

GST - Right Time for GoM to go rabbiting on ENA for 'inTAXicating' revenue!

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THE air of festivities hangs thick from the months of September till year-end in India. The cultural-cum-religious rejoicing for the people at large also turns 'intoxicating' for the Central and State exchequers! Consumer demand, including liquor sales, traditionally peaks to a new crescendo during this time of the year. The twin pointers to such a trend are the unsustainable jumps in the GST and State Excise Duty collections. For the GST, it was 1.17 lakh Crore in September and then 1.3 lakh Crore in October. For the liquor revenue, tales of myriad taxes and collections abound. Albeit largely an inelastic good, its sales and tax collections parallelly run north during the festive and also the following wintry months. Since taxing liquor is a constitutionally enshrined privilege of the States, the zombie of revenue collections varies from State to State, depending on the philosophical hues of the governments ranging from conservatism, liberalism to nihilism! Conservatives tend to control farm-to-throat distribution and run their own retail outlets very much like many conservatism-shielding States in the US.

Liberals like the NCR Government, which recently auctioned all its 850 retail outlets in 32 Zones to private parties, keep experimenting new ideas to mobilise dollops of extra revenue! What nudged Delhi to experiment with a new all-immersive Excise Policy was the dire fiscal strait after COVID-19 walloped the VAT and GST revenue potential of the States and the Central Government too. The pandemic has, in fact, pushed revenue heads underwater across the world! To wriggle out of straight-jacket, what the Delhi Chief Minister, who is known for his sartorial simplicity and also occasional 'duplicity' on many vital issues of public interests, has done is to follow a simple nous of the contemporary fashion-forward economics! And that is - if more milk is to be 'milked', you simply sell the cow! The spreadsheets approach in corporate jargon! Sounds heuristic, indeed! Anyway, the Delhi Government's Twitterati are united in their expectations to garner Rs 3500 Crore extra revenue from their new 'grain-testing' idea - truly, 'intoxicating'!

In contrast to wet Delhi, the officially dry State of Bihar has, of late, been in the news for consumption of the very same watery 'social evil' it had banned for political reasons! A few years ago, the Nitish Kumar Government had choreographed political events for censorious disapproval of liquor and hubristically decided to go dry when the world around Bihar's geographical coordinates was getting wetter and, perhaps, also better in terms of tax collections! It imposed puritanical regulations to curb consumption as well as production in gargantuan contempt to the pompous history of the 'burning water' (*aqua ardens*) since the boozing days of the Sumerians and the Chinese! The collective political sagacity of the State Government simply slurred over the ancient and modern slates of wisdom!

Casting magic spells for a gender-specific political constituency, the party in power used the magic-wand-rod to squelch the whiffs of disquiet originating from tipplers whose throats unfortunately could not put up with titillation of dryness!

Thus, there opened a salubrious window for the illicit trade to drive and thrive! And then arrived the disastrous sequel to such a trade under prohibition - that is unstoppable greed for quick and filthy lucre! A sort of *laissez-aller*! This led to belligerent and *laissez-faire* -style sales of spurious liquor in Wild West space! A predictable consequence followed - Over 40 quaffed to painful death and many being treated! This is despite the district administration and the police being lumbered with bizarre and complex array of regulations! A pie-eyed review of the bittersweet policy is long overdue! The State Cabinet, I believe, had a closed-door 'Turing test' of enforcement apparatus and the need for a matrix of additional regulatory cobwebs! Wow! A case of driving a speedboat in a bathtub!

The State Government needs to avoid hoopla and borrow a leaf of experience from other countries and also some empirical studies which have established that prohibition does not work in the long-run! If welfare of the poor is to be enriched, the State should stop 'rabbiting' with quirky ideas to vanquish the favourite vice of the masses! Rather than putting them under wheel, the overarching solution lies in imposing punishing taxes and the extra resources collected therein should, rather, be spent on strengthening social spending by designing a scheme tailor-made for the targeted constituency. Post-COVID-19, Bihar stands a glorious loser with looser enforcement of leftover fiscal options. Its GST collections are insipid and depleted and it has already forfeited, with jollity, its excise duty revenue in a weird political 'Squid Game'!

Let's now switch the turf from consumption to manufacture or supply of liquor. At the time of moving the 101st Constitution Amendment Bill, all State taxes except the local bodies' taxes and Alcohol for human consumption, were proposed to be subsumed in the GST. Since the States had taken an intransigent stand on liquor and petroleum products, a status quo was maintained with the preening assumptions that buoyant revenue collections under GST may dilute their resistance in the future! Thus, petroleum products, natural gas, ATF & others numbering six remained in the Entry 84 of the Union List of the 7th Schedule of the Constitution. Similarly, Entry 54 of the State List contained six items including alcoholic liquor for human consumption. The Bill was enacted and all other items - raw materials for manufacture & supply - came under the sweep of GST vide Article 246A and Article 366(12A) of the Constitution.

Then appeared on the horizon, with a plonk, the hydra-headed issue of taxation of ENA (Extra Neutral Alcohol). Though going by the amended constitutional scheme of the new levy, except for the items specified in the Entries in the Lists I & II, which were later backed by the opinion of the Attorney General also, all other goods & services fell in just one deep bucket of GST. But the spirit of cooperative federalism overshadowed the legal arrangement on demand from the 'hawks' backed by the voice of silence coming from the 'doves' among the States! They literally pulled out all the stops! And the GST Council, with certain theatrical flair, kept on debating with no destination in sight right from the 20th meeting when the ENA issue was brought on the roster.

The GST Council literally acted ne'er-do-well on this issue and a status quo bolstered the 'spirit' of both - the States as well as the liquor industry. How? The industry felt more cozy with the VAT authorities and the States joyously treated it as an extra funnel of non-sharable revenue to their kitties. After late Mr Arun Jaitley, the present Chairperson also found the issue as slippery as an eel. Though the entire arguments of the States seemed nuts but the circumstantially-beleaguered Chairperson preferred *dÃ©tente*

in place of locking horns! Meanwhile, the industry kept on quaffing pint after pint over the fiscal indecision! But, like every good time, the pina colada session of the industry rammed into its expiry date! In many States, it was saddled with demand from both

- the VAT authorities as well as GST authorities. Double taxation! Ouch! Many called it a reptilian tax regime! Nothing 'quaffable' about it! The wrenching time had arrived! And they began to flood inboxes of State and Central policy makers with their representations for pain-sequestering measures. No response tellingly began to trouble the industry which had started hankering for certainty-in-taxation in the interest of long-term investments. The saddlebags of arrears also kept on gaining weight!

Thus, a group of squirming-in-pain taxpayers filed writs against the UP Government levy on ENA, phraseologically described as a 'non-GST Alcohol'. And the Allahabad High Court has, in its decision in the case of M/s Jain Distillery Pvt Ltd ([2021-TIOL-2022-HC-ALL-GST](#)), ruled what was ubiquitously known to all stake-holders - Upon enactment of the 101st Constitution Amendment Act, the State lost its legislative competence to enact laws to impose tax on sales of ENA. It quashed the UPVAT Notification and made it clear that for the lack of any saving clause to impose such a levy, all goods which are specifically not mentioned in the pertinent Entries in the Union or State Lists, are liable to only GST levy. ENA being not fit for human consumption is a raw material and is covered under the purview of GST laws. It further stated that the phraseology like non-GST Alcohol is a misnomer. Referring to the SC decision in the case of Synthetic & Chemicals Ltd ([2002-TIOL-723-SC-CT](#)

), the HC further reiterated that since ENA is not fit for human consumption, it cannot, therefore, be clubbed with the specified items in Entry 54 of the State List which does not cover alcohol, fit as well as unfit for human consumption.

No doubt, the State of UP would like to file an SLP by planking its ground on the undenatured aspect of the spirit but now that the legal space stands 'decarbonised', it throws an opportunity for the recently-set-up Group of Ministers (GoM) with a clear mandate to suggest measures to buoy up GST revenue collections. In view of the Allahabad HC decision and also the TRU's views backed by the AG's opinion, ENA is an industrial raw material, well covered under the GST and the GoM should settle the issue once forever. No wiggle room to play baddie! No matter in which rate bucket it may be plonked but what is relevant for the industry is that it does not survive as a prodigious source of future legal wrangles!

One more inference of the HC decision which may be drawn is that in view of the lucid elucidation of the constitutional arrangement of taxation, even the GST Council cannot decide to 'gift' ENA back to the States to continue with the present arrangement as the Constitution itself does not vest any such legislative competence in the States. Article 279A of the 101st Constitution Amendment Act vests unfettered powers in the Council to levy taxes, including Cess and special taxes, but certainly not to exercise the 'right to gift' a particular good or service to the States

so that no political ruckus is kicked up! Wateriness of the devilishly entangled issue may nudge the GoM to make a flawed recommendation to buy peace with the States but such a road ahead would have too many legal potholes to be overcome! There is no tangible reason to be total rabbit over the issue! It is also the time to count the cost! Cosying up States at the cost of clear interpretation of the constitutional scheme may bring punditry of the Council in question! More importantly, if GST is levied on ENA, the States do not tend to lose revenue as it would continue to collect SGST and also claim a share in the Central collection through the divisible pool. I sincerely hope that the GoM would not try anything which would, at best, be standing at broken legs and also elements of utter hollowness!