to that subject matter.[united provinces vs. Atique begum AIR 1941 FC 16](STATE OF BOMBAY VS . BALSARA AIR 1951 SC 918] .

TO FIND the powers of legislature elsewhere will be futile [D.K. SINGH OP. CIT. F. N. 1 AT 47]

SIMILARLY , to find the article 302, an additional source of power for parliament is to misconstrue the article , further more it figures against the scheme of distribution of legislative powers envisaged in the constitution. For example, entry 92 of list I of schedule VII is 'interstate trade and commerce' parliament has full and plenary powers to make a law with respect to 'interstate trade and commerce'. parliament has full and plenary powers to make a law with respect to 'interstate trade and commerce' including one which imposes 'restrictions on the freedom of trade and commerce , in public interest. If the article 302 is construed as providing a source of power for parliament , there appears to be an overlapping between the two provisions and that does not make any sense .

Extra questions-

Question-1 –“levy of a non discriminatory tax may constitute infraction of article 301 of the constitution of india if it impedes the freedom of trade , commerce and intercourse . all taxes which contain restrictions to trade , commerce and intercourse , discriminatory or non – discriminatory , infringe article 301 unless they are saved under article 302-304”.

Question-2&3- ‘ the compensatory tax theory as judicially evolved in automobile transport is not compatible to constitutional. The automobile transport

case in so far as it lays down that compensatory taxes are out of the reach of article 301 cannot of taxation at best may throw light on the aspect as to whether it contains restriction on freedom of trade , commerce and intercourse . the compensatory tax theory being not compatible with the constitution, it is not necessary to annexure question no. 3”

Question -4 ---“to find out as to whether entry tax levied by different states in the present batch of cases violates article 301 of the constitution, each state has to be looked into and examined as per our discussions and conclusion as above.”

“ a law made by state legislatures complying clause(a) of article 304 and not containing any restriction on the freedom of trade , commerce and intercourse need not not comply article 304(a) but contains restrictions on freedom of trade , commerce and intercourse has to be routed through proviso whether required or not shall depend on the nature and content of the state legislation .”

Answers to incidental questions -

PART XIII (INCLUDING ARTICLE 301) of the constitution to which legislative power of state is subject , does not have effect of denuding any sovereign power of the state or effecting the federal structure of the constitution .”

“the levy of taxes is presumed to be in public interest”.

“levy of taxes which may be presumed to be in public interest still has to comply with part XIII of the constitution for it be justified as reasonable restriction.”

“imposition of restriction by way of tax legislation under article 304(b) is part of constitutional scheme and presidential sanction has been provided to keep a check on the legislative passed under article 304(b) is also subject to judicial review , in

no manner , militants against the constituent scheme .”

“there is no question of affecting the separation of power between the legislature and judiciary on the ground that levy on taxes under article 304(b) which contains restriction to the freedom of trade , commerce and intercourse have to routed through the president of India as per the constitutional scheme . the constitution contains large number of provisions including article 304(b) where a state legislation is subject to presidential sanction which provisions are in accordance with the constitutional scheme and does not affect the separation of power between the legislatures and judiciary . article 304(b) enables the state legislature through proviso to article 304(b). the question of judicial review arises only when there is a challenge to such legislation . judicial review of such legislation in no manner affects the separation of power .”

“the compensatory tax theory as propounded in automobile industry transport is not compatible with the constitutional scheme is delineated in the part XIII of the constitutional scheme is delineated in the part XIII of the constitution . farmer of the constituent with the constitutional scheme as delineated in the part XIII of the constitution .

Framers of the constitution have provided for all the exceptions under which freedom of trade , commerce and intercourse as one of the exceptions the same cannot be added as an exception by any judicial interpretation . the compensatory tax theory brings dictohmy which is inconsistent with the language employed in article 301 .

Constitution does not see tax as a barrier to free trade movement :-supreme court ---

A NINE JUDGE constitution bench of the supreme court is hearing petition filed by

private manufacture and companies against the varied entry tax leveid by different tax:- a day after the parliament passed the goods and service tax bill for a uniform comprehensive tax regime to promote Hassel free trade , a nine judge constitution bench of the supreme court on Thursday observed that tax should not act as a barrier to free trade , commerce and intercourse in the country .

the bench is hearing petitions filed by private manufacturers and companies against the varied entry tax levied by different states .

“once , it operates as a barrier , it stops being a tax . it becomes an obstruction and offensive chief justice of India TS THAKUR(former) , who headed the constitution bench , observed orally.”

It is the freedom of trade , commerce and intercourse which allows a trader , commerce and intercourse which allows a trader to move from place to place within the country without obstruction . a trader moves constantly and so long as his fundamental right is protected under article 19 , there is no question of a fiscal restriction being an obstruction ,”-chief justice thakur said .

The observations same during a debate between a nine judge constitution hence lad by the bench and attorney general , Mukul Rohatogi ,, who justified that each state lewis tax , taking into considerations its history and needs of its people . the debate was on the constebur airbus with the freedom , trade and commerce in the country .

Not discrimination-

Rohatogi submitted that special provision relating to different states and grant of special financial subsidies to them do not amount to discrimination if they are done for the upliftment of the particular state .

“you cannot being equality by eclipsing the fact that there is difference in the history , geography and development graph of states . people of Tamil Nadu have never faced the trials and tribulations of north -eastern states.” Rohatogi argued.

Mr. he rohatogi said discrimination not “hostile”, diberal and intentional.” And meant for the upliftment of a poor state is not unconstitutional .

“one third of our country is infested by nexalities running through the heart of the country . so we have to develop their states , “rahotogi remarked on the varied taxation regimes followed by states in order to argument their efforts to build infrastructure .

“states are not subrevient to the centre under the constitution.”states are not appendengee but supreme in their overnight under the constitution.”, he submitted.

The bench of the is hearing on the validity of separate entry of taxes goods , mandated by various state government statutes , without heeding to the plea of the centre to unit for the passage of GST bill in the parliament.

Rohatogi had at the very commencement on the case pleaded to the bench that they should wait till the fate of the pending GST bill was known.

The bench also comprising justices AK SIKRI , SA BOBDE, SHIVA KIRTI SINGH , NV RAMANA, R BHANUMATI, AM KHANWILKAR, DY CHANDRACHUD AND ASHOK BHASHAN , decided to go ahead with the hearing , saying , that “complex tax issues are involved”.

It said issues related to part levies by the states will be decided in the matter.

The attorney general submitted that some arrangement could be made in respect to

part demands by the state relating to entry tax after GST bill , involving a constitution amendment , was passed by the parliament .

Entry tax is imposed by state governments on movements of goods from one state to another . it is levied by the state that receiver the goods.

inter relational between article 19(1)(g) and 301-

Article 19(1)(g), a fundamental right confers on the citizens the right to practice any profession or carry on any occupation , trade or business . subject to reasonable restriction in public interest . on the other article 301 confers only a statutory right , the right under article 19(1)(g) can only claimed by any one . a difference between articles 19(1)(g) and 301 , it is said that article 301 could be invoked only when an individual is presented from ending his goods a cross the state , or from one point to another in the same time state .

Across the state , or from one point , t another in the same state , while article 19(1)(g) can be invoked when the complaint is with regard to the right of an individual to carry on business unrelated to , or irrespective of the movement of goods ,i.e., while article 301 contemplates the right of trade In motion. Article 19(1)(g) secures the right at rest.

In some situations , both provision may become applicable and it may be possible to invoke them both. The three alternative sub value are –

- (i) A provision may be valid under articles 301 to 304 as well as or.
- (ii) It may be invalid under articles 301-304 as well or
- (iii) It may be invalid under articles 301-304 but not

under article 19(1)(g) situations .

- (iv) Article 32 petition will lie in situation (i) and (ii), but not in situation(iii).

REGULATORY AND COMPENSATORY TAX ---

The concept of regulatory and compensatory taxation has been applied by the Indian courts to the state taxation under entries 56 and 57 of list II. , 7th schedule . measures which impose compensatory bar distinction taxes , or are purely regulatory , do not fall with the purview of restrictions contemplated in article 301. The reason is that they facilitate , rather than hamper , the flow of trade and commerce .

A purely regulatory and compensatory tax law cannot be regarded as violative of freedom of trade and commerce . the concept of regulatory and compensatory tax has been applied by the Indian courts mainly to the state taxation under entries 56 and 57 of list II(8). THE WORD 'free' I article 301 does not mean freedom from laws or regulation . there is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and law imposing rules of proper conduct or other restraints for the due and orderly manner of carrying out the activities . the distinction is known as regulations .

The compensatory and regulatory laws are intended merely to regulate trade and commerce , they facilitate free trade and commerce , they facilitate free trade and not

restrict or restrain freedom of trade . for example -, the measures as traffic regulation, licensing of vehicles , charging for the maintenance of roads , marketing and health regulations , price control , economic and social distancing and prescribing minimum ways are purely regulatory measures . likewise, a law which lowers a tax or toll for the use of a road or bridge is not a barrier or burden on a trade but helps in free flow of trade .it is a compensatory tax which is no hindrance to any such freedom of trade so long as they are within reasonable limits .therefore , we need to know the distinction between "freedom of trade in article 301 and 'restriction' in article 302 and 304.

Case laws-

1. In *Atiabari tea co. vs. state of Assam*(AIR 1951 SC 232)---in this case, the validity of the Assam taxation (on goods carried by roads or inland waterways) act of 1954, under entry 56, list II was challenged on the ground that it violated article 301 of the constitution and was not saved by article 304(b). in this case, the petitioner carried on the business of growing tea and exporting it to the Calcutta via Assam while passing through Assam , THE tea was liable to tax under the said act. The court held that the impugned law undoubtedly levied a tax directly and immediately on the movements of goods and therefore , came within the purview of article 301. The object of state law was , "to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the state . that being so the restriction placed by the act on the free movement of the goods is writ large on its face(AIR 1961 SC AT 254)

FURTHER , the court held by the majority took the view that the freedom guaranteed by article 301 would

become illusionary if the movement , transport or the carrying of goods were allowed to be imposed , obstructed or hampered by the taxation without satisfying the requirements of which by no means was excessive . simply , because the tax was levied on the 'movement of goods , from one place to place to another , it was held to offend article 301. The state could have by majority passed the act in question by following the procedure laid down in article 304(b).

2.in state of Mysore vs. Sanjeeviah (AIR 1967 SC 1189)-in this case , the government made a rule under the Mysore forest act, 1900, banning movement of forest produce between sunset and sunrise. The supreme court held that the rule void as it was not a 'regulatory' but 'restrictive' measure which infringed the right guaranteed under article 301.

3. in automobile transport ltd. Vs state of Rajasthan (AIR 1962 SC 1406 FOLLOWED IN STATE OF ASSAM VS. LABANYA PROBHA(AIR 1967 SC 1575), THE VALIDITY OF A GOVERNMENT NOTIFICATION UNDER THE MADRAS MOTOR VEHICLES TAXATION ACT,1931) IN THIS CASE , the appellat challenged the validity of the Rajasthan motor vehicles taxation act , 1951, as violating article 301. The state government imposed a tax on all motor vehicles used and kept within the state of Rajasthan. THE court held that the tax valid as they were only regulatory measures imposing compensatory taxes-for facilitating trade , commerce and intercourse . the direct and immediate effect test laid down in Atiabari's case was affirmed by the court with a clarification that regulatory measures imposing

compensatory tax do not come within the purview of the restrictions contemplated in article 301 and therefore , such measures need not comply with the requirements of provisions of article 304(b). the majority judgement held that a compensatory tax is not a restriction upon the movement part of trade and commerce .

The majority judgements in Atiabari tea co.'s case read with a majoriy judgement in the automobile case lead to the following principle relating to article 301---

- 1) Article 301 assures freedom of interstate as well as intrastate trade, commerce and intercourse
 - 2) Trade, commerce and intercourse have the widest connotation and take in movement of goods and persons.
 - 3) The freedom of trade is not only from laws enacted in the exercise of the powers conferred by the legislative entries of the powers conferred by the legislative entries relating to trade and commerce and intercourse and relating to trade and commerce or production , supply and distribution of goods , but also to all laws including tax laws
 - 4) Only those laws whose direct and immediate effect to inhibit or restrict freedom of trade or commerce will come with the mischief of article 301 .
 - 5) Laws which are merely regularly or which impose purely compensatory taxes , and hence , intended to facilitate freedom of trade and commerce will come with the mischief of article 301.
 - 6) Laws which are merely regularly or which impose purely compensatory taxes , and hence , intended to facilitate freedom of trade , are outside the scope article 301 .
1. In Khurbari tea co. vs. state of Assam(AIR 1964 SC 925)-THE SUPREME COURT held the Assam tax on movement of tea as being both reasonable and in public interest . the

court suggested that when the president gives his assent, it can be presumed that the central government has applied its mind and come to the conclusion that the proposed tax constitutes a reasonable restriction is required to be imposed in public interest.

FUTURE SCOPE FOR THE FREEDOM OF TRADE AND COMMERCE (ARTICLES 301-307)-

IN all federations, an attempt is made through constitutional provisions to create and pressure a national economic fabric to remove and prevent local barriers to economic activity, to remove the impediments in the way of inter state trade and commerce and thus to make the country as one single economic unit so that economic resources of all the various units may be utilised to the common advantage of all [Bowie, studies in federation, p-296-357(1954)]

The object of such provisions in a federal constitution -the framers of the constitution were fully conscious of the importance of maintaining the economic unity of the union of India. Free movement and exchange of goods throughout the territory of India was essential for the economic unity of the country which alone sustain the progress of the country. prior of the integration of India and the new constitution, there were in existence a large number of Indian states which in exercise of their sovereign powers, had created customs barriers between themselves and the rest of the INDIA, thus hindering at several points which constituted the boundaries of those Indian states, the free flow of commerce. thus, the main object of article 301 was obviously to break down the border barriers between the states and to create one unit with a view to encouraging the free flow of stream of trade and

commerce throughout the territory of India [Atiabari tea co. Ltd. Vs. state of Assam, AIR 1961 SC 252, INDIAN CEMENT VS. STATE OF A. P.](1988 SCC 744)].

ARTICLE 301 OF THE CONSTITUTION OF INDIA DECLARES THAT TRADE, COMMERCE AND INTERCOURSE THROUGHOUT THE TERRITORY OF INDIA SHALL BE FREE. Article 301 of the Indian constitution is modelled on section 92 of the Australian constitution which says that "trade and commerce and intercourse" among the states whether by means of internal carriage or ocean navigation, shall be absolutely free. in this historical context, this section was intended to abolish state custom barriers. but as a result of judicial decisions, it applies to both the commonwealth as well as the states. this was recognised in the decision of JAMES VS. COMMONWEALTH OF AUSTRALIA [(1936)AC 578], in which a commonwealth statute requiring a license for inter state shipments of dried fruits was declared unconstitutional by the privy council. but the freedom of India is wider than that in Australia under section 92. while section 92 refers to inter - state trade only. article 301 includes both the freedom of interstate and intrastate, i.e., within the territory of state trade and commerce. that, it imposes a restriction in the legislative powers of both parliament and the state legislature. the presence of words, "absolutely free" in Australian constitution presented many difficulties in that country, trade and commerce could not be regulated by the centre. the restriction are contained in articles 302 to 305. this is necessary because no freedom is absolute and even in Australia. the freedom is not 'absolute' but 'regulated' and 'relative'.

Article 301 applies not only to interstate trade but also intra state , commerce and intercourse . Thus, article 301 will be violated where restrictions are imposed at the frontier of a state on any stage prior on subsequent . the freedom guaranteed by article 301 is freedom from all restrictions , except those which are provided for in the other is in the subject only to the restrictions specified in articles 302 to 305 . these provisions clearly show that the guarantee under article 301 cannot be taken away by an executive action [district collector , Hyderabad vs. Ibrahim and co. (AIR 1970 SC 1255)] . restrictions from which the freedom is guaranteed should be such restrictions the states whether by means of internal carriage or ocean navigation , shall be absolutely free. In his historical context, this section was intended to abolish state custom barrier. But as a result of judicial decisions , it applies to both the commonwealth as well as the states. This was recognised in the decision of James vs. commonwealth of Australia[(1936) AC 578] , in which a commonwealth statute requiring a license for inter state shipments of dried fruits was declared unconstitutional by the privy council.

But , the constitution 4th amendment now makes existing laws and future laws providing the state monopoly in trade immune from attack on the ground of infringement of articles 301 and 303.

Article 307 empowers parliament to appoint such authority as it considers appropriate for carrying out purposes as it considers appropriate for carrying for out purposes of articles 301,302, 303 and 304 . it can be confers on such authorities such powers and duties as it thinks necessary.

Conclusion-----.....

In conclusion, the problems concerning trade and commerce are more economic in

content and than legal . article 307 authorises parliament to appoint by law such authorities for carrying out the purposes of articles 301-304.

Thus , the order inter state sale will be governed by igst (integrated goods and services tax)act, 2017. Integrated goods and services tax (igst) is the sum of cgst and sgst which will get imposed on the goods and services in interstate supply. It is destination based and will accrue to the importing state.

IT IS SEEN from the foregoing discussion that the concept of trade is an exchange of any article either by barter or for money or for service rendered . I other words , it is exchange between two parties , one who tenders the consideration and the other who tenders the consideration , goods , money , service or such other things , except gambling and other illegal activities viz, transportation any woman or girl for the purpose of prostitution or other immoral acts , the counter beiting of notes is a crime against inter-state commerce . free trade is a norm , that trade in goods , services , labour and capital among or within sovereign states a flow, without government discrimination.

It is seen that the provision of freedom of trade exits in India from the Indian constitution, since, prior it to the there was no scope for any provision of free trade in trade in India. Although , for the first time , a full fledge structure was envisaged only under the government of India act, 1935 , experimentation in that direction had already been started under the government of India act, 1919.

It is observed that the simon commission in its report, 1930, pointed out that it is desirable that there should be the greatest

possible freedom of movement of goods in India . while the simon commission was in session the Indian states committee , in its report pointed out that inter state trade and commerce was the left to the states . the committee also pointed out that , due to various customs imposed by the states , no freedom of trade and commerce was possible and suggested for abolition of internal customs by the state themselves.

The problems concerning trade and commerce are more economic in content and than legal . article 307 authorises parliament to appoint by law such authority for carrying out the purposes of articles 301-304.

Thus , the order interstate sales will be governed by IGST(integrated goods and services tax)act, 2017 . integrated goods and services tax is the sum of CGST and SGST WHICH will get imposed on the goods and services in interstate supply .it is destination based and will accrue to the importing state .

It is seen that the white paper , 1932, made a division of legislative powers on trade and commerce between the federal legislative powers on trade and commerce between the federal legislature and provincial legislature. Federal legislature was given exclusive power over foreign trade while provincial legislatures were given powers on trade and commerce between the federal legislature and commerce between the federal legislature and provincial legislature. Federal legislature was given exclusive power over foreign trade while provincial legislatures . federal legislatures was given exclusive power over foreign trade while provincial legislatures were

given powers to make law in respect of trade and commerce within the province .

It is seen that the report of the joint select committee , 1933 gave the provinces power due the control of production , supply and distribution of commodities and for the first time specific powers over :'trade and commerce fall within the province .'

It is seen that for the first time in the constitutional history of India , a specific provision on freedom of trade got its place under section 297 of government of India act, 1935 which imposed limitation only legislative powers of government of freedom of trade and prohibited discrimination in taxation on goods coming from other provinces.

It is seen that in the draft constitution of India, 1948, freedom of trade , commerce and intercourse was placed in article 16 , but on 8th September , 1949, draft article 16 , but on 8th September , 1949 , draft article 16 was put in a new chapter , viz, XA consisting articles 274A to 274DD . when the final draft came before for the constituent assembly the draft provisions of part XA WERE RESHAPED and finally put in part XIII consisting of articles 301-307 , without any change in the scheme .

It is seen that the framers of the constitution , since the inception of the subject of trade and commerce , has given great importance and dealt with the subject of trade and commerce , has given great importance and dealt with the subject , with great concern . on the other hand , the process was not very coherent , consistent or smooth. Building on the foundation of section 297 of government of India act, 1935, the framers of the constitution , were concerned for the

minimisation of the state's and corresponding maximisation of the union's control over the trade and commerce throughout the country /territory of India. This concern of the framers of the constitution has been yet met with great debates and repulsion in the course of its development , since the commencement of the constitution . the provision of article 301 of the constitution of India is discussed in the next chapter to get a clear picture of freedom of trade and intercourse in the Indian constitutional context.

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